

BLOGS AS CONSTITUTIONAL DIALOGUE: REKINDLING THE DIALOGIC PROMISE?

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On October 18, 2006, prominent conservative commentator Bill O'Reilly was discussing the rising prominence of "blogs" with political strategist Larry Sabato and political scientist Wendy Schiller. After both he and Sabato had lamented the "vitriol" and "vile" nature of blogs, O'Reilly concluded the segment by stating, "Because if I can get away with it, boy, I'd go in [to the blogosphere] with a hand grenade."¹ Mr. O'Reilly seems to have missed the irony in his condemning the blogosphere for its "vitriol" while simultaneously threatening such a broad phenomenon with metaphorical violence.

O'Reilly's trademark hyperbole notwithstanding, the advent of the digital age has created a fear among some traditional scholars and pundits that people are becoming more disconnected and narrow-minded in their approach to political discourse. Prominent legal scholar Cass Sunstein argues that the Internet has balkanized people more than ever before due to their newfound ability to filter views and interests.² Sunstein fears that a shrinking public forum (where people must confront new and heterodox ideas) will decidedly harm the public discourse and make finding common ground in a democratic society more difficult.³

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1. *The O'Reilly Factor* (Fox television broadcast Oct. 18, 2006), *quoted in* Think Progress, O'Reilly on Blogosphere: "I'd Go in with a Hand Grenade," <http://thinkprogress.org/2006/10/19/oreilly-blogosphere-grenade/> (Oct. 19, 2006).

2. CASS R. SUNSTEIN, *REPUBLIC.COM* 54–56 (2001) (citing a number of examples involving web filtering, through which people subscribe to news alerts about only those issues that interest them, and discussing the alleged tendencies of groups to self-segregate in order "to maintain a degree of comfort and possibly a way of life" in the case of religious groups, or with the intent to strengthen "members' convictions in order to promote long-term recruitment plans").

3. *Id.* at 62 ("To say the least, it will be difficult for people, armed with such opposing perspectives, to reach anything like common ground or to make progress on the underlying questions. Consider how these difficulties will increase if

The issue of improving or harming the public discourse particularly implicates constitutional dialogue theory. Constitutional dialogue encompasses the idea that different governmental branches and the people interact in ways that shape the dominant views of constitutional interpretation over time.⁴ Constitutional dialogue (in its various theoretical formulations) has gained prominence as a way of overcoming the countermajoritarian difficulty and providing a better theory of legitimacy for the otherwise undemocratic decisions of unelected judges. Despite this potential, scholars have struggled to explain its processes and fully demonstrate that through such dialogue, the countermajoritarian difficulty is at least largely attenuated.⁵ This paper will more specifically address equilibrium theories of constitutional dialogue, which posit that Supreme Court decisions facilitate society-wide discussion about constitutional values, and that public discourse eventually helps form a stable view of constitutional meanings to which the Court ultimately conforms its opinions.⁶ Thus, the way in which new institutional mechanisms ultimately affect the public discourse particularly implicate constitutional dialogue, especially if they harm the public discourse and decrease the possibility of widespread and stable views on important constitutional matters.

Sunstein and others (including Richard Davis) focus many of their criticisms on the now-ubiquitous message boards and “weblogs” (more commonly referred to as “blogs”) that have flourished on the Internet, especially those concerned with politics. Blogs provide a means for anyone with Internet access to quickly post and update his or her thoughts on subjects ranging from the vitally important to the extremely trivial. Given the alleged tendency of like-minded people to join together in blogs and discussion groups that reflect their personal views, Sunstein worries that blogs will balkanize the public forum, through blog users’ shutting out opposing viewpoints and therefore reading only those blogs

people do not know the competing view, consistently avoid speaking with one another, and are unaware how to address competing concerns of fellow citizens.”).

4. Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109 (2006) (“Dialogue theories emphasize that the judiciary does not (as an empirical matter) nor should not (as a normative matter) have a monopoly on constitutional interpretation. Rather, when exercising the power of judicial review, judges engage in an interactive, interconnected and dialectical conversation about constitutional meaning.”).

5. *Id.* at 1110.

6. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 654–57 (1993). For more discussion of dialogue theory, see *infra* Part I.

that reinforce their preexisting political convictions.⁷ Critics of the emerging “blogosphere”⁸ are especially concerned about the problem of group polarization and increasing extremism that they contend will expand the chasm between opposing viewpoints and damage hopes for finding common ground in a democratic society.⁹ While Sunstein articulated his critique of online discussion when the blogosphere was still in its infancy, his view has gained many adherents and continues to be propagated by leading commentators and academics.¹⁰

Sunstein’s critique of Internet discussion and its impact on public discourse has major implications for constitutional dialogue theory, particularly equilibrium theories of dialogue. If Sunstein is correct that the Internet reduces interactive discourse between opposing viewpoints, then the formation of stable and broadly supported ideas about constitutional meaning may be severely

7. SUNSTEIN, *supra* note 2, at 61 (acknowledging possible pre-Internet examples of preexisting demographics’ determining views (such as African-American newspapers read almost exclusively by African-Americans), but concluding that “diverse groups [will see] and [hear] quite different points of view,” thus making it difficult for them to come to mutual understanding); *see also* RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM* 177 (1999).

8. The “blogosphere” is a term that refers generally to all blogs, but particularly references the interconnected social culture of blogs and highlights their propensity to link to one another on the Internet. For the purposes of this article, the term “blogosphere” will reference not only traditional blogs as found at websites such as Blogger, <https://www.blogger.com/start> (last visited Oct. 25, 2007) (providing a platform for users to create and update blogs), but Usenet groups as well. While Usenet groups (basically newsgroup discussion forums) are often not classified as blogs, they tend to function in a similar fashion, with discussion and debate between numerous members in the form of frequent postings and replies.

9. William A. Galston, *If Political Fragmentation is the Problem, Is the Internet the Solution?*, in *THE CIVIC WEB: ONLINE POLITICS AND DEMOCRATIC VALUES* 35, 38–39 (David M. Anderson & Michael Cornfield eds., 2003) (“Because Internet communities are voluntary, they are more likely to be homogenous rather than heterogeneous, and group homogeneity can have negative consequences for society as a whole.”). Galston discusses the fear that the Internet will lead to “accelerated pluralism,” and will push the newly fragmented political interests into the “extreme.” *See id.*; *see also* SUNSTEIN, *supra* note 2, at 71–73 (discussing group polarization and the Internet). R

10. High-profile critics continue to articulate views of the blogosphere similar to Sunstein’s. *See, e.g.*, DAVIS, *supra* note 7, at 177; Galston, *supra* note 9, at 37–39; David Glenn, *A Bark-and-Byte Battle Over Campaign Finance*, *CHRON. HIGHER EDUC.*, Apr. 21, 2006, at A18 (noting the views of Carol Darr of the Institute for Politics, Democracy and the Internet at George Washington University). In addition, the conventional media often echo various forms of this critique (albeit in a much less academic and sophisticated form) when reporting on the blogosphere. *See, e.g.*, David S. Broder, *Thinking Outside the Blog*, *WASH. POST*, June 22, 2006, at A29. R

undermined. As equilibrium theories of dialogue particularly rely on an interaction between the Supreme Court and “the people” in order to provide acceptable constitutional interpretations, a balkanized “people” would create serious impediments to reaching consensus on constitutional issues. Sunstein and other critics of the Internet’s alleged balkanization recognize the importance and desirability of an engaged citizenry,¹¹ just as dialogue theory advocates endorse the normative desirability of promoting discussion about constitutional values in a broader society.¹² Thus, the chief question is whether the Internet (and blogs in particular) will harm the public discourse and societal dialogue on constitutional meaning.

This Note will argue, however, that the conventional media¹³ cheapened and eviscerated the metaphorical “Speaker’s Corner” that Sunstein fears the Internet might destroy long before the rise of blogs. Indeed, the danger to the public discourse comes not from blogs, but from the conventional media, which long ago ceased to promote substantive discussion about constitutional values. In fact, this article will show that the Internet and blogs can provide an antidote to a debased political culture and serve to educate the public on important constitutional issues. While I will not argue that blogs are a panacea that will transform our constitutional culture, I will show that they provide an improvement over the pre-blogging status quo. In addition, the underlying structure of blogs can serve as a model for positive dialogic scholars who seek mechanisms to foster increased constitutional dialogue in society as a whole. Overall, I will show that blogs can effectively advance con-

11. SUNSTEIN, *supra* note 2, at 78–79. Sunstein does not suggest that all-inclusive deliberating bodies are always the ideal, but does suggest that at some point deliberative enclaves of homogeneous thought should interact and debate in the heterogeneous public sphere. *Id.* at 78. He then states his normative hope that social constructs have an overarching effect of improving social deliberation, both democratic and otherwise. *Id.* at 78–79. Many other scholars also concern themselves with the types of social constructs that lead to improved democratic deliberation and engagement. *See, e.g.*, Galston, *supra* note 9, at 41–43.

12. Bateup, *supra* note 4, at 1165 (“Given the evidence of growing civic disengagement, however, we should also think about practical strategies that would enable the views of the citizenry to be incorporated more completely into constitutional dialogue in the future. Even if some aspects of the people’s positive role in the American system fail to be completely understood, the normative desirability of connecting debate and discussion about constitutional values to broader society is clear.”).

13. By “conventional media,” I refer specifically to television networks (including the cable news networks); large traditional print media, such as the *New York Times*, the *Washington Post*, and *USA Today*; and other outlets owned by large corporate conglomerates, such as News Corporation, Viacom, or Time Warner.

stitutional dialogue in three ways: (1) by engaging people directly in dialogue about constitutional issues, (2) by galvanizing people to participate in the political process in a way that makes them better informed and better capable of applying pressure to the political branches in order to effectuate constitutional change, and (3) by pressuring other institutional actors (namely, the conventional media) to focus more substantively on constitutional issues, thus improving dialogue outside of the blogosphere.

Part I will explain and discuss constitutional dialogue theory, focusing especially on equilibrium theories of dialogue and their dependence on a well-formulated public discourse. It will also hypothesize about what dialogue entails (building on the ideas of other scholars), and provide a more precise description of what dialogue should encompass. Part II will discuss the background of blogs as a discussion medium, providing evidence about blog readership, blog influence, and insights into the overall composition of the blogosphere. It will then explore the major criticisms of blogs, especially the charge that they increase polarization and balkanization, harming the public discourse. Part III argues that the conventional media have largely failed to promote substantive constitutional dialogue in society, while blogs provide an alternative medium that can better foster discourse about constitutional meanings. It will also discuss how blogs can help push the conventional media toward more substantial examination of constitutional issues, thus helping to reshape debates and improve discourse outside of the blogosphere as well. This argument will be supported by examining the structural relationship between blogs and the conventional media and showing how the blogosphere can help shape the debate even for those who never read a blog.

I.

CONSTITUTIONAL DIALOGUES: POWER TO THE PEOPLE.

Constitutional dialogue theory focuses on the problem of the countermajoritarian difficulty within our constitutional system. Critics have cited the Supreme Court as anti-democratic because it issues decisions that infringe on legislative- and executive-branch prerogatives. The “countermajoritarian difficulty” has been at the forefront of constitutional debate since Alexander Bickel first

coined the term in 1962.¹⁴ The “difficulty” that scholars (including Bickel) have tried to address is the inherent tension between a democratic society and appointed judges who are politically unaccountable yet have the power to overturn the popular will.¹⁵ The countermajoritarian difficulty thus places the ideal of American democracy strongly at odds with the concept of judicial review, and critics of judicial review have seized on this theory to argue for more judicial deference to the other branches.¹⁶

Constitutional dialogue theories attempt to overcome this criticism, however, by showing that the political branches and the people can respond to judicial decisions in a dialogic fashion, thus at least attenuating the countermajoritarian problem.¹⁷ Under the broad umbrella of constitutional dialogue theory, scholars have taken different approaches that either positively describe the nature of dialogue and the players involved or provide a normative account that addresses concerns of democratic legitimacy.¹⁸ While many scholars focus on the constitutional dialogue between the judicial and political branches,¹⁹ this article will focus primarily on equilibrium theories of dialogue that more fully integrate “the people” as a constitutional actor.

14. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

15. *Id.* at 16–23.

16. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–43 (1998).

17. Bateup, *supra* note 4, at 1110–14. Bateup discusses how the idea of “dialogue” mostly arose in response to the countermajoritarian critique and is greatly focused on restoring the idea of “legitimacy” to the judicial branch. *Id.* at 1109–10. The rise of dialogue theory occurred as a result of the failure of constitutional theory to propose adequate theories of constitutional interpretation that would “appropriately confine judicial discretion.” *Id.* at 1113–14; see also Friedman, *supra* note 6, at 653 (“The term [dialogue] emphasizes that judicial review is significantly more interdependent and interactive than generally described. The Constitution is not interpreted by aloof judges imposing their will on the people. Rather, constitutional interpretation is an elaborate discussion between judges and the body politic.”).

18. Bateup, *supra* note 4, at 1111–12 (noting that prescriptive theories often fail to answer legitimacy concerns satisfactorily, while the normative accounts often provide more evidence that the countermajoritarian problem is overstated, though they do not necessarily describe what judicial review *should* accomplish in modern society).

19. See *id.* at 1123–57 (providing a complete description of theories that focus on the interactive dialogue between the different governmental branches, as well as more judicial-centered ideas of dialogue).

Equilibrium theories of constitutional dialogue provide a method of explaining the judicial decision-making process that incorporates the people into the deliberations about rights and constitutional norms. The judicial role under this theory is to foster “*society-wide* constitutional discussion that ultimately leads to a settled equilibrium about constitutional meaning.”²⁰ The most prominent scholars articulating theories within this “people-centered” theory of constitutional dialogue include Barry Friedman, Robert Post, and Reva Siegel.²¹

Friedman’s view utilizes social science studies to show that while the Supreme Court has significant flexibility in issuing its decisions, opinions outside the mainstream of public opinion will often create a popular backlash.²² Most importantly, Friedman stresses the role of public opinion as a major force that helps to control the Court.²³ Friedman notes that the Court plays an important role in this system of dialogue by serving as the facilitator of a

20. *Id.* at 1157.

21. For Friedman’s views on dialogue, see generally Friedman, *supra* note 6; Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004). For Post and Siegel’s account of dialogue, see generally Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter *Legislative Constitutionalism*]; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1041 (2004); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Robert C. Post, *The Supreme Court 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

22. Friedman, *supra* note 6, at 679–80 (“The [oscillation of judicial opinions] also represents the constraint against a judiciary completely out of step with the majority. Rather than spinning normative theories to constrain judges, we should see that the constraint is internal. Judges are constrained by the political system that surrounds them. When judges stray too far from the mark, pressures build—in judicial appointments and in political rhetoric—to bring them back into line. The dialogic protection is that the judiciary—or the people—always are struggling to achieve convergence. The constraint is inherent in the judicial process rather than external to it. The people will follow judicial decrees so long as the judges seem right. When the judges no longer appear to be correct, the people will press for judicial change. Intuitively, at least, the judges know this.”).

23. Friedman, *supra* note 21, at 1295 (“Although the evidence is not perfect, a variety of studies have come to the conclusion that the decisions of the Supreme Court do not long stay out of line with popular opinion. Those decisions kick off a debate, to be sure. Even if the Court is in line with a majority or plurality of citizens, if there is intense opposition the debate is inevitable. But as the debate runs its course, the Court gradually aligns itself with the weight of popular opinion.”).

broader national discussion about constitutional meaning.²⁴ In this role, the Court “mediates the views of different participants in the debate and shapes the terms in which future debate might proceed.”²⁵ This allows future debate to proceed along particular lines (within an explicitly constitutional framework) and forces the public and other political branches to react in their capacities.

Friedman also recognizes that the discussion and debate in society can ultimately have an effect on the Court, especially when the perspectives of non-judicial actors become salient on particular issues.²⁶ Ultimately, this popular debate and the political pressure that it can affect will lead to the production of stable and broadly supported views on constitutional issues.²⁷ The deliberation that takes place in Friedman’s account of constitutional dialogue emphasizes that the process is dynamic and relies heavily on “the People” to demand that the Court respond to changing popular interpretations of constitutional issues.

Post and Siegel’s account of constitutional dialogue largely matches Friedman’s, though they rely on historical examples rather than social science to prove their argument.²⁸ Like Friedman, they assert that a constitutional dialogue among the people is normatively desirable because it overcomes the countermajoritarian diffi-

24. Friedman, *supra* note 6, at 654 (noting that although the Court’s framing of the issue often takes precedence in how the debate proceeds, the Court otherwise functions similarly to the other branches in that it “speaks to the meaning of the text” and simply participates in a debate over the Constitution’s meaning).

25. Bateup, *supra* note 4, at 1159.

26. *Id.* (“[T]he perspectives of non-judicial actors may therefore influence the Court as much, if not more, than the Court itself influences the rest of society.”).

27. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2602 (2003) (“But what those who complain about judicial review often miss is that consistent with the concept of popular constitutionalism, the judicial veto necessarily must fall within a range acceptable to popular judgment over time. Judicial decisions need not be instantly popular or accepted; that is just one way in which popular constitutionalism is ‘mediated.’ Sorting immediate preferences from longstanding and deeply held constitutional views may take some time. The question is whether on reflection a judicial decision will win popular acceptance.”).

28. Bateup, *supra* note 4, at 1161 (“These rich historical examples show that, while the Court plays an active role in inspiring or facilitating popular understandings of the Constitution, changing constitutional understandings of the people can also enable the Court ‘to learn . . . about a better way to interpret the Constitution.’”).

culty in the long term.²⁹ However, Post and Siegel particularly emphasize that the Supreme Court retains a great deal of control over the amount and extent of dialogue in society through its framing of different issues.³⁰ Criticisms of Post and Siegel's account have noted that their model for dialogue leads to difficulties in overcoming the countermajoritarian problem when the Court addresses issues of low political saliency.³¹ Friedman's account fails to address the problem of the Court's engaging (and possibly having the only say on) low-visibility issues.³² Christine Bateup best summarizes the core of equilibrium theories of dialogue by stating:

Critical to the normative appeal of these theories is the society-wide nature of dialogue, which is rather different than the strictly institutional accounts that are found in most other [constitutional dialogue] theories. The role of channeling and fostering societal discussion recognizes that the Court is not simply an additional voice in constitutional dialogue, but actively engages in a generative exchange that ultimately leads to a settled equilibrium about constitutional meaning. This is normatively desirable because the judicial moderation and facilitation of the contributions of different dialogic participants assists in the search for more widely accepted and enduring answers to questions of constitutional meaning.³³

29. *Id.* This is the key portion of equilibrium theory's argument in favor of constitutional dialogue, namely, its ability to incorporate "the People" into constitutional interpretation of contested ideas. *See id.*

30. Post, *Fashioning the Legal Constitution*, *supra* note 21, at 9–10 ("[T]he Court constructs the membrane separating constitutional law from constitutional culture. Normally the Court allows this membrane to remain quite porous, facilitating a free and continuous exchange between constitutional law and constitutional culture. . . . The Court can stiffen the membrane dividing constitutional law from constitutional culture whenever it perceives that constitutional culture threatens constitutional values that the Court wishes to protect. This occurs typically, but not exclusively, in the context of constitutional rights.").

31. Bateup, *supra* note 4, at 1163 ("If Post and Siegel directed their attention to low saliency cases, however, the story about judicial overreaching is likely to be different. The Court may be in a better position to cement its own views on issues of relatively low political salience that are unlikely to engage popular discussion in any meaningful way. In such cases, the time that is needed for other actors to respond to the Court may bolster more assertive judicial action.").

32. *Id.* ("This highlights the difficulty with Friedman's account, which is that he does not take full account of the potential for judicial overreaching in cases that do not engage widespread constitutional discussion. If the long term effects of judicial action in these cases are such that non-judicial actors increasingly refrain from challenging the Court, then it may be true that this account of dialogic judicial review suffers from lingering democratic debilitation effects.").

33. *Id.* at 1164 (footnote omitted).

Although much abbreviated, the following example (using the school desegregation cases) provides a better idea of how the dialogic process functions. First, the Court rules that segregation in public schools is unconstitutional.³⁴ Obviously, this upsets the social order in place since *Plessy*,³⁵ and numerous states and localities react strongly against the decision. Some states want clarification as to what *Brown* specifically requires them to do, and the Court responds with *Brown II* and the “with all deliberate speed” requirement.³⁶ Possibly due to the outcry, the Court does not require immediate desegregation, but seems to provide some margin of time to the states. As the awareness and discourse about racial segregation in society heightens, Congress eventually is persuaded to take up where the Court left off through the Civil Rights Act of 1964³⁷ (which established desegregation mechanisms under Title VI³⁸). As individual localities attempt to find ways around the new requirements, the Court (galvanized by shifting public opinion) responds by requiring unitary school districts in order to create genuine desegregation.³⁹ In order to facilitate faster desegregation, lower courts order bussing to integrate, and the Court affirms these orders.⁴⁰ As many people react negatively to the bussing programs, public opinion shifts back, and the Court eventually circumscribes the federal judiciary’s role by reigning in court-ordered solutions and ending oversight of various school districts.⁴¹ Obviously, this is not a complete account of the school desegregation process and the interaction between the judicial and political branches, but it does provide an illustration of how dialogue theorists see the process operating in the real world.

While social science evidence and historical examples tend to show that the Supreme Court conforms to public opinion over time, equilibrium theories of constitutional dialogue are not incontrovertible. The biggest question raised by detractors concerns the level of participation by “the People” in this societal dialogue.⁴² Ev-

34. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*).

35. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

36. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

37. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (2000)).

38. 42 U.S.C. §§ 2000d to 2000d-4a.

39. *Green v. County Sch. Bd.*, 391 U.S. 430, 441–42 (1968).

40. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

41. *See Missouri v. Jenkins*, 515 U.S. 70 (1995).

42. Bateup, *supra* note 4, at 1164 (noting that empirical evidence suggests widespread apathy in American political culture, which would undermine arguments in favor of dialogue, but ultimately dismissing such criticisms as only a small

idence suggests a high level of political apathy among citizens in America today,⁴³ though even critics acknowledge that the public dialogue (however limited) seems to help push the Court into line with public opinion over time.⁴⁴ What remains entirely unclear under this model of dialogue are the methods by which the public dialogue brings the Court into line with prevailing views.

Commentators also acknowledge that “the normative desirability of connecting debate and discussion about constitutional values to broader society is clear,” and efforts should be undertaken to promote dialogue in society.⁴⁵ Bateup recommends “adapting or designing systems of constitutional dialogue in a way which recognizes the central place of the people in ongoing discussion about fundamental values.”⁴⁶ As this article will later show, blogs can play precisely this role in fostering increased constitutional dialogue in society.

In order to analyze how blogging can affect dialogue, however, it is important to have a precise understanding of what dialogue should entail. Post and Siegel often discuss dialogue in vague terms that do not explicitly describe what an engaged citizenry does to participate in a “dialogue” with the Court.⁴⁷ Hints of what they conceive of as dialogue are offered in a case study about the women’s rights movement of the 1960s and 1970s.⁴⁸ There, they reference

part of the picture because the shaping of public opinion (and the Court’s movement into alignment with public opinion) does actually occur).

43. See Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 913–20 (2005); see generally JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 19 (1997); ROBERT D. PUTNAM, *BOWLING ALONE* 44–47 (2000).

44. Bateup, *supra* note 4, at 1164.

45. *Id.* at 1165 (“This is closely linked to a particular understanding of constitutionalism that views the Constitution not only as a document of positive law that creates government institutions and defines rules of governmental behavior, but also as an ‘expression of the deepest beliefs and convictions of the . . . nation, of our ‘fundamental principles as they have been understood by the traditions of our people and our law.’”).

46. *Id.* at 1166.

47. *E.g.*, Post & Siegel, *Legislative Constitutionalism*, *supra* note 21, at 1983 (using terms like “constitutional contestation” and “dialogue” interchangeably, implying that dialogue involves a measure of clash among citizens, institutions, government officials, and scholars in ways that bring the issue to the forefront of cultural and academic thought).

48. *Id.* at 1984 (referencing the Family and Medical Leave Act of 1993 and discussing the mobilization of the second-wave feminist movement and its effects on the overall culture in pushing for the constitutional rights claims that eventually came to be embodied in that statute).

“conversations at work, on campuses, and at dinner tables” as contributing to the dialogue, thanks especially to feminists’ unified message that women needed full equality with men.⁴⁹ They also cite strikes, mass protests, demands for Congressional resolutions, and ultimately successful pressure on Congress for concrete legislative action as forming key components of the dialogue that advanced constitutional meaning in the context of women’s rights.⁵⁰ Thus, Post and Siegel conceptualize constitutional dialogue as a form of political discussion and activism that specifically situates itself within a constitutional framework of ideas.

Friedman also does not explicitly define “dialogue,” though he does provide a general narrative that provides a listing of activities that dialogue clearly encompasses. Beyond the actions of a few “key” individuals who bring lawsuits to test the bounds of a constitutional decision, Friedman notes that individuals will debate Supreme Court decisions formally, informally, and through written articles.⁵¹ Particularly relevant to this article, Friedman also mentions media attention, voting, financial support to interest groups,

49. *Id.* at 1986. Post and Siegel discuss how the movement pushed toward enforcement of anti-discrimination ideals that were embodied in the Constitution, and they explain how the particular needs of enforcement helped to shape the dialogue by promoting the idea that anti-discrimination laws by themselves were insufficient to enforce constitutional rights. *See id.* at 1986–88.

50. *Id.* at 1988–2000. While the specific details of their case study is beyond the scope of this Note, the idea of framing arguments and advancing them as specifically constitutional ideas (thus furthering dialogue) is effectively captured by this excerpt:

The structure of the movement’s constitutional argument was, however, more complex. Its decision to stage its inaugural strike on the fiftieth anniversary of the Nineteenth Amendment’s ratification located strike demands in a constitutional framework. In an era when the Court had not yet recognized sex discrimination claims under the Fourteenth Amendment, or accorded constitutional protections to the abortion right, the strikers invoked the Nineteenth Amendment to assert that women had a constitutional right to equal citizenship with men. The Nineteenth Amendment represented an especially crucial source of constitutional authority because it was the only constitutional text or history that explicitly recognized men and women as equal citizens. Yet even as the strikers invoked the collective memory of the Nineteenth Amendment’s ratification, they did not specifically appeal to the Nineteenth Amendment as law. Instead they pointed to the suffrage Amendment as a frame of reference, a point of origin, the beginning of a journey. The strike’s message was that a half-century after the Nineteenth Amendment’s ratification, the right to vote had not proven adequate to make women equal citizens with men.

Id. at 1990 (footnote omitted).

51. Friedman, *supra* note 6, at 656–57. Friedman provides a hypothetical summary of the process as follows:

and feedback to legislative actors as possible forms of dialogue.⁵² While he notes a number of other steps in a possible dialogue (such as the appointment of judges through newly elected officials), Friedman tries to offer up at least the rough outlines of what dialogue entails.

Expanding on dialogue as “debate and discussion about constitutional values,”⁵³ this article will attempt to show the specific ways that blogging enhances constitutional dialogue. The brief descriptions of dialogue submitted by Friedman, Post, and Siegel provide a good starting point for describing dialogue, but they require elaboration in order to determine how a new mechanism (in this case, blogging) affects dialogue in society. As the primary goal of dialogue is to formulate and shape public opinion into a stable equilibrium supported by a wide swath of the populace, the mechanisms that help advance dialogue should educate and provoke thought

The Court issues its decision. The Supreme Court is important, like the President, or Congress: it is the “last” judicial voice, at least for this round. The public notices when the Supreme Court decides. Reporters cover the cases the Court will hear—generating interest—and the decisions, which generate debate. Some people agree with the Court; others are outraged. People discuss the decision in formal meetings, or in informal gatherings, or they act alone. Articles are written commenting on the Court’s decision. More lawsuits are brought, some formulated specifically to test the bounds of the Court’s decision. Town councils act. School boards act. Legislatures act at every level of government.

This cycle of action creates more media attention. Some issues become more important than others. The Court has made some previously dormant issues important. People take sides. They formulate opinions. They listen as others speak, and thus they change their opinions. They vote, or mail in a check to an organization, or write their representative in the legislature. A political campaign ensues. Promises are made. Candidates are elected, including Presidents and senators. These candidates have views, shaped throughout the debate, on judicial candidates. New judges are appointed. The judges have views similar to those of the officials who appointed them. Cases come to these new judges. The judges observe legislative action and note the “unworkability” of prior decisions. They work around the prior decisions. They confront the prior decisions. New Justices also are appointed to the Supreme Court, or perhaps the Supreme Court finally “hears” the people. The people dig in; the Court bails out. The Constitution is *re*interpreted, and its meaning changes.

So it goes in infinite progress. . . . This process of interpreting the Constitution is interactive. It is dialogic. Courts play a prominent role, but theirs is assuredly not the only voice in the dialogue.

Id. at 656–58 (footnotes omitted).

52. *Id.* at 656–57.

53. Bateup, *supra* note 4, at 1165.

about various constitutional issues.⁵⁴ Under this conception of dialogue, the media (in all forms, including newspapers, televisions, and alternative media) should provide detailed articles and segments that make the constitutional arguments at issue salient to the public. Discussion should take place among families, friends, and colleagues to help correct misconceptions about facts and issues while simultaneously heightening awareness of the dispute.

Most importantly, the above mechanisms should provoke people to political awareness and action, including interaction with legislative representatives, involvement (with money or time) with groups focused on the constitutional issue in question, and efforts to bring about the necessary political changes by connecting with like-minded individuals who will either bolster or weaken the position taken by the Supreme Court.⁵⁵ Dialogue not only functions as a society-wide discussion about constitutional issues, but also encompasses political issues that implicate extensions of constitutional concerns (such as discrimination, health policy—particularly regarding government funding of certain procedures—and affirmative action policies, to name just a few examples). Obviously, the electoral process provides numerous outlets for participation by individuals, though the feasibility of participating in the methods of dialogue listed above will vary widely from person to person. However, these varying articulations of the substance of dialogue provide a strong basis for examining how blogs and the media alternately affect dialogue in society. In order to properly understand how blogs can fulfill the goals of dialogue, however, it is necessary to first understand the “blogosphere” and how it functions.

II.

THE BLOGOSPHERE AND ITS DETRACTORS.

A. *The Rise of Blogging.*

Commentators recognized the possibility that the Internet would dramatically open the gateway to new voices and perspectives even before the heyday of the dot-com economy.⁵⁶ As the Internet

54. *See id.* at 1142 (“Instead, the different branches of government including the Court, together with the people, were educated by the dialogic input of each other, leading to substantive modification of their positions and further constitutional change over time as the parties adapted their views.”). Educating the participants about the issues involved seems to be a key role of constitutional dialogue and helps stabilize the views over time. *See id.*

55. *See* Friedman, *supra* note 6, at 656.

56. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–07 (1995) (“[T]he new media order that these technologies will bring will be

began to grow exponentially, scholars became intrigued by the rise of message boards, electronic bulletin boards, and Usenet newsgroups that allowed people to discuss topics in detail and engage in a deliberative process not unlike that of a town meeting.⁵⁷ These message board arrangements offered promise beyond a simple town meeting, however, as their scope allowed for more voices, more time, and more deliberation.⁵⁸ While early commentators drew on these analogies to describe the new phenomena, they were generally unsure of the full potential of the Internet and whether or not such analogies were overblown.⁵⁹

The ensuing growth of Usenet groups and blogs at least demonstrated that in terms of numbers, the Internet could lead to impressive “virtual town meetings.”⁶⁰ By the end of 1997, over two million people participated in Usenet discussions.⁶¹ This growth has continued into the present day, and the number of readers of electronic discussion forums has overtaken the circulations of national newspapers.⁶² Usenet discussion groups encompass a wide array of topics, including sports, current events, religion, gardening, and more idiosyncratic topics.⁶³ Usenet effectively provided a

much more democratic and diverse than the environment we see now. Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all.”)

57. Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1746 (1995). While Lessig characterized the new realm of cyberspace as not unlike a town meeting, he also noted that the range of communications made available by the Internet meant that it possessed certain advantages by allowing people to “meet, and talk, and live in cyberspace in ways not possible in real space.” *Id.*

58. *Id.*

59. *Id.* at 1747 (noting that understanding the new developments would require living in a world with them for some time).

60. A quick note about the differences between Usenet and blogs. Usenet refers to an older communications protocol that allows users to exchange articles and messages in a way similar to e-mail (though typically the information is organized and aggregated in some way). The major difference between Usenet and e-mail, however, is that e-mail functions as a one-to-one communication, whereas Usenet functions as a one-to-many or many-to-many communication, similar to blogs or other web pages. Blogs typically are websites that allow the owner to alter the content quickly and update information (many allow other users to contribute as well, similar to a Usenet group). It is worth noting that many of the earliest bloggers shifted to blogging from posting on Usenet as software advances made web pages easier to design and edit. See RICHARD DAVIS, *POLITICS ONLINE: BLOGS, CHATROOMS, AND DISCUSSION GROUPS IN AMERICAN DEMOCRACY* 7–16, 19–20 (2005) for a fuller discussion of the differences between Usenet and blogs.

61. *Id.* at 8.

62. *Id.* at x (noting that as of 2005, more people log on to electronic discussion forums than read *The New York Times* or *The Washington Post*).

63. *Id.* at 12–13.

way for savvy Internet users sharing similar interests to link up with one another during the 1990s before blogs became popular.

Weblogs (or “blogs”) first appeared in the mid-1990s and remained uncommon until about 1999,⁶⁴ but have evolved and grown rapidly since then. In 1999, free tools emerged that allowed anyone with Internet access to create a blog with little effort.⁶⁵ Blogs began as link-driven sites that offered only minimal commentary about whatever the particular link to another site happened to reference.⁶⁶ Generally, a blog consists of a webpage with the most recent entries placed at the top with frequent updates by the author.⁶⁷ Many blogs also include extensive links to the author’s favorite sites and “blogrolls,” or links to similar blogs.⁶⁸ The practice of blogrolling helps to ensure the survival of individual blogs and allows new voices to quickly gain readership.⁶⁹

While many an early blog functioned simply as a personal journal for the blog author (or “blogger”), others pioneered the practice of operating a blog as an interactive discussion forum, providing for reader commentary, feedback, and responses to issues and questions posed by the blogger. One of the biggest advantages of certain blog-designing programs was that users could shape their blogs with great flexibility, adding content of any variety.⁷⁰ The free-form interface quickly led to a proliferation of blogs among different interests in a way not dissimilar to Usenet. As of October 2007, Technorati (a site devoted to monitoring the links and relative popularity of the blogosphere) tracked over 107.8 million different blogs.⁷¹ In recent years, blogging has become in-

64. See Rebecca Blood, *Weblogs: A History and Perspective*, in *WE’VE GOT BLOG: HOW WEBLOGS ARE CHANGING OUR CULTURE* 7 (John Rodzvilla ed., 2002).

65. See *id.* at 8. The easiest interfaces allow the blogger to choose a background, font style, and other minor details from established templates, and then to create posts instantly. One of the most popular of these free interfaces is Blogger, which Google purchased in 2002. See Blogger: About Us, <http://www.blogger.com/about> (last visited Oct. 25, 2007).

66. Blood, *supra* note 64, at 8. The amount of commentary increased over time as users realized that their own commentary could function similarly to that of a “pundit” commenting on a recent news event in a newspaper column. See *id.* at 10–12.

67. R. SCOTT HALL, *THE BLOG AHEAD* 3 (2006).

68. *Id.*

69. *Id.* at 30–31.

70. See *id.* at 3–4.

71. Technorati: About Us, <http://www.technorati.com/about/> (last visited Oct. 4, 2007). It is worth noting that some of these blogs have been abandoned by their authors for various reasons, and thus the number of active blogs may be somewhat smaller. See Sifry’s Alerts, <http://www.sifry.com/alerts/> (July 7, 2004

creasingly mainstream and is no longer the dominion of a few technology-savvy individuals, but is rather a popular and prevalent tool in our culture.

Electronic discussion has begun to have a major impact on American political culture as well. The rise of political discussion forums has come about, in part, because of mass discontent with the traditional one-way media; many people are turning to blogs for stories and analysis they believe deserve attention.⁷² Blogging has already been employed as a tool by dissidents living in repressive regimes abroad, and a group called Reporters Without Borders has even published an e-book entitled *Handbook for Bloggers & Cyber-Dissidents*.⁷³

Domestically, blogs have entered the lexicon as a major player in political journalism. The growth of blog readership has helped to fuel the influence of the political blogosphere. A report in July 2006 by the Pew Internet & American Life Project determined that thirty-nine percent of Internet users read blogs.⁷⁴ This means that fifty-seven million Americans counted themselves as blog readers, and past Pew Reports have attributed the increasing readership at least in part to the explosion of political blogs.⁷⁵ Out of the entire

02:23 EST); *but see* Posting of Mary Hodder to Napsterization, <http://napsterization.org/stories/archives/000255.html> (May 31, 2004 21:39 EST) (noting that not all inactive blogs are abandoned). The problem of abandonment is seen less often with the larger political blogging sites, however, because of the advertisement revenue they generate (even if the original author leaves such a blog, another blogger typically takes over and continues writing in keeping with that blog's particular focus).

72. HALL, *supra* note 67, at 38 ("The pros would say it is journalism practiced by amateurs, but its very appeal is rooted in a betrayal that the pros in the mainstream media have visited upon their customers. Most amateurs lack the guile, and in some cases, the cynicism that a seasoned veteran develops."); *see also* GLENN REYNOLDS, AN ARMY OF DAVIDS 90–92 (2006). A more detailed discussion of popular dissatisfaction with the conventional media (from all political viewpoints) will follow in *infra* Part III.

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73. REPORTERS WITHOUT BORDERS, HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS (2005), http://www.rsf.org/IMG/pdf/Bloggers_Handbook2.pdf; *see also* HALL, *supra* note 67, at 46–47 (summarizing the e-book's analysis of how blogging has exposed corruption in totalitarian regimes and examples of bloggers' going to jail for their online political activism).

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74. AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AM. LIFE PROJECT, BLOGGERS: A PORTRAIT OF THE INTERNET'S NEW STORYTELLERS, at i (2006), <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf> (citing a margin of error of plus or minus two percentage points for its statistics on Internet users).

75. Memorandum from Lee Rainie, Dir., Pew Internet & Am. Life Project 1 (Jan. 2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf.

blogosphere, the Pew survey determined that eleven percent of bloggers cited politics and government as the primary subject focus of their blogs.⁷⁶ While this percentage might seem small, it does suggest that of the 75.2 million blogs tracked by Technorati, approximately 8.2 million blogs were devoted to discussions of politics, government, and related issues. Most remarkable about the explosion of blog readership is that it has occurred outside of a presidential election cycle, which fueled much of the political blog readership growth in 2003–2004. Unfortunately, Pew conducted no scientific survey cross-tabulations that might show the demographics of those who consider themselves *political* blog readers.⁷⁷

While it is difficult to provide exactitude when examining the influence of individual political blogs, statistics including user totals, page views, and site-meter ratings help to demonstrate the increasing amount of discussion on political blogs of all partisan stripes. Glenn Reynolds, a prominent conservative/libertarian blogger, University of Tennessee law professor, and influential writer on technology and freedom issues, receives 250 thousand to 500 thousand unique visits to his blog, Instapundit.com, each day.⁷⁸ Although estimates vary (and traffic can vary from month to month), the most popular liberal blog, Daily Kos, receives about 3.7

76. LENHART & FOX, *supra* note 74, at ii. It is important to note that this statistic describes the number of *blogs* that discuss politics and government, not the actual number of *readers* of political blogs. *See id.* This portion of the survey had a margin of error of plus or minus 7%. *Id.* at i.

77. While the survey does include demographics about blog readers as a whole, *see id.* at ii, Pew did not provide any of the cross-tabulation data that would be required to extrapolate such information about political blog readers. Experienced pollsters can attest that providing accurate subset information is often difficult and prohibitively expensive.

78. David Weigel, *An Army of Bloggers*, REASON, July 2006, at 49, 51. A “unique visitor” refers to an Internet user going to a website for the first time that session (with sessions being of varying lengths of time, depending on the measurement timeframe used), with successive “refreshes” of the webpage or revisits within a short interval of time not counted as additional “unique visits.” JASON BURBY ET AL., WEB ANALYTICS ASS’N, WEB ANALYTICS DEFINITIONS 9 (2007), <http://www.webanalyticsassociation.org/attachments/committees/5/WAA-Standards-Analytics-Definitions-Volume-I-20070816.pdf>. Alexa (<http://www.alexa.com>) and Site Meter (<http://www.sitemeter.com>) are two frequently used websites that help to track website traffic. While there is some dispute as to exact numbers used by these sites, they provide an estimate of the relative popularity of different political blogs. In addition, this Note does not argue that blogs improve and shape the political and constitutional discourse through sheer force of numbers (though their growing readership is certainly helping on that front). Later Parts will discuss how blogs help shape and improve the debate irrespective of their readership size.

million readers each week.⁷⁹ For some perspective on the website's reach, that is more than the readership of the top ten print opinion magazines (on the left and right) *combined*.⁸⁰

Blog readers also are not necessarily extremists; rather, they reflect the diversity of views in the United States today. Older surveys of online political discussion tended to show that discussants' political viewpoints largely matched those of the overall population, although online discussants favor Democratic or Independent viewpoints in slightly greater numbers than the overall population.⁸¹ In general, surveys show that Internet blogosphere participants are not the wild extremists they are often portrayed as being.⁸² While it is unclear whether political blog readership will continue to grow, recent election cycles and political events have continued to help expand blog readership.⁸³ The increasing reach of the blogosphere and Internet discussion has not gone unnoticed by scholars and policymakers, who have frequently puzzled over how this new medium will fit into the political discourse of society.

B. *Internet Discussion Draws Criticism.*

As the avenues for Internet discussion have multiplied exponentially, scholars and commentators have begun to express concerns about the cacophony of voices emanating from the Internet. Law professor Cass Sunstein leveled an extensive criticism of In-

79. Benjamin Wallace-Wells, *Kos Call*, WASH. MONTHLY, Jan.–Feb. 2006, at 18, 18.

80. *Id.*

81. See DAVIS, *supra* note 60, at 82–83.

82. See *id.* at 83–84; see also HALL, *supra* note 67, at 54 (asserting that the self-correcting nature of the blogosphere prevents wildly exaggerated and extreme claims from becoming mainstream because they are immediately challenged). Sunstein correctly notes that extremists tend to use the Internet for their own purposes, see *supra* note 2, at 53, but the point here is that the overall total of participants in online discussion is not terribly different from demographics seen in offline political activism.

83. The “Rathergate” incident involving fake Bush National Guard memos, the 2004 elections, and poor government response to Hurricane Katrina all caused major spikes in blog readership as people looked to keep up with these fast-developing stories. Evidence of these spikes in blog readership can be found in Alexa’s graphs showing the relative “reach” (the percent of global Internet users who visit a site) for both dailykos.com and instapundit.com. Traffic Details for: dailykos.com, http://www.alexa.com/data/details/traffic_details?site0=dailykos.com&site1=instapundit.com&site2=&site3=&site4=&h=300&w=610&h=400&w=700&z=3&range=max&size=large&y=r&z=3&url=dailykos.com (last visited Oct. 23, 2007).

ternet discussion forums in his book, *Republic.com*.⁸⁴ Sunstein greatly fears the proliferation of hate groups on the Internet, which he believes allows them to connect easily and “[feed] their various predilections.”⁸⁵ While Sunstein acknowledges that a hate-group Internet discussion is an extreme case, he believes that such groups provide insight into a fragmented speech market.

Sunstein asserts that Internet discussion groups and self-selection in speech markets produce people who are better able to self-insulate from differing points of view.⁸⁶ The specialization of the Internet (combined with its capacity to give the user full control over what he or she views) could allow for people to filter out views they dislike, so that people self-segregate into tight-knit groups that merely reinforce their own preconceived values.⁸⁷ William A. Galston expresses similar concerns over the rise of homogeneous “voluntary communities” that tend to attract only like-minded people, a practice he believes is facilitated by Internet discussion groups.⁸⁸ In support of this line of argument, Sunstein cites a study from 1997

84. SUNSTEIN, *supra* note 2. Although he wrote this book in the early days of blogging, Sunstein still adheres to this view, *see* Cass Sunstein, *Democracy and Filtering*, COMM. ACM, Dec. 2004, at 57, 58–59 (reaffirming the view that the Internet allows people to wall themselves off from opposing viewpoints and that the Internet should promote cross-linking to facilitate exposure to adverse ideas), and other scholars continue to accept its views, *see* Jay Rosen, *In Democratic Time*, BOSTON REV., Summer 2001, <http://bostonreview.net/BR26.3/rosen.html> (largely agreeing with Sunstein’s arguments); Michael Schudson, *Shaking Hands*, BOSTON REV., Summer 2001, <http://bostonreview.net/BR26.3/schudson.html> (same).

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85. SUNSTEIN, *supra* note 2, at 53 (“Hundreds of hate groups are now reported to be communicating on the Internet, often about conspiracies and (this will come as no surprise) formulas for making bombs. Members of such groups tend to communicate largely or mostly with one another, feeding their various predilections.”).

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86. *See id.* Sunstein sees “place-based” communities as requiring more interaction with diversity compared to “interest-based” communities (which he categorizes the Internet as an example). *See id.* He asserts that “self-insulation is more difficult” in communities with major public forums and general interest intermediaries, but he does not significantly address the ability to self-select and self-insulate that currently occurs in the “[r]eal [non-Internet] world.” *See id.* (citation omitted).

87. *Id.* at 55 (focusing on the idea that people tend to be drawn towards things they like or that interest them, while being repelled by subjects that bore or fail to interest them).

88. Galston, *supra* note 9, at 37–38 (arguing that “voluntary communities” like blogs tend to hold narrow views of broad agreement, which “exacerbates the growing problem of fragmentation (at least regarding domestic issues) in contemporary American politics”). Unlike Sunstein, Galston does not object to the focusing of associations facilitated by the Internet per se, but Galston does find such focusing very problematic when situated in the political sphere. *Id.* at 37.

showing that only fifteen percent of partisan websites offered links to opposing viewpoints.⁸⁹ Moreover, Sunstein conducted his own study in June 2000 of sixty political sites, finding that only fifteen percent provided links to sites with opposing views, while fifty-eight percent provided links to like-minded sites.⁹⁰

While Sunstein acknowledges that any society with freedom of choice will face some amount of balkanization, he fears that Internet discussion groups will amplify the difficulty of reaching common ground in our highly pluralistic society.⁹¹ He especially highlights the phenomenon of “group polarization” on the Internet and the belief that people will make choices to end up in “echo chambers of their own design.”⁹² Group polarization refers to the idea that “[a]fter deliberation, people are likely to move toward a more extreme point in the direction to which the group’s members were originally inclined.”⁹³ Sunstein sees the emerging Internet discussion groups as speaking only within their own memberships, thus encouraging opposing groups to drift apart toward extremes.⁹⁴

Sunstein also addresses the problem of “cybercascades,” in which information quickly spreads through various Internet chan-

89. SUNSTEIN, *supra* note 2, at 59 & 208 n.4 (citing Andrew Chin, *Making the World-Wide Web Safe for Democracy*, 19 HASTINGS COMM. & ENT. L.J. 309 (1997)).

90. *Id.* It is worth noting that about 42% of the sites Sunstein sampled had no links to like-minded sites, *see id.*, implying that they simply do not link elsewhere at all, making the sample somewhat problematic.

91. *Id.* at 61–62 (“If diverse groups are seeing and hearing quite different points of view, or focusing on quite different topics, mutual understanding might be difficult, and it might be increasingly hard for people to solve problems that society faces together. . . . To say the least, it will be difficult for people, armed with such opposing perspectives, to reach anything like common ground or to make progress on the underlying questions. Consider how these difficulties will increase if people do not know the competing view, consistently avoid speaking with one another, and are unaware how to address competing concerns of fellow citizens.”).

92. *Id.* at 65, 71. Sunstein goes on to assert that “[g]roup polarization is unquestionably occurring on the Internet.” *Id.* at 71. Galston and Davis raise similar concerns. *See* DAVIS, *supra* note 7, at 177; William A. Galston, *The Impact of the Internet on Civic Life: An Early Assessment*, in *THE INTERNET IN PUBLIC LIFE* 59, 74 (Verna V. Gehring, ed., 2004).

93. SUNSTEIN, *supra* note 2, at 65.

94. *Id.* at 66 (“If the public is balkanized and if different groups are designing their own preferred communications packages, the consequence will be not merely the same but still more balkanization, as group members move one another toward more extreme points in line with their initial tendencies. At the same time, different deliberating groups, each consisting of like-minded people, will be driven increasingly far apart, simply because most of their discussions are with one another.”).

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nels, provoking widespread outrage.⁹⁵ A more modern term for such an event would be a “blogswarm,” in which numerous blogs take up an issue in order to quickly spread information and calls to action against a third party.⁹⁶ Sunstein believes that these cybercascades can often spread false information, leaving thousands duped when the truth fails to deter the cascade because insulated groups are not listening to one another.⁹⁷ This phenomenon is at the core of Sunstein’s criticism, as cybercascades involve the broad dissemination of false information to large swathes of the American public, creating an ill-informed and polarized populace and damaging hopes for deliberative democracy.⁹⁸

Another frequent and related criticism of online discussion (leveled by political science professor Richard Davis) is that the Internet does not facilitate actual deliberation in its political discourse.⁹⁹ This criticism focuses on the alleged problem of people’s

95. *Id.* at 80–82. In discussing examples of cascades, Sunstein correctly identifies the phenomena and how they occur, but ironically he points out a number of examples of information cascades occurring in the “real world,” such as the widespread belief that hazardous waste dumps are one of the most serious environmental problems, or the erroneous idea held in some African-American communities that white doctors are responsible for the spread of AIDS among African-Americans. *Id.*

96. The most well publicized blogswarms have concerned the forged Bush National Guard memos published by CBS, which provoked outrage on the right, and the corresponding anger on the left over falsehoods in ABC’s recent “docudrama,” *The Path to 9/11*. See Howard Kurtz, *After Blogs Got Hits, CBS Got a Black Eye*, WASH. POST, Sept. 20, 2004, at C1 (discussing the role of bloggers in exposing the Bush National Guard memos as forgeries); Joan Walsh, *The False Path to 9/11*, SALON.COM, Sept. 11, 2006, <http://www.salon.com/opinion/feature/2006/09/11/pathto911/> (noting the liberal blogosphere’s role in forcing ABC to change certain falsehoods in the docudrama).

97. SUNSTEIN, *supra* note 2, at 82–83. Sunstein does cite a number of examples of falsehoods spread by the Internet, but many of the examples he notes are specifically tied to e-mail chain letters and not necessarily Internet discussion groups. See *id.* at 82. While his critique therefore has some merit, particularly in relation to the more gullible members of society, as seems to be the case with his example of South African President Mbeki’s finding “denialist” websites about the AIDS virus, see *id.* at 82–83, it ignores the massive fact-checking capabilities of the Internet and the self-correcting mechanisms found in many group-oriented websites such as Wikipedia. Some evidence suggests that online group information sites can be just as accurate as “official” sources. See Stacy Schiff, *Know It All*, NEW YORKER, July 31, 2006, at 36. While this Note makes no grand claims that user-generated Internet content has near-perfect accuracy, it is not too bold to suggest that these studies and past experience show Sunstein’s worry about information cascades to be largely overblown.

98. SUNSTEIN, *supra* note 2, at 87.

99. DAVIS, *supra* note 7, at 177; see also DAVIS, *supra* note 60, at 125–26.

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speaking past one another and not connecting as a deliberative group, but merely collecting together as isolated individuals.¹⁰⁰ Robert D. Putnam alluded to this issue in his discussion of experiments comparing face-to-face and computer-mediated communication, where online participants sometimes developed a sense of “depersonalization” that made fostering trust and understanding more difficult.¹⁰¹ The collection of individuals who allegedly talk past one another in Internet discussion forums leads to what Davis calls an “Absence of Engagement,” in which little actual deliberation takes place and issues fester without solutions.¹⁰² Davis believes this problem is partially fostered by the lack of online moderators, as no one leads or controls discussions that often lead to what Davis alternately describes as “anarchy” and “chaos.”¹⁰³ The blogosphere, as depicted by Sunstein and Davis, is a cacophony of angry voices that spread disinformation and drive people farther apart, both civically and politically.

After laying out their criticisms, Sunstein and Davis offer similar solutions that they believe will help foster more helpful and constructive deliberation on the Internet. Sunstein proposes the creation of a public forum doctrine that ensures people will encounter diverse viewpoints.¹⁰⁴ This would be accompanied by the

100. DAVIS, *supra* note 7, at 177 (“In Usenet political discussions, people talk past one another, when they are not verbally attacking each other. The emphasis is not problem solving, but discussion dominance. Such behavior does not resemble deliberation and it does not encourage participation, particularly by the less politically interested.”). R

101. PUTNAM, *supra* note 43, at 176. Putnam’s landmark book largely focused on the breakdown of community bonds in society as a whole, which he saw as a trend with roots far antedating the rise of the Internet. *See id.* at 44–47. The possible implications of his conclusions and their consistency (or lack thereof) with Sunstein’s and Davis’s views are numerous, but beyond the scope of this article. R

102. *See* DAVIS, *supra* note 60, at 123–24. R

103. *Id.* at 120–21. While it is clear that online discussion lacks the sophistication of the discourse found in the United States Senate, Davis seems particularly concerned about the proliferation of the profanity and ad hominem attacks that sometimes crop up in discussion threads. *See id.* at 121–22.

104. SUNSTEIN, *supra* note 2, at 169 (“But it seems far more realistic to say that many people—it would be silly to say exactly how many, but surely millions—are prepared to listen to points of view that they have not selected. . . . To work well, a deliberative democracy had better have many such people. It cannot function without them. And if many people are able to benefit from wider exposure, it is worthwhile to think about ways to improve the communications market to their, and our, advantage. [Sunstein] discuss[es] six reform possibilities here: (1) deliberative domains; (2) disclosure of relevant conduct by producers of communications; (3) voluntary self-regulation; (4) economic subsidies, including publicly subsidized programming and Websites; (5) ‘must-carry’ rules, in the form of links, R

creation of Internet deliberative domains that could allow for discussion between heterogeneous groups and views.¹⁰⁵ Sunstein does not provide much description about what these domains might look like, except to say that people would “be able to read and (if you wish) participate in discussions . . . involving, for example, civil rights, the environment, unemployment, foreign affairs, the stock market, children, gun control, labor unions, and much more.”¹⁰⁶ In Sunstein’s view, these sites would draw diverse individuals and be governed by the norms of interaction set out by their managers, such as a norm of civility.¹⁰⁷ Sunstein also advocates “must-carry” rules that would require the most popular websites to keep links to others that present opposing points of view.¹⁰⁸

Davis presents a similar argument, proposing an ideal public space that focuses on educating citizens, fostering discussion among citizens and policy makers, and promoting deliberation leading to societal problem solving.¹⁰⁹ He sees government playing

imposed on the most popular Websites, designed to produce exposure to substantive questions; and (6) ‘must-carry’ rules, also in the form of links, imposed on highly partisan Websites, designed to ensure that viewers learn about sites with opposing views, perhaps through linked sites and perhaps through hyperlinks.” (list punctuation altered for clarity).

105. *Id.* at 170–71.

106. *Id.* at 171 (noting that these topics and sub-topics could have “agreed-upon facts and competing points of view, as an introduction and frame for the discussion,” but failing to note that in many political topics (global warming being a noteworthy example), there are little to no “agreed-upon facts” across the political spectrum).

107. *Id.* Unfortunately, Sunstein does not elaborate on the standards for moderation that the private managers would employ to police these sites. The model also does not describe adequately how these deliberative domains would overcome the alleged problem of participants’ talking past one another.

108. *Id.* at 182–83. The “must-carry” rules described by Sunstein would require links on the most popular websites to other sites and views, ensuring a diversity of viewpoints. *See id.* at 182. Sunstein analogizes to the old fairness doctrine on television and radio, which required discussions of public issues to provide a diversity of views. *Id.* While Sunstein questions whether a “must-carry” rule would be upheld by today’s Supreme Court (particularly in an arena that does not present the scarcity problems present in television and radio in the 1970s), *id.* at 182–83, he believes that imposing requirements on larger websites of linking to the opposite viewpoint would help induce exposure to a diversity of viewpoints. *Id.* at 186. However, this solution would not overcome the user-driven nature of the Internet, as many users could continue to ignore the opposing viewpoint by not clicking through on the website. *See id.* at 188–89. Sunstein acknowledges this potential problem, but maintains that some users will choose (out of curiosity) to examine the opposing view anyway. *Id.* at 186.

109. DAVIS, *supra* note 60, at 135–36 (“The purpose of ideal public space would be threefold: education of citizens, discussion among citizens and between

a role in funding such spaces, although his argument does not necessarily depend on such a development.¹¹⁰ Mostly, Davis seems concerned about creating a neutral or “civil” civic web, where people can deliberate in a style similar to Madisonian democracy, which he does not see occurring under the status quo.¹¹¹ While a full examination of the current state of the media and the blogosphere will later address these criticisms, we must first explore how Sunstein’s and Davis’s criticisms have major implications for constitutional dialogues.

C. *Blog Criticisms Implicate Constitutional Dialogue.*

Assuming that Friedman, Post, and Siegel provide a mostly accurate depiction of constitutional dialogue in society,¹¹² Sunstein’s and Davis’s arguments that blogs harm the public discourse have major implications for dialogue theory. If people are truly becoming balkanized because of the Internet and their newfound ability to keep disagreeable views at bay, then the formation of stable and broadly supported views on constitutional issues will become increasingly difficult. This alleged problem would only be exacerbated in the future as increasing numbers of Americans move online for their news consumption and political information.¹¹³

Sunstein’s fear that common ground would be impossible to find in his world of digital polarization¹¹⁴ is especially problematic in the realm of constitutional concerns, where major disagreement currently exists over issues such as presidential war powers, abortion, and campaign finance. As equilibrium theories of constitutional dialogue depend heavily on the ability of society to reach an

citizens and policy makers, and deliberation leading to societal problem resolution.”).

110. *Id.* at 137 (“Government may need to play a role in ensuring that space remains open for public use and appropriate funding is existent for civic uses.”).

111. *See id.* at 135–38.

112. While there is some disagreement about the nature of societal dialogue and its effect on the Court, the remainder of this article will accept the equilibrium theories as true. In any event, the evidence showing that the Court’s decisions fall into line with public opinion over time demonstrates that public opinion plays a role in some way, and this article is most concerned with how those opinions are formed and expressed in the public sphere (whether through traditional media or blogs).

113. A Pew study found that on any given day, at least fifty million Americans currently check the Internet for news, and this number continues to grow. JOHN B. HARRIGAN, PEW INTERNET & AM. LIFE PROJECT, FOR MANY HOME BROADBAND USERS, THE INTERNET IS A PRIMARY NEWS SOURCE 1 (2006), http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf.

114. SUNSTEIN, *supra* note 2, at 61–62.

“equilibrium” on individual constitutional issues, constitutional dialogue could be substantially disrupted by the alleged problems cited in Sunstein’s and Davis’s work. A lack of societal dialogue that helps build a consensus on major issues could potentially release the Supreme Court from the leash of public opinion, thus resurrecting the countermajoritarian difficulty as the Court is unable to discern clear directives from a fragmented public with overly diverse opinions.

Other portions of the Sunstein–Davis critique of Internet discussion also implicate potential problems for constitutional dialogue theories. Sunstein’s fear of the quick spread of false information might have some effect on dialogue, as people form opinions on major issues based on false information. While this criticism might not harm constitutional dialogues seriously (as the research shows that the Court conforms to public opinion over long periods only),¹¹⁵ the persistence of false rumors in society (irrespective of the Internet)¹¹⁶ shows that if the Internet does work to spread false views as Sunstein alleges, it could conceivably harm dialogue over the long term. If the public becomes simultaneously more tuned in because of the blogosphere but increasingly ignorant as Sunstein suggests is possible, the public dialogue will likely not reach a proper consensus on key issues. These alleged problems could severely weaken the Friedman model of constitutional dialogue, as the formation of opinions might rely on incorrect information, and people would not expose themselves to opposing viewpoints (and gain a full understanding of the question at issue from all sides of the debate). Thus, the implication of Sunstein’s argument is that Internet discussion will severely undermine constitutional dialogue, as the process that has served to promote democratic values in the past (by constraining a “tyrannical” judicial review) will no longer function.

The lack of a rational “discourse” on Internet discussion forums identified by Davis could also, if true, undermine the equilib-

115. Bateup, *supra* note 4, at 1164.

116. The persistence of the view that the United States found weapons of mass destruction in Iraq (despite the Bush administration’s openly, if quietly, acknowledging that this is not the case) provides a perfect example of how false stories can be extraordinarily difficult to suppress, even in high-information cultures. A Harris Poll from July 2006 found that fifty percent of Americans believed that Iraq possessed weapons of mass destruction at the time of the U.S. invasion, although administration investigations and reports have discounted any such claim. Charles J. Hanley, *Half of U.S. Still Believes Iraq Had WMD*, WASH. POST, Aug. 7, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/07/AR2006080700189.html>.

rium model of constitutional dialogue. If Internet discussion serves only to allow people to talk past one another, then it will dampen hopes that society can achieve consensus on constitutional issues. While the resultant harm to constitutional dialogue might be minimized if the Internet does not replace previous forms of public discourse, it could still have negative effects. However, the next section of this Note will show that the Sunstein–Davis critique is highly overblown, and the damage to constitutional dialogue has come not from the blogosphere, but from the conventional media and their failure to promote substantive debate.

III.

BLOGS CAN ADVANCE CONSTITUTIONAL DIALOGUE WHERE THE CONVENTIONAL MEDIA HAVE FAILED TO DO SO.

A. *The Conventional Media Have Undercut Substantive Constitutional Dialogue.*

While Sunstein and Davis focus their anxiety about the public debate on the blogosphere, they fail to recognize what other scholars have identified as a bigger offender in damaging the public discourse: the conventional media. I will argue in *infra* Part III.B that their critique of Internet discussion is largely misplaced, but first I will examine how the conventional media's failure to promote substantive discussion had already hampered the process of constitutional dialogue before the appearance of the blogosphere. Particularly, the media's function as gatekeeper inhibited new ideas and voices while simultaneously failing to provide in-depth discussion about key constitutional questions. Before the arrival of the blogosphere, the conventional media's reduction of complex constitutional debates into sound-bite television created a dilemma that threatened to undercut Friedman's model of dialogue within society.

A particular failure of conventional media outlets has been the lack of substantive information conveyed to the public.¹¹⁷ While it

117. For example, media watchdogs using scientific polling in October 1992 (before many people knew about the Internet, much less blogs), found that a sample of 600 likely voters were inundated with various forms of media, from radio to newspapers, with a majority saying that television was their main source of information. JEFF COHEN & NORMAN SOLOMON, *ADVENTURES IN MEDIALAND: BEHIND THE NEWS, BEYOND THE PUNDITS* 113 (1993). This same group of high-media-consumption voters could not accurately describe President H.W. Bush's actions the previous week regarding sanctions with China or the Reagan official recently indicted for his participation in the Iran-Contra affair (only 19% could identify Caspar

is possible that voters merely choose to remain uninformed, despite the best efforts of journalism and the traditional news media, scholars have shown that this is simply not the case. In the latter half of the twentieth century, the conventional media became the ultimate intermediary in politics and civic life, and even Richard Davis himself acknowledges that the media's portrayal of candidates and issues largely shaped voters' perceptions.¹¹⁸ Other studies also concluded that information straight from candidates themselves (with their inherent biases and self-interest) provides a more accurate campaign discourse compared to information conveyed by conventional media.¹¹⁹

Increasingly in political campaigns, the conventional media focus less on where candidates stand on the issues, and instead on who is ahead in the polls ("horse race" coverage).¹²⁰ Other commentators have noted that reporters prefer stories that focus on the "pure politics" of a matter and examine issues only as a last resort.¹²¹ The media's power to function as a gatekeeper for political

Weinberger). *Id.* The voters were especially well-informed, however, about frivolous information, including the Bush family dog's name (86% correctly identified Millie) and the television character criticized by Dan Quayle (89% correctly noted the Vice-President's angry denunciation of Murphy Brown). *Id.* Other issues examined in the survey found a woefully under-informed electorate, whether on U.S. budget spending or Arkansas state taxes under Governor Bill Clinton (only 21% of people could answer inquiries on these issues correctly). *Id.* at 114. The survey cited was commissioned by FAIR (Fairness & Accuracy In Reporting). *Id.* at 114, 251.

118. RICHARD DAVIS, *THE PRESS AND AMERICAN POLITICS: THE NEW MEDIATOR* 182 (3d ed., Prentice Hall 2001) (1992).

119. STEPHEN J. FARNSWORTH & S. ROBERT LICHTER, *THE NIGHTLY NEWS NIGHTMARE: NETWORK TELEVISION'S COVERAGE OF U.S. PRESIDENTIAL ELECTIONS, 1988-2000*, at 6 (2003) ("[C]andidates and campaigns do a far better job of responding to citizen desires for substance, fairness, and comprehensiveness than the television networks do. . . . In fact, this is not even a close call: the unmediated campaigns do a far better job of responding to these important citizen desires for campaign information than do the television networks.").

120. *Id.* at 11, 37. A review of content analyses by different scholars found that nearly all of the studies objected to the heavy use of horse race coverage in presidential campaigns. *Id.* at 11, 37, 205-20 (citing LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* (1988); S. ROBERT LICHTER & RICHARD E. NOYES, *GOOD INTENTIONS MAKE BAD NEWS: WHY AMERICANS HATE CAMPAIGN JOURNALISM* (1995); S. ROBERT LICHTER ET AL., *THE VIDEO CAMPAIGN* (1988); S. ROBERT LICHTER & RICHARD E. NOYES, *WHY ELECTIONS ARE BAD NEWS* (1998); THOMAS E. PATTERSON, *OUT OF ORDER* (1993); MICHAEL J. ROBINSON & MARGARET A. SHEEHAN, *OVER THE WIRE AND ON TV* (1983); S. Robert Lichter et al., *Media Coverage*, *PUB. OPINION*, Jan.-Feb. 1989, at 18).

121. JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 25 (1996) ("The subtle but steady result is a stream of daily

candidates also means that the horse race focus ends the candidacies of many aspirants early, as the end of media coverage (when the horse race is no longer interesting as a political process story) makes the candidate effectively disappear.¹²² The loser in this process is discussion about substantive issues (both political and constitutional) facing society, and it is not a stretch to say that if the media do not focus on issues like Social Security, an in-depth discussion on the First Amendment is probably out of the question.

The media's lack of focus on substantive issues harms constitutional dialogue in American society by reinforcing public cynicism, encouraging voters to tune out of the dialogue, and filtering the Supreme Court's role as a facilitator of dialogue.¹²³ Studies show that the press focuses on horse race politics, and dismissal of issue-oriented appeals by candidates as "election year pandering" has helped promote cynicism in the body politic.¹²⁴ The increasing public cynicism about civic affairs can often lead voters to tune out of the political process altogether, as they frustratedly conclude that

messages that the real meaning of public life is the struggle of Bob Dole against Newt Gingrich against Bill Clinton, rather than our collective efforts to solve collective problems.").

122. FARNSWORTH & LICHTER, *supra* note 119, at 47. This problem is particularly pronounced in the area of presidential nominating contests. *Id.* at 58. In addition, the horse-race emphasis has also coincided with the rise of pundits who dictate the terms of the debate and focus on process stories, effectively shutting out alternative voices that might offer different perspectives. *Id.* at 77. This "insider" heavy focus on political coverage often leads to even more coverage of horse-race and process issues, with the pundits questioning tactics and campaign strategy rather than issue stances. *Id.* at 76. Oddly, the increasing self-importance of the media and the pundit class continues to grow, despite a propensity for incorrectly predicting election outcomes, erroneously assuming which issues will resonate with people, and making tasteless remarks on the air. COHEN & SOLOMON, *supra* note 117, at 17–19; *see also* FALLOWS, *supra* note 121, at 31–32.

123. It is worth noting that even when the media has offered coverage of substantive matters, the reporting has often been inaccurate. A study published in 1990 found that eighteen of thirty-two stories published over fifty days by different local TV newsrooms in metropolitan areas "were inaccurate or misleading." John McManus, *Local TV News: Not a Pretty Picture*, COLUM. JOURNALISM REV., May–June 1990, at 42. In all but one case, the study found that errors in the coverage were due to at least one of three economically logical factors: the errors (1) likely increased the story's appeal, (2) helped to cut the cost of the reporting, or (3) oversimplified a story so it could be told in two minutes. *Id.* at 43. It is perhaps a sad commentary on the state of the news media that a recent study found the "fake-news" show *The Daily Show* to be just as substantive as most network news. *It's No Joke: IU Study Finds the Daily Show with Jon Stewart to Be as Substantive as Network News*, IU NEWS ROOM, Oct. 4, 2006, <http://newsinfo.iu.edu/news/page/normal/4159.html>.

124. *See* CAPPELLA & JAMIESON, *supra* note 43, at 201–05.

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all political discourse is irredeemable.¹²⁵ Experimental evidence has borne out this problem, and most scholars have found that the increase in poor reporting and infotainment is leading to a populace that is alienated from the political process and civic discourse.¹²⁶

This cynicism and “tuning out” may undermine one of the key activities of constitutional dialogue (discussed in *supra* Part I), where people politically organize and interact with legislators to act for or against Supreme Court decisions. Overall, the decline in journalistic quality may help explain the increasing disengagement of Americans across all measures of political and community participation documented by scholars over the late decades of the twentieth century.¹²⁷ This decline in participation ultimately undermines the equilibrium model of constitutional dialogue, as fewer people choose to become educated and form opinions on the major constitutional questions of the day. Without an engaged populace, the popular backlash envisioned by Friedman, Post, and Siegel cannot materialize and bring the Court back into line with public opinion. Even if a majority opinion forms about a constitutional issue, too many people will view the issue cynically (as the conventional media have encouraged) and refuse to participate in the dialogue or help shape a public consensus. Instead of participating in a protest or giving money to an interest group, people instead assume the role of uninterested passive observers, who possibly participate in dialogue only through voting (if they are part of the approximately sixty percent of the populace that bothers with that much) and otherwise ignore constitutional issues. Thus, the problems of the conventional media discussed above revive the countermajoritarian problem of the Court’s acting on its own views by undermining constitutional dialogue in society.

The lack of substance in media reports also prevents the Supreme Court from properly functioning as a facilitator of constitutional dialogue. The focus on horse race issues over substantive matters also applies to Supreme Court decisions, and the coverage of major decisions can often focus on which political party may gain

125. FARNSWORTH & LICHTER, *supra* note 119, at 142 (discussing the numerous studies showing increasing voter frustration and cynicism); *see generally* KATHLEEN HALL JAMIESON, *EVERYTHING YOU THINK YOU KNOW ABOUT POLITICS . . . AND WHY YOU’RE WRONG* 32–36 (2000); PATTERSON, *supra* note 120, at 217; PUTNAM, *supra* note 43, at 45–47.

126. FARNSWORTH & LICHTER, *supra* note 119, at 143; *see also* CAPPELLA & JAMIESON, *supra* note 43, at 186–207.

127. *See, e.g.*, PUTNAM, *supra* note 43, at 44–45 (discussing the downward trend in political and community participation among Americans).

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a benefit from the issue. For example, major media outlets quickly framed the Supreme Court's decision in *Hamdan v. Rumsfeld*¹²⁸ in terms of partisan politics and how the political parties should approach the decision.¹²⁹ Given the condensing of complicated issues into smaller articles and the sometimes incorrect reporting of the conventional media, people also can form opinions that are not based on full understandings of the issue in question. This prevents the Supreme Court from focusing the discourse and framing the issue properly, as the mediator role of the media can often fail to frame the issue in its proper context. It is possible that diminishing the Court's facilitator role could make it more difficult for the public to form a consensus about constitutional issues, especially if the debate is not framed in the manner the Court intended.

While the conventional media remain a problem, the American public is at least somewhat aware that the media are failing to inform them of important matters.¹³⁰ This frustration with the conventional media has often been cited as a factor supporting the rise of the blogosphere, as people seek alternative outlets for substantive information about current events and politics.¹³¹ While many

128. 126 S. Ct. 2749 (2006).

129. See Michael Isikoff & Stuart Taylor Jr., *The Gitmo Fallout*, NEWSWEEK, July 17, 2006, at 14 ("The court decision's possible effects have set off an intense debate within the administration over how to respond."); Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006, at A1 ("The ruling shifts the spotlight to Congress, whose members face reelection this fall and who have largely avoided the military commission issue since the Sept. 11, 2001, attacks because of its political uncertainties."); Nathan Thornburgh, *Gitmo. How to Fix It*, TIME, July 10, 2006, at 22 ("Complicating matters further is that Congress is exhibiting its usual election-year pathologies. Democrats, wary of being lumped in with al-Qaeda should they introduce a bill that protects the rights of terrorism suspects, are calling on the White House to make the first move. Republican lawmakers are already divided between those eager to impress security-minded voters back home with a tough new tribunal and others, like Virginia's John Warner, who warn that moving too quickly or too carelessly might lead to another embarrassing showdown with the Supreme Court."); *Bush Says He'll Work with Congress on Tribunal Plan*, CNN.COM, June 29, 2006, <http://www.cnn.com/2006/POLITICS/06/29/hamdan.reax/index.html>.

130. During the 1988–2000 presidential cycles, the public grew increasingly frustrated with the quality of political media coverage, and a November 2000 post-election survey found that a majority of the public believed that journalists should have less influence in presidential elections. FARNSWORTH & LICHTER, *supra* note 119, at 7 (citing PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, CAMPAIGN 2000 HIGHLY RATED (2000), <http://people-press.org/reports/display.php3?ReportID=23>).

131. See David Kline, *Toward a More Participatory Democracy*, in BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE 3, 4 (David Kline & Dan Burstein eds., 2005) ("Chief among these reasons [for blog-

scholars suggest that the media created a pre-blogging status quo lacking in healthy constitutional dialogue, this Note will now refute the criticisms of the blogosphere and demonstrate that blogs will not (as Sunstein's and Davis's arguments suggest) amplify these status quo problems further.

B. The Sunstein–Davis Critique of the Blogosphere Is Inaccurate.

The fears expressed by Sunstein and Davis about the rise of the blogosphere are generally misguided, as are their prescriptions for an ill that largely does not exist. Their assumptions about Internet discussion miss the mark, as the blogosphere's growing size and influence have helped to mitigate their concerns and have not harmed dialogue in society as they feared (a discussion of how the blogosphere actually promotes dialogue follows in *infra* Part III.C). In fact, the blogosphere decentralizes rather than balkanizing, and it provides those individuals with the strongest arguments and ideas a venue to participate in the public debate. In addition, the blogosphere's unregulated environment has naturally created common venues for different perspectives where the best ideas "bubble up" from smaller venues and then engage with the opposition in a truly free marketplace of ideas. Finally, the various perspectives found within the blogosphere have not walled their adherents off from one another; instead, people with different perspectives often engage one another, even if they do so not in the language and tone of an idealized high-society debating club that the blogosphere's detractors might prefer.

A primary error in Sunstein's analysis is his prediction that the blogosphere will create a balkanized society. In fact, the blogosphere has served mostly to decentralize media, which is not an unhealthy phenomenon.¹³² The blogosphere's tendency toward decentralization contrasts greatly with the conventional media, which utilize numerous chokepoints of control (from publishers to editors, and even to the writers who are actually hired).¹³³ No one

gers' impact on American politics], of course, is the widespread public dissatisfaction with the mainstream media and the way it has conducted itself as the supposedly neutral arbiter and reporter of political news."). Kline notes that polling demonstrates that the widespread dissatisfaction with the conventional media cuts across nearly all political and social lines. *See id.* at 4–7.

132. The conglomeration of media into a few major companies obviously presents an interesting issue about how this centralization of ownership might hamper dialogue, but that is beyond the scope of this Note.

133. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 196–98 (2006). According to Benkler, the "hub-and-spoke technical architecture" of older mass-media models and the for-

person, corporation, or organization can control the content and popularity of individual bloggers (though certain high profile blogs can certainly promote others), thus allowing for an unprecedented level of individual control over the medium.¹³⁴

The balkanization feared by Sunstein simply has failed to materialize, as blogs often serve as a “crucible” of ideas where “interesting interpretations of important issues are forged and tested.”¹³⁵ These ideas often must be tested against opposing viewpoints, and the blogosphere is beginning to test new forums where ideas can actively clash, further speeding up the previous (and also effective) model of people writing their own ideas and criticizing the views of others after they have been posted.¹³⁶ Swords Crossed is a site designed specifically to have the right and left engage directly in debate, while larger sites such as Daily Kos and Instapundit.com tend to serve as more traditional left-wing and right-wing blogs. Even in the absence of sites such as Swords Crossed and The Hotline’s Blogometer, however, remaining relevant within the blogosphere often requires highly partisan bloggers to engage the arguments of commentators from the opposite end of the political spectrum.¹³⁷ Continuing relevance especially requires bloggers to challenge and comment on “consensus narratives,” effectively countering balkanization and providing shared experiences that Sunstein and Putnam

mer high cost of reaching large numbers of people with messages make subverting any “conventional wisdom” view difficult. *Id.* at 196–97. He particularly notes the criticism that mass-media in liberal democracies has become too concentrated in a few hands, so that there are “[t]oo few information collection points [that] leave too many views entirely unexplored and unrepresented.” *Id.* at 197.

134. *See id.* at 267–70.

135. Henry Farrell, *Bloggers and Parties*, BOSTON REV., Sept.–Oct. 2006, <http://bostonreview.net/BR31.5/farrell.html>.

136. One such new site pioneering this exercise is Swords Crossed, the brainchild of highly prominent bloggers from two of the largest blogs on the right and left, Redstate and Daily Kos, respectively. The *National Journal* also has begun posting daily summaries of the biggest issues being discussed by the blogosphere on the left and right. The Hotline’s Blogometer, <http://blogometer.nationaljournal.com> (last visited Oct. 4, 2007).

137. *See* Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2004/01/what-i-learned-about-blogging-in-year.html> (Jan. 23, 2004, 00:06 EST) (“[M]uch of the blogosphere is devoted to criticizing what other people have to say. It’s hard to argue with what the folks at National Review Online or Salon are saying unless you go read their articles, and, in writing a post about them, you will almost always either quote or link to the article, or both. Ditto for people who criticize Glenn Reynolds, Andrew Sullivan, or Kos, or Atrios. If you don’t like what Glenn said about Iraq, you quote a bit of his posting, link to it, and then make fun of him. These links are the most important way that people travel on the Web from one view to its opposite.”).

fear society is losing, albeit shared experiences viewed through different lenses.¹³⁸

Jack Balkin correctly notes that one of the reasons mass balkanization has not occurred within the blogosphere is that the Internet is not, as envisioned by Sunstein, a medium similar to radio or television, where opposing viewpoints could easily be shut out by the host of the program (or, in this case, the blog owner).¹³⁹ Given the predilection of the blogosphere to criticize what others have to say,¹⁴⁰ ignoring opposing viewpoints might lead to silence on a blog or, at a minimum, uninteresting posts compared to the rest of the blogosphere. While the criticisms written by bloggers may not rise to the level of law journal treatises, they often deal with substantive issues and are not, as Sunstein fears, simply “to show how dangerous, dumb, or contemptible the views of the adversary really are.”¹⁴¹

138. Henry Jenkins, *Challenging the Consensus*, BOSTON REV., Summer 2001, <http://bostonreview.net/BR26.3/jenkins.html> (“At the same time, the functioning of grassroots media channels will depend on the shared frame of reference created by the traditional intermediaries; much of the most successful ‘viral’ content of the Web has actually commented upon or spoofed content that originated in mainstream media. Broadcasting will provide the common culture, the Web will provide more localized channels for responding to that culture and challenging the ‘consensus narrative.’ Mainstream culture plays an important role in providing shared fodder for interaction in chat rooms and on discussion lists.” (citation omitted)).

139. Balkin, *supra* note 137.

140. *Id.*

141. SUNSTEIN, *supra* note 2, at 59–60. A good example of a post criticizing the opposite viewpoint and substantively advancing the dialogue is Glenn Greenwald’s post in August of 2006 on constitutional powers in times of national emergencies, in which he criticizes Glenn Reynolds and Judge Richard Posner for their “truly radical theories of constitutional interpretation.” Unclaimed Territory, <http://glenngreenwald.blogspot.com> (Aug. 29, 2006, 15:11 EST). The post goes on to fully analyze and critique the theories expounded by Posner, and it is certainly an example of constitutional dialogue envisioned by Friedman, Post, and Siegel. *See id.* Other bloggers’ posts also exemplify this type of substantive issue engagement. *See, e.g.*, Posting of digby to Hullabaloo, <http://digbysblog.blogspot.com/2006/01/for-sake-of-constitution-by-digby-al.html> (Jan. 16, 2006, 10:34 EST) (noting the dangers of the unitary executive theory and advocating the need for resurgent Congressional power); Posting of Adam Lambert (clammyc) to ePluribus Media, http://www.epluribusmedia.org/features/2007/20070130_gonzales_appointments.html (Jan. 30, 2007) (discussing presidential appointment powers, particularly in the context of U.S. Attorneys, how the appointment process has changed, and the role of the Senate in that process); Posting of populist to MyDD, <http://www.mydd.com/story/2006/11/26/123917/67> (Nov. 26, 2006, 12:39:17 EST) (posting an essay by freelance author Steve Osborn that provides an in-depth discussion on impeachment and its legitimate uses, including some originalist arguments); Posting of rktect to Daily Kos, <http://www.dailykos.com/storyonly/2007/4/7/93411/10260> (Apr. 7, 2007, 08:44:17 PDT) (discussing the

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While the types of links Sunstein refers to often occur, the fastest-growing, most prevalent blogs are those that actually delve into *why* the blogger believes the opposing viewpoint is wrong rather than simply asserting that it is so. In fact, the prevalent practice of linking that has become mainstream (and nearly required) in blogging helps expose people to disagreeable views that they might otherwise not find in a standard “neutral” newspaper article.¹⁴²

As Sunstein incorrectly viewed the blogosphere through the frame of the established media, he failed to see that the decentralized nature of blogs will not balkanize society, but instead act as a corollary and counterpoint to the conventional media and the “conventional wisdom” that it often reflects. Reader surveys have found that journalists and politicians form a disproportionate share of the blogosphere’s readership.¹⁴³ This has given the blogosphere a degree of influence over the conventional media and the consensus narratives, except that the narratives are not being distributed from the top down (as before), but from the bottom up. The blogosphere’s decentralization thus pushes common narratives and ideas into wider society (from both the left and right), providing a degree of commonality that Sunstein feared would be lost in the blogosphere.¹⁴⁴

Even within the blogosphere itself, balkanization has not taken hold despite the myriad blogs that address some aspect of the politi-

history of presidential appointment and removal powers by referencing, among other things, various Supreme Court precedents).

142. Balkin, *supra* note 137. The practice has become so prevalent and expected that when users post diaries at the most popular liberal blog, Daily Kos, asserting a fact, news item, or opposing viewpoint (for such purposes as disagreement or ridicule) without a link, commenters almost immediately request a link, and if one is not quickly forthcoming from the diary’s author, the diary tends to be discounted for lack of credibility. See DailyKos Frequently Asked Questions, http://www.dkosopedia.com/wiki/DailyKos_FAQ#Writing_diaries (last visited Oct. 24, 2007) (specifically requesting that “[w]hen you quote material that is not your own, please provide a link whenever possible,” and “[d]iarists are strongly encouraged to back up all assertions with facts (and preferably links to supporting materials) whenever possible.”).

143. Farrell, *supra* note 135 (“Bloggers’ ability to take up a new political issue, toss different interpretations back and forth among themselves, point out flaws, and arrive at final viewpoints makes them a highly valuable resource for political professionals and commentators in search of novel and salient ways of framing issues. It’s unsurprising that survey evidence suggests that a disproportionate number of journalists and politicians are regular blog readers.”).

144. *See id.* (“The availability of Internet-based communications and community-building technologies has allowed people from quite different ideological backgrounds to come together, to identify points of common interest, and to build a community of action.”).

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cal discourse. Studies of the blogosphere have found that blog readership has formed a lognormal distribution so that an “elite” group of bloggers reaches a disproportionately high number of readers compared to more numerous smaller blogs that lack the imposing readerships of Power Line or Daily Kos.¹⁴⁵ This does not mean that blogging has become elitist, however. Instead, it allows for the largest blogs to serve as clearinghouses for what the blogosphere as a whole is discussing, with the most pertinent and important stories or arguments percolating from smaller to progressively larger blogs.¹⁴⁶ This creates a degree of commonality within the blogosphere, and it allows outside observers (namely journalists) to easily take cues on major stories developing in the blogosphere by keying in on the largest blogs.

However, the blogosphere has organically managed to keep this process from succumbing to the chokepoints and elitism that plague the conventional media in two main ways. First, the list of “elite” bloggers has remained fluid, with onetime big names moving down and new voices rising in their place and amassing significant readership.¹⁴⁷ Though it can be difficult to break through to the “A-list” of bloggers, it does regularly occur; compared to the world of traditional media columnists, it happens at lightening speed.¹⁴⁸

145. Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs* 10–11 (Aug. 2004), <http://www.danieldrezner.com/research/blogpaperfinal.pdf>. Others have argued that the blogosphere follows more of a power law distribution. See Clay Shirky’s *Writings About the Internet*, http://www.shirky.com/writings/powerlaw_weblog.html (Feb. 10, 2003). The Drezner–Farrell analysis provides better statistical support. (Lognormal and power law distributions do not vary enough to affect the analysis in this article; the only real difference is that lognormal distributions tend to be less static than power law distributions, allowing slightly more change in the distributional hierarchy.)

146. Drezner & Farrell, *supra* note 145, at 12–14 (“Blogs with large numbers of incoming links offer both a means of filtering interesting blog posts from less interesting ones, and a focal point at which bloggers with interesting posts, and potential readers of these posts can coordinate. When less prominent bloggers have an interesting piece of information or point of view that is relevant to a political controversy, they will usually post this on their own blogs. However, they will also often have an incentive to contact one of the large ‘focal point’ blogs, to publicize their post. The latter may post on the issue with a hyperlink back to the original blog, if the story or point of view is interesting enough, so that the originator of the piece of information receives more readers. In this manner, bloggers with fewer links function as ‘fire alarms’ for focal point blogs, providing new information and links.” (footnote omitted)).

147. *E.g.*, Clive Thompson, *Blogs to Riches*, N.Y. MAG., Feb. 20, 2006, at 26.

148. *Id.* Often the key to breaking through in the blogging world and gaining readership is to post frequently with strong arguments and to gain the attention of the major political sites. See *id.* This route was used by Glenn Greenwald to

Second, the low entry barriers to blogging and its interactive nature (especially on Scoop-based sites like Daily Kos and MyDD that allow readers to post their own diaries that can be recommended by others) allow new bloggers to steadily gain readership and influence, and then to launch their own blogs, to which their readerships often follow.¹⁴⁹ Thus, while the blogosphere is highly decentralized, the process through which stories channel to high-readership blogs and into the conventional media creates common narratives that counteract the balkanization that Sunstein fears.

In addition, other scholarly responses to Sunstein have focused on his (somewhat tenuous) premise that people erect political walls around themselves to keep out opposing viewpoints. Sunstein's assertion is questionable, as studies have noted that the question is not what views people expose themselves to, but whether they engage politically at all.¹⁵⁰ Instead, people focus on the issues that are most important to their lives and selectively engage on those issues

quickly gain a huge following on his blog discussing politics and constitutional law matters, Unclaimed Territory. After gaining a significant readership exclusively on the blogosphere, Greenwald published a book, *How Would a Patriot Act?*, which shot to number one on the Amazon.com bestseller list only a few days after its release with no marketing campaign or publicity outside the blogosphere. See Unclaimed Territory, <http://glenngreenwald.blogspot.com> (Apr. 26, 2006, 08:41 EST).

149. Posting of Chris Bowers to MyDD, <http://www.mydd.com/story/2005/6/12/17357/3049> (June 12, 2005, 17:03:57 EST) ("Because of Scoop's diary feature, it is possible to become at least a semi-famous blogger without having a blog of your own. An entire generation of popular liberal bloggers grew out of the Dailykos diaries and comments: Billmon, Steve Soto, Steve Gillard, Melanie, DemfromCT, DhinMI, Theoria, Tom Schaller, Meteor Blades, DavidNYC, myself, SusanHu, Jerome a Paris, lapin, Maryscott O'Conner, NYCO, Mariascot, and many, many more. . . . Every day brings more reasons to read the highly trafficked liberal blogs. Every two weeks or so brings a new liberal blog from someone who has already become famous as a diarist. Community moderated blogging platforms such as Scoop have provided us with an excellent means of finding new voices . . .").

150. Shanto Iyengar, *Cynicism and Choice*, BOSTON REV., Summer 2001, <http://bostonreview.net/BR26.3/iyengar.html> ("Subsequent research into the partisan selectivity hypothesis has demonstrated that American voters are not especially motivated to tune out dissenting voices or sources of information. Based on their assessment of the relevant literature, David Sears and Jonathan Freedman in 1967 concluded that de facto selectivity—the process by which people decide about the extent of their political engagement—rather than motivated or partisan selectivity—the process by which people decide which information to pay attention to—was the norm. Given what we know about the level of information among the mass public, de facto selectivity implies that candidates should worry less about their ability to recruit from the ranks of the opposition and more about their ability to reach anyone at all." (citation omitted)).

of greatest importance to them, while selectively excluding viewpoints on a partisan basis to a much lesser degree.¹⁵¹ As Robert McChesney notes, the concern should not be how the “unwashed masses” participate in the democratic system, but whether they participate at all, and the Internet should operate in a way that promotes this participation.¹⁵² This line of thinking concludes that the goal should be to promote more consumer sovereignty and participation within the Internet and political discussion, as its benefits to democracy outweigh Sunstein’s fears.¹⁵³

Davis’s view that online discussion fails to promote substantive discourse also does not stand up to scrutiny. Superficially, a casual glance at the blogosphere might suggest that Davis is correct, with profanity and ad hominem attacks cropping up on all sides of the political spectrum. However, Henry Farrell notes that the tone of strong populist political movements of the eighteenth century more closely resembled the discourse on blogs than an Enlightenment salon debate.¹⁵⁴

Closer examination of the blogosphere shows that substantive discourse does occur, even across the political divide. While bloggers across the political spectrum are unlikely to agree about specific issues (and will often attack each other for their differing opinions), these disagreements often “generate clear faultlines of debate on policy issues.”¹⁵⁵ The media’s increasing reliance on blogs for feedback and issue-framing suggest that the blogosphere is grappling with substantive issues and using the deliberative pro-

151. *Id.* (“Rather than screening information on the basis of their partisan values or ideology, voters are more inclined to employ a relevance, or utility-based, criterion that prompts them to tune in more carefully to news reports about issues that affect them. Thus citizens do not confine their attention to information they agree with; instead, they give special attention to information on topics that interest them.”).

152. Robert W. McChesney, *Power to the Producers*, BOSTON REV., Summer 2001, <http://bostonreview.net/BR26.3/mcchesney.html> (“The task is to determine what sort of social reform would connect the mass of people with politics.”).

153. *Id.* (“What this means is clear. To have the Internet contribute to a democratization of our society requires that we work to democratize our political economy and reform our media system.”).

154. Farrell, *supra* note 135 (“Theorists of the public sphere who hark back to the idealized coffeehouses of the Enlightenment tend to forget or pass over the spleen, vulgarity, and vigor of 18th-century political debate. Political engagement goes hand in hand with viewpoints that are strongly held and trenchantly expressed.”).

155. Drezner & Farrell, *supra* note 145, at 18.

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cess to interpret new events and revelations.¹⁵⁶ In addition, the expertise found in some blogs contributes to the discourse in a high-minded, almost scholarly way. Experts can provide summaries of foreign-language materials, analyses of events, and cogent arguments based on their backgrounds that would often not make it into any type of discourse within the conventional media.¹⁵⁷ Finally, the feedback features found through comment threads on blogs have helped to shape interconnected communities, where the readers interact with bloggers and promote a give-and-take that remains civil as often as not, even in the face of disagreements.¹⁵⁸ These interconnected communities have even begun to overflow into the non-virtual world, where conventions of bloggers and readers occur (featuring panels of experts and discourse not unlike a law school symposium) that further promote solidarity within the world of online political discourse.¹⁵⁹ Overall, blogs will remain freewheeling, contain occasional obscenities, and never rise to the level of a Cass Sunstein law treatise, but they were never designed to replace scholastic debate and argument. The blogosphere instead

156. Daniel W. Drezner & Henry Farrell, *Web of Influence*, in *BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE*, *supra* note 131, at 83, 89 (noting that influential narrative-shapers such as Executive Editor Bill Keller of the *New York Times*, Howard Kurtz of the *Washington Post*, Paul Krugman of the *New York Times*, and Fareed Zakaria of *Newsweek* all have admitted to utilizing blogs for information-gathering or media commentary).

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157. *Id.* (noting that the conventional media often suffers “a deficit of specialized, detailed knowledge,” which blogs can counteract and supplement through their expertise). For example, the blogger David Nishimura emerged as a useful expert during the early stages of the Iraq occupation when his expertise in art, archaeology, and history helped shed light on the looting of precious artifacts from the Iraqi National Museum. *Id.*

158. Farrell, *supra* note 135 (“Many blogs also have comments sections, allowing non-bloggers to join the conversation. The result is a much more freewheeling, egalitarian form of communication than traditional media, one in which the distinction between author and reader is sometimes blurred to the point of near-irrelevance. . . . Debates in the blogosphere aren’t disinterested academic discourse, or anything like it. Serious arguments are mixed together with ad hominem attacks, insults, and irrelevancies. But political blogs are not meant to be a substitute for either journalism or academic debate. They are something new: a widely dispersed set of interlinked arguments about politics that responds with extraordinary rapidity to new events.”).

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159. See Adam Nagourney, *Gathering Highlights Power of the Blog*, *N.Y. TIMES*, Jun. 10, 2006, at A10. Interestingly, the YearlyKos convention was organized by readers of the Daily Kos blog, not by its founder and owner, Markos Moulitsas Zúniga. See Lynn Sweet, <http://blogs.suntimes.com/sweet/> (July 15, 2007, 06:35 EST) (correcting a prior posting that stated that the YearlyKos convention was founded by Moulitsas and clarifying that the convention is organized by a group of volunteers unaffiliated with the founder and Daily Kos).

allows for new voices to emerge and contribute to the debate, which will lead to an increase in constitutional dialogue compared to the dialogue present in the pre-blogging conventional media.

C. The Blogosphere Improves Constitutional Dialogue.

As the conventional media have generally failed to educate the electorate, enhance the public discourse, or promote constitutional dialogue, citizens have sought other methods to improve their civic knowledge and participate in meaningful debates. One of the primary beneficiaries of this disenchantment with the conventional media has been the blogosphere, to which people have turned in an effort to find both more substantive and more interesting discussion.¹⁶⁰ The influx of new voices and readers has led to an improvement in the quality of the political debate, fusing newsworthy information with significant clash and discussion about substantive issues (including constitutional matters).¹⁶¹ There are numerous ways and reasons that the blogosphere has at least modestly helped to improve constitutional dialogue in the last few years and will likely continue to do so for the foreseeable future. The overall improvement of the dialogue that the blogosphere has facilitated provides a useful method for invigorating the dialogic balance envisioned by Friedman, Post, and Siegel and overcoming the counter-majoritarian difficulty.

The blogosphere's lack of significant entry barriers has given a meaningful alternative to educated experts and citizens seeking better information and insight on issues, and constitutional debate has particularly benefited from this development. Numerous constitutional scholars have been able to start their own blogs and post frequently, providing insight into constitutional debates and decision-making that would likely never be featured on any nightly news broadcast.¹⁶² Respected scholars and judges such as Richard Posner, Eugene Volokh, Geoffrey Stone, and even Cass Sunstein have all used blogging to advance arguments and debate major issues of constitutional import (sometimes with one another).¹⁶³ The ease

160. See Kline, *supra* note 131, at 4.

161. See *id.* at 11.

162. See, e.g., Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/08/the_ten_command.html (Aug. 15, 2005, 01:08 EST) (discussing establishment clause jurisprudence).

163. The first three scholars listed above blog at The Becker-Posner Blog, The Volokh Conspiracy, and The University of Chicago Law School Faculty Blog, respectively. Cass Sunstein normally guest-blogs at Balkinization, Lessig Blog, and The Volokh Conspiracy.

of setting up a blog and writing smaller posts (as compared to legal articles) about constitutional matters has facilitated the dissemination of ideas and arguments to interested citizens, improving the accessibility of new arguments and aiding dialogue among other scholars and the public at large. This has been especially useful for scholars and experts searching for new venues to broadcast their ideas, especially if they have been shut out of the conventional media but have useful ideas to add to the debate.¹⁶⁴ New blogs (with significant readerships) are now devoted to dissecting the briefs, opinions, and actions of the Supreme Court, allowing discussion by readers through comments.¹⁶⁵ While SCOTUSblog obviously fits a smaller niche within the larger blogosphere, it is indicative of the ability of the medium to produce new constitutional dialogue and educate the public about constitutional matters.¹⁶⁶ Previously, expert scholars such as Volokh and Stone could argue constitutional merits only within the halls of academia, the pages of specialized legal publications, or when the media would actually invite them to share their views on television (rarely) or within the confines of an op-ed piece for a newspaper (slightly more frequently).

The breakdown of barriers to participate in a “constitutional dialogue” with the avowed experts of the field also has a distinct leveling effect. Now, experts must justify their arguments to laymen based on merit and can be challenged in a purer form of “the mar-

164. University of Michigan history professor Juan Cole provides the perfect example of this type of blogging, offering insight about the war on terror and international relations. *See* Drezner & Farrell, *supra* note 156, at 86–87. After being shut out of the conventional press, Cole started his own blog, eventually attracting over 250,000 readers per month, which allowed him to become an expert commentator and witness for the conventional media and Congress, respectively. *Id.*

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165. HALL, *supra* note 67, at 63–64. The most significant of these blogs is SCOTUSblog, <http://www.scotusblog.com> (last visited Oct. 4, 2007). In addition, many of the largest Circuit Courts of Appeals now have blogs (not written by the judges, but usually by attorneys and scholars working within the circuit) devoted to analyzing important issues within their respective jurisdictions. *See* Ninth Circuit Blog, <http://circuit9.blogspot.com> (last visited Oct. 4, 2007); Second Circuit Blog, <http://circuit2.blogspot.com> (last visited Oct. 4, 2007); Seventh Circuit Blog, <http://circuit7.blogspot.com> (last visited Oct. 4, 2007); Third Circuit Blog, <http://circuit3.blogspot.com> (last visited Oct. 4, 2007).

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166. Other prominent blogs fill such legal niches. *See, e.g.*, CrimProf Blog, http://lawprofessors.typepad.com/crimprof_blog/ (last visited Oct. 4, 2007) (focusing on criminal law issues, sentencing guidelines, and their accompanying constitutional issues); Election Law, <http://electionlawblog.org> (last visited Oct. 4, 2007) (discussing election law issues, including constitutional concerns about campaign finance, redistricting, and separation of powers issues).

ketplace of ideas” than was previously possible.¹⁶⁷ The lack of barriers to reading and writing blogs has allowed for new accessibility in constitutional dialogue by giving scholars the ability to reach larger audiences and giving the public a more approachable venue to learn about and understand the constitutional issues at stake.¹⁶⁸

A second major advantage for the blogosphere in attempting to improve constitutional dialogue is its dual role as both a one-to-many and interactive medium. Previously, access to one-to-many media was retained as a privilege of only a small group of writers, pundits, politicians, and media personalities.¹⁶⁹ The rise of the blogosphere completely undercuts this “privilege” by allowing people to reach thousands of others with their arguments, with their readerships limited only by the appeal of their writing and the traffic generated through word of mouth (and other means) on the Internet.¹⁷⁰ This allows the most successful bloggers to easily have a larger readership than many conventional media outlets, and it provides them with a platform to promote well-articulated viewpoints and perspectives.¹⁷¹ Even smaller bloggers are able to reach geometrically more people than they previously could, especially given the ability of individual bloggers to self-promote and draw readership through various methods.¹⁷² The one-to-many nature of blogs

167. See REYNOLDS, *supra* note 72, at 261 (“Until pretty recently, self-expression on any sizable scale was the limited province of the rich and powerful, or their clients.”).

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168. An extraordinary new series at Daily Kos helps emphasize the ability of the blogosphere to let scholars reach mass audiences, and also provides a feedback mechanism where citizens can critique and offer feedback about their own views on constitutional rights and processes. In September 2007, noted political scientist Larry Sabato began posting a series entitled, “Making a More Perfect Constitution,” which discusses proposed changes to strengthen the Constitution and improve American democracy. His diaries so far have created lengthy discussions on the Electoral College, political campaigning, and war powers, with each diary generating a significant amount of community participation (each has averaged at least 100 comments and included follow-up commentary and feedback from Sabato). See Daily Kos: Diaries, <http://larry-j-sabato.dailykos.com> (last visited Oct. 25, 2007), to view the various diaries posted by Sabato.

169. *Id.*

170. It is worth noting that bandwidth problems have begun to appear with the largest sites (such as Daily Kos or MyDD), illustrating that they are hypothetically limited by their server capacity. However, the advertising revenue generated by the largest sites has also allowed them to easily pay for new servers, so bandwidth is not a truly limiting problem.

171. See Wallace-Wells, *supra* note 79, at 18 (noting that one blog in particular, Daily Kos, has 3.7 million readers each week).

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172. PAUL BAUSCH ET AL., *WE BLOG: PUBLISHING ONLINE WITH WEBLOGS* 246–70 (2002) (discussing various blog publicity methods, including free methods

effectively gives ordinary individuals the power to have their arguments reach large numbers of people, allowing for more democratic constitutional dialogue than when the conventional media controlled the debate and only elite pundits had access to a large readership. As equilibrium theories of constitutional dialogue are heavily dependent on issues' gaining salience through democratic discourse, the ability of new individuals to express their views to more people than they previously could strongly indicates the positive influence blogs can have on constitutional dialogue. However, the combination of the blogosphere's one-to-many format with its interactive features is what truly gives blogs the ability to promote better constitutional dialogue in the broader electorate.

Perhaps the greatest innovation of the blogosphere that gives it the potential to promote constitutional dialogue is its interactive nature. The conventional media have always engaged in one-way communication that engenders a passive audience, allowing only minimal interaction from their readership (such as letters to the editor in newspapers).¹⁷³ In contrast, the blogosphere relies heavily on reader interaction, with the most successful blogs encouraging immediate feedback through comments sections that "[allow] non-bloggers to join the conversation."¹⁷⁴ This format creates a freewheeling form of communication, where the blogger can often set the subject matter of debate, but readers can (and often do) shape the direction of the discussion.¹⁷⁵ This two-way discourse al-

such as strong linking (and requesting that other bloggers link to you), search engine URL adding, using webrings, and cross-posting at more popular sites). While I do not argue that these methods will ultimately lead to a readership rivaling Daily Kos or Instapundit.com, as the lognormal distribution discussion above argued, it is still quite possible to gain a significant readership as a new blogger.

173. Farrell, *supra* note 135 ("Newspapers, magazines, and broadcast media involve one-way communication from the originator of the content to the readers or audience. To be sure, there are letters to the editor, but blogs are more fundamentally dialogic. Bloggers are engaged in continual debate with each other."). It should also be noted that in describing blogs as "fundamentally dialogic," Farrell is not referring to the idea of constitutional dialogue (he is not a constitutional dialogue scholar), but merely using the common term of "dialogue" as a two-way communication. *See id.*

174. *Id.*

175. Recent diaries at Daily Kos concerning the nature of habeas corpus and its relation to the Constitution highlight how sharp disputes (even between like-minded political activists) can take place, leading to a high level of debate over the nature of constitutional rights (and a proliferation of diaries from different points of view on the subject). *Compare* Posting of adigal, <http://www.dailykos.com/story/2007/1/18/143937/514> (Jan. 18, 2007, 11:41:56 PDT) (arguing that the Constitution does not guarantee habeas corpus), *and* Posting of Lefty Law Student, <http://www.dailykos.com/story/2007/1/18/173011/729> (Jan. 18, 2007, 14:42:37 PDT)

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lows the blogosphere to quickly shape arguments, receive feedback on public sentiment, and encourage readers to form their own opinions far better than the conventional media's reliance on one-way "indoctrination" that gives the average citizen much less of a role in the public discourse.

Current evidence also suggests that blogosphere participants (readers and writers) are more engaged civically than people who simply rely on the conventional media,¹⁷⁶ raising the possibility that the interactive nature of blogs encourages people to educate themselves further in order to better participate in the discourse.¹⁷⁷ The feedback also often comes from readers with highly disparate backgrounds and experiences, which allows for more understanding and "shared experiences" in the public commons than Sunstein envisioned in his critique.¹⁷⁸ While the development of the interactive dialogue online has often been viewed as a new phenomenon, some scholars see it as a return to increased community discourse that was the norm when labor unions, churches, and local political parties served as an interactive counterweight to the conventional media.¹⁷⁹ This interaction has allowed average citizens to participate in discussions about major constitutional issues, such that dis-

(claiming that former U.S. Attorney General Gonzales was correct about habeas and the Suspension Clause), *with* Posting of Categorically Imperative, <http://www.dailykos.com/story/2007/1/19/0192/97908> (Jan. 19, 2007, 21:10:02 PDT) (arguing that there is a constitutional right to habeas corpus).

176. DAVIS, *supra* note 60, at 79. Davis's studies show that online discussion participants use all forms of media more often (with the exception of newspapers, but Davis acknowledged the study did not take into account the possibility that online participants read newspaper content online) than non-online discussion participants. *See id.* at 78–79.

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177. Although no studies show any causation between blogosphere participation and higher engagement, the correlation of higher traditional media use by blog readers compared to engaged citizens who rely exclusively on traditional media (as opposed to lesser-engaged members of the electorate) suggests that some aspect of the blogosphere encourages people to become more "tuned in" to current events and civic matters. *See id.* at 80 ("It is possible that online discussion actually may enhance traditional media use.").

178. *See* J.D. Lasica, *Blogging as a Form of Journalism: Weblogs Offer a Vital, Creative Outlet for Alternative Voices*, in *WE'VE GOT BLOG: HOW WEBLOGS ARE CHANGING OUR CULTURE*, *supra* note 64, at 163, 164–65 ("The Net opens up the spigots for those who want to take on the mantle of journalist. 'The Web gives voice to a lot of alternative points of view,' [Paul] Andrews [former technology columnist] says.").

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179. REYNOLDS, *supra* note 72, at 92 ("In this we are perhaps going full circle. Prior to the Hearst era—and even, to a degree, prior to World War II—Big Media power was countervailed by other institutions: political parties, churches, labor unions, even widespread political discussion groups. The blog phenomenon may be viewed as a return of such influences—a broadening of the community of discourse to include, well, the community.").

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cussions about important constitutional questions are no longer the exclusive province of politicians, pundits, attorneys, and judges.¹⁸⁰ Whether this is a new phenomenon or a return to an older emphasis on citizen discussion and participation, the interactive nature of the blogosphere has allowed for the democratization of constitutional dialogue, allowing more people to become informed about and discuss key issues than do the conventional media. While the online discussions do not always focus exclusively on constitutional issues, simply galvanizing people to participate more directly in the political process functions to improve constitutional dialogue under the Friedman–Post–Siegel model, as political participation translates to pressure on the institutional actors that weigh in on constitutional issues.¹⁸¹

The blogosphere's interactive channels also help facilitate the dialogue described in Part I. Instead of limiting people to discussing constitutional issues with only their families, friends, and colleagues, Internet discussion forums allow conversation and debate with anyone who chooses to participate. This conversation connects people who might otherwise not come into contact with one another, allowing for educational communication about a variety of

180. These discussions have allowed laymen to learn about issues such as originalism, the "Living Constitution," and gender rights. See Posting of Armando to Daily Kos, <http://www.dailykos.com/story/2006/2/16/152937/438> (Feb. 16, 2006, 12:29:37 PDT). There are frequent instances of in-depth posts discussing these matters that invite significant commentary from the well-trained and uneducated alike, providing a good basis for constitutional discourse in the blogosphere. See, e.g., *id.*; see also HALL, *supra* note 67, at 38 (suggesting that amateurism does not detract from the contribution that blogs make to political discourse).

181. A recent example of blogs' affecting the dialogue simultaneously through both discussion and political action is the left-leaning blogosphere's movement to impeach President Bush by beginning at the local level. This caused major debates about the nature of an impeachable offense under the Constitution, and it also spurred some local Vermont townships to pass impeachment resolutions. See Posting of Kagro X to Daily Kos, <http://www.dailykos.com/storyonly/2007/3/6/223157/8591> (Mar. 6, 2007, 21:00:05 PDT) ("Arbortender's diary linked back to another blog, where the idea apparently originated. And to be perfectly honest with you, this read at first like just another fringe-y, kooked-out misreading of procedure. But I just happen to have an old copy of Jefferson's Manual here on the desk, and sure enough, that's just what it says. The legislature of any state or territory may transmit charges to the Congress and recommend impeachment. Now, to be sure, there is nothing that forces the House of Representatives—still the sole body capable of adopting actual articles of impeachment—to act on such charges. In fact, you can be assured that they'd do everything in their power to avoid doing so. But what a story it'd make! A little known constitutional procedure that has lain dormant for decades, never before used against a president, and pitting the duly elected and sworn legislature of a state against a federal Congress sitting on its hands and refusing to act!").

issues (such as lawyers explaining legal arguments to non-attorneys, doctors describing issues they confront daily in the health care system, or citizens recounting problems they have encountered in dealing with a particular elected official). These online discussions can potentially provoke people to take a more active role in traditional fora of civic affairs, such as writing letters to the editor, telephoning legislators, or promoting positive feedback to media outlets that choose to focus on an issue that the online group finds particularly salient.¹⁸²

The blogosphere has also particularly improved constitutional dialogue through its promotion of political organizing about particular constitutional issues. While the ability of blogs and discussion threads to specialize and focus on individual constitutional matters has already been thoroughly discussed, the blogosphere has also discovered creative ways for people to transform their views into specific political action and support. For example, the left-wing blogosphere has been strongly supportive of a new innovation called ActBlue, which allows individuals to draw up lists of candidates and interest groups that back a particular issue.¹⁸³ Bloggers can create ActBlue listings and then provide easy-to-use links for like-minded readers to donate to the candidates who share the blog's perspective. For instance, bloggers particularly concerned about voter disenfranchisement issues started a page to support state secretary of state candidates who pledged to fight voter suppression.¹⁸⁴ The ActBlue pages often allow the visitor to immediately view the positions of the candidates and volunteer for their campaigns. This new mechanism has allowed blogs to further amplify their ability to affect dialogue, and it provides valuable information to readers about which elected officials or candidates support the constitutional causes they care about. Blogs encourage the constitutional dialogue envisioned by Friedman, Post, and Siegel, as people educate themselves about issues affecting constitutional rights and are motivated to act (and apply political pressure),

182. These activities are often the primary calls to action that are found most frequently on Daily Kos. See Farrell, *supra* note 135 (“[S]ome parts of the blogosphere . . . have become the seedbed for dense, interconnected communities, forsaking [sic] broad-ranging argument between diverse opinions for concerted political action.”).

183. See <http://www.actblue.com> (last visited Oct. 4, 2007).

184. See The Secretary of State Project: ActBlue Donation Page, <http://www.actblue.com/page/colorofchange> (last visited Oct. 4, 2007).

thus lessening the countermajoritarian difficulty (by shaping public opinion over time).¹⁸⁵

One drawback of the interactive blogosphere, however, is that interaction is not necessarily required of people reading blogs. This results in a disparity between “posters” (people who actually post and participate in the online discussion, sometimes even posting their own blogs or diaries) and “lurkers” (people who merely read the posts and accompanying discussion without otherwise participating).¹⁸⁶ According to surveys, the ratio of posters to lurkers ranges anywhere from 1:3 to 1:10, but studies have found that lurkers often become posters over time.¹⁸⁷ A drawback of the prevalence of lurkers is that online discussion in the blogosphere does not draw nearly as many people into the dialogue as would conceivably be possible. However, the blogosphere still promotes constitutional dialogue more effectively than the conventional media baseline, as it allows new voices into the debate. In addition, the dichotomy between posters and lurkers may add to the quality of the debate, as posters tend to follow current events and important arguments within different subjects more closely,¹⁸⁸ so that the more-informed are the ones contributing to the debate, while the less-informed can become better educated about matters over time. The implications of this emerging dichotomy are still uncertain as studies have yet to ascertain patterns predicting how poster and

185. A vivid example of the political activism relating to constitutional matters (in this case, freedom of speech) was provided by the Kentucky controversy over public employees' access to left-leaning blogs. In short, the administration of Governor Ernie Fletcher of Kentucky had tired of the scathing criticism and reporting done by the BluegrassReport, and it blocked access to the site (and other left-leaning blogs, while still allowing right-leaning blogs) on public employees' computers. See Posting by Mark Nickolas to BluegrassReport.org, http://www.bluegrassreport.org/bluegrass_politics/2006/07/nickolas_vs_fle.html (July 10, 2006, 16:07 EST) (detailing the alleged censorship and discussing a federal lawsuit filed by Nickolas against Governor Fletcher and others in the Fletcher administration). The controversy simultaneously stirred debates over the nature of freedom of speech for public employees, the freedom of the press (and whether bloggers qualify), and censorship by state officials. See *id.* The BluegrassReport also helped to promote the dialogic function of political activism by having readers focus criticism and negative feedback on the governor's administration. See *id.*

186. DAVIS, *supra* note 60, at 85.

187. *Id.* at 86 (“It is important to note that, for many people, lurking may be a temporary phenomenon—something they do until they become familiar with the medium. As [the study] shows, the more frequently one participates, the more likely one will post messages and not just lurk.”).

188. *Id.* at 94–95 (“Posters do indeed follow politics much more frequently than lurkers.”). Davis cites studies showing that 60% of posters say they follow politics most of the time, while only 46% of lurkers do so. *Id.* at 95 tbl.4.10.

lurker behavior differ, but it is plausible that the distinction could aid constitutional dialogue on the Internet by allowing the slow incorporation of new voices while preserving high-quality debate.

The blogosphere also improves constitutional dialogue by driving issues via its interaction with the conventional media. While early idealists suggested that online media would eventually replace the conventional media, recent findings (and more temperate views) have found that the blogosphere works to shape and complement the conventional media.¹⁸⁹ Bloggers have taken on an increased role in forcing the conventional media to devote more coverage to issues the blogosphere views as salient.¹⁹⁰ This can help stories that receive initial focus almost exclusively within the blogosphere to break through in the traditional media as traditional outlets become incapable of ignoring an issue.¹⁹¹

In addition, blogger commentary about conventional media coverage of an issue can help to cut through cynicism and actually describe the substantive issues at play, especially when the conventional media reporters may not have a full understanding of the stories they cover.¹⁹² The specialist critiques that often emerge from the blogosphere help to force the conventional media to conform to the actual facts when shaping a debate, so that false anecdotes and gross exaggerations are less likely to infect the public dialogue than in the past.¹⁹³ In the context of issues with constitu-

189. REYNOLDS, *supra* note 72, at 95. Reynolds does not see blogs as replacing “Big Media,” but he does note evidence that they are often supplementing and challenging the coverage of the conventional media. *Id.*

190. *Id.* (“This ‘flash media’ coverage does a lot of good. Sometimes—as in the Trent Lott case, documented in a lengthy case study by Harvard’s Kennedy School of Government, or in Iraqi blogger Zeyad’s coverage of pro-democracy rallies in Baghdad, scooping the *New York Times*—this sort of coverage gets Big Media entities interested.” (citation omitted)).

191. ROBERT J. KLOTZ, *THE POLITICS OF INTERNET COMMUNICATION* 121 (2004) (“The [Trent Lott birthday-party speech] story began quietly in the mainstream media, but received substantial attention in blogs. In a *New York Times* article, Paul Krugman described blog-author Joshua Marshall as more responsible than anyone else for raising the profile of the story, which ultimately led to Lott’s resignation as Senate majority leader.”).

192. See Blood, *supra* note 64, at 9–10 (“Their sarcasm and fearless commentary remind us to question the vested interests of our sources of information and the expertise of individual reporters as they file news stories about subjects they may not fully understand.”).

193. Matt Welch, *Blogworld and Its Gravity: The New Amateur Journalists Weigh In*, in *BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE*, *supra* note 131, at 371, 379–80 (“[J]ournalists finally have something approaching real peer review, in all its brutality. . . . Blogs can bring a collective intelligence to bear on a question.”).

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tional salience, the rapid response of blogs such as SCOTUSblog can especially help shape the conventional media narratives about the implications of court decisions as journalists consult such sites for commentary and insight in formulating their own stories.¹⁹⁴ The blogosphere's ability to promote certain substantive issues (and story angles) in conventional media coverage allows the influence of blogs to reach beyond cyberspace and affects the dialogue for people who do not participate in online discussion.¹⁹⁵ The blogosphere has helped to move stories and discussions about racial minority rights (in the context of the war on terror) and the possibility of American foreign policy interventions under international law (Darfur) into the mainstream and provoke wider debates among people who might otherwise not have been exposed to these issues.¹⁹⁶ In this way, the blogosphere has prodded the conventional media into reclaiming (at least partially—the latest celebrity gossip still receives a great deal of coverage) its stewardship of the dialogue and educating citizens in a way that will allow the equilibrium function of dialogue to operate more effectively.

It is worth mentioning that the blogosphere has not promoted one mechanism of dialogue that Post and Siegel highlight, namely mass demonstrations. While blogs were used to publicize and cover the widespread protests against the Iraq War and Republican convention in New York City, those protests were coordinated primarily by various interest groups such as anti-war and veterans organizations.¹⁹⁷ In addition, the recent pro-immigration protests attended by millions of Latinos appear to have largely been coordinated through Spanish-language radio and immigration rights organiza-

194. See HALL, *supra* note 67, at 64–65 (identifying a number of constitutional and legal issues discussed on the SCOTUSblog and noting that such matters would historically have been debated in localized law journals or specialized legal newspapers but now are accessible (both literally and intellectually) to anyone with Internet access).

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195. See Drezner & Farrell, *supra* note 156, at 88–89, 91 (“The more blogs that discuss a particular issue, the more likely that the blogosphere will set the agenda for future news coverage.”). Indeed, media leaders have admitted to being influenced by the stories permeating the blogosphere. *Id.* at 89.

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196. See *id.* at 91–92 (noting that the blogosphere acts as both an “amplifier” and a “remixer” of media coverage, which makes it difficult for the conventional media to ignore). Darfur particularly was shaped by a small number of bloggers spreading their message to more “elite” blogs, which finally focused at least some media attention on the region. See *id.* at 92.

197. See Marcella Bombardieri, *Veterans of Iraq War Join Forces to Protest U.S. Invasion*, BOSTON GLOBE, Sept. 2, 2004, at A28 (discussing the role of veterans' groups in protesting the Iraq war).

tions.¹⁹⁸ While it is possible the blogosphere will eventually direct its energies toward organizing demonstrations, it has not yet engaged in the type of dialogue that reflects this aspect of the Post–Siegel model.

The other mechanisms above have allowed the blogosphere to influence and improve dialogue, however, and the traditional functioning of equilibrium dialogue theory will help to focus the debate while continuing to educate and bring in new voices that shape the discussion. Much like the mechanism that forces blogs on different sides of a debate to respond to one another,¹⁹⁹ the Supreme Court’s role in equilibrium theory of facilitating and framing the debate will function to force blogs with differing viewpoints to address the arguments of merit on each side and not simply talk past one another. In this way, the blogosphere is a forum ideally suited to constitutional dialogue, as the Supreme Court sets the rules and boundaries of the debate through its decisions and the blogosphere is then free to explore every inch of the decisions’ implications through discussion.

The blogosphere’s exploration of Court decisions can thus help to set the tone and frame the larger societal debate, and it can especially allow the conventional media to gauge whether a backlash might materialize due to a decision and accordingly to focus more coverage on the debate. It may even be possible for blogs to create issue salience about decisions that would otherwise not be seen as controversial and would not function within the equilibrium theory, so that the Court must remain responsive within the dialogue on more than just a narrow range of issues. While blogs obviously cannot generate public feedback regarding every decision, they can provide a better forum for sparking interest and debate than what was provided by the conventional media over the past few decades.

CONCLUSION

While many commentators fear the rise of the blogosphere, its development can result in a great boon for constitutional dialogue in our society. The long-term decline of the conventional media has severely undercut the system of dialogue that helped to galvanize public opinion and work against the countermajoritarian difficulty by acting as a check against the Supreme Court’s power. The

198. *E.g.*, Karin Brulliard, *More Immigration Demonstrations Planned*, WASH. POST, Aug. 31, 2006, at A12.

199. Drezner & Farrell, *supra* note 156, at 90–91.

failure of the media to educate the public about important issues (especially constitutional matters) ultimately makes any backlash less likely, as people become too apathetic or uninformed to engage politically (even in the smallest ways with family and friends) about questions of rights that would otherwise create profound disagreement. If the conventional media continue to fail the public in the indefinite future, the countermajoritarian difficulty will be exacerbated further, as the Court could operate outside the acceptable views of a majority of the public with little risk of backlash.

Thankfully, the rise of the blogosphere has provided a meaningful alternative to this spiral of ignorance. Blogs and Internet discussion have provided a new source of information for millions of Americans while simultaneously allowing them to debate the meaning and significance of new events and arguments. By serving as an effective incubator of public opinion, the blogosphere drives public opinion and turns what was previously a media-driven one-way monologue into a true public dialogue. This development already has helped to reinvigorate the hope that constitutional discussion and debate can take place in such a way as to create dialogue between “the people,” the elected branches, and the Supreme Court. As the blogosphere becomes better at focusing collective political action and applying pressure to the public debate in the media and the political realm, it could serve to further alleviate the countermajoritarian difficulty by quickly organizing backlash and signaling the Court about the acceptable bounds of constitutional decision-making.

While scholars such as Sunstein and Davis have derided the rise of the blogosphere, the fears articulated in their critiques have generally not come true. While the discourse in the blogosphere will never be mistaken for a Socratic dialogue, it nevertheless provides an effective outlet for the *vox populi*, enabling people to participate more directly in the debate about issues that ultimately affect their lives. Ultimately, these voices must be welcomed to the debate about constitutional values despite any shortcomings of their presence, as democratic discourse cannot tolerate the stifling of such a clearly useful mode of communication in the name of enforcing mores about civility and order. It is unclear to what degree the blogosphere will ultimately improve constitutional dialogue in the United States, but the blogosphere has undoubtedly provided an improvement over the dearth of substance and meaningful discourse that has characterized the conventional media for the past three decades. The blogosphere’s empowerment of individuals to involve themselves in our constitutional culture will not

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result in millions' possessing the constitutional understandings of Cass Sunstein or Erwin Chemerinsky. However, millions of citizens will certainly have an understanding vastly superior to those who previously were simply captive and passive audience members of the major news networks.