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The Impact Of Social Media on the Legislative Process: How the Speech or Debate Clause Could be Interpreted

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THE IMPACT OF SOCIAL MEDIA ON THE LEGISLATIVE PROCESS: HOW THE SPEECH OR DEBATE CLAUSE COULD BE INTERPRETED

*Shelby Sklar**

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INTRODUCTION

On Tuesday, June 25, 2013, Texas State Senator Wendy Davis led a nearly thirteen-hour filibuster. In the special session of the Texas Senate, Davis's filibuster halted the passage of a bill that would make abortions after twenty weeks illegal and would impose other

* J.D., Northwestern University School of Law, 2015; B.A., University of Florida, 2012. Special thanks to the editors of the Northwestern Journal of Law and Social Policy who helped prepare this article for publication.

restrictions on abortion administration in Texas.¹ Davis's goal was to prevent the Texas Senate from passing the bill by running out the clock on the Senate session in which voting on Senate Bill 5 needed to occur.² Using the filibuster in the state and federal Senate to block passage of a bill may be a long-used tactic,³ but Davis's filibuster went beyond the normal vote-blocking practice because of her use of social media to garner public attention in the process.⁴

¹ Christy Hoppe, *After 12 1/2-Hour Filibuster, Senate Bill 5 is Dead*, DALLAS MORNING NEWS (June 25, 2013, 6:32 PM), <http://trailblazersblog.dallasnews.com/2013/06/wendy-davis-begins-filibuster-to-stop-omnibus-abortion-bill.html/>; Manny Fernandez, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, N.Y. TIMES (June 25, 2013), http://www.nytimes.com/2013/06/26/us/politics/senate-democrats-in-texas-try-blocking-abortion-bill-with-filibuster.html?_r=0.

² Fernandez, *supra* note 1.

³ See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 183-84 (1997) ("Generally speaking, a filibuster is the strategic use of delay to block legislation, to obstruct a nomination, to force an amendment, or to prompt other Senate action."); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 496 (1995) ("[T]he rules of the Senate have allowed for filibusters since the early republic. In fact, the first filibuster was attempted in the First Congress.")

⁴ The Washington Post reported that Davis's "tweetstorm," or social media campaign, leading up to and during her filibuster was planned by Davis's supporters to garner attention for her cause. The article gave this example of how pro-choice supporters of Davis encouraged people to spread the word:

If you are NOT in Austin and cannot get here, tweet and retweet your support for us," one local activist wrote on her blog. "The anti-brigade is out in force ... Don't engage them, just tweet your support for what we are doing. Tweet at positive public figures, get us trending and raise the signal for women's rights. TWEETSTORM them out of business, y'all!

Caitlin Dewey, *Wendy Davis 'Tweetstorm' was Planned in Advance*, WASH. POST (June 26, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/26/this-tweetstorm-was-planned-in-advance/>.

Following Davis's filibuster, Texas Governor Rick Perry called a second special session where the legislature passed the bill⁵ and Governor Perry signed the bill into law.⁶ After the filibuster, Davis used the momentum to compete in the 2014 Texas gubernatorial election.⁷ Planned Parenthood of Greater Texas Surgical Health Services filed a lawsuit against the bill, and the Fifth Circuit held the bill constitutional, allowing the bill to go into effect on October 29,

⁵ Matt Smith & Joe Sutton, *Perry Renews Texas Abortion Battle with Special Session*, CNN (June 28, 2013, 7:29 AM), <http://www.cnn.com/2013/06/26/politics/texas-abortion-bill/> ("Perry said the Legislature would convene July 1 in special session to take up the abortion bill, which was declared dead before dawn Wednesday. The bill failed after a night of drama in Austin during which a lone lawmaker talked for more than 10 hours in an attempt to run out the clock on a special session."); Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html>.

⁶ Fernandez, *supra* note 5 ("Gov. Rick Perry signed a bill into law Thursday giving Texas some of the toughest restrictions on abortion in the country, even as women's rights advocates vowed to challenge the law's legality in court."); see Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1, §§ 1–12, 2013 Tex. Sess. Law Serv. 4795–802 (West) (to be codified at TEX. HEALTH & SAFETY CODE §§ 171.0031, 171.041–048, 171.061–064, & amending § 245.010.011; TEX. OCC. CODE amending §§ 164.052 & 164.055).

⁷ Sean Sullivan, *Texas State Sen. Wendy Davis Announces Campaign for Governor*, WASH. POST (Oct. 3, 2013), http://articles.washingtonpost.com/2013-10-03/politics/42661649_1_fort-worth-democrat-abortion-filibuster ("Fourteen weeks and two days after Texas state Sen. Wendy Davis catapulted onto the national radar with her protracted fight against abortion restrictions, the Democrat announced her campaign for governor Thursday, emphasizing her commitment to education."); Manny Fernandez, *Wendy Davis Enters Race for Texas Governor With a Shorter Speech*, N.Y. TIMES (Oct. 3, 2013), <http://www.nytimes.com/2013/10/04/us/politics/entering-race-for-texas-governor-with-a-shorter-speech.html> ("Exactly 100 days after the legislative filibuster that defied the Republican establishment and turned her into a Democratic star, State Senator Wendy Davis announced Thursday that she would run for governor, opening an underdog campaign to lead a state that last sent a Democrat to the governor's mansion nearly 23 years ago."); WENDY DAVIS FOR TEXAS, <http://www.wendydavistexas.com/> (last visited Nov. 3, 2013).

2013.⁸ As of this writing, the parties are still litigating various issues of the lawsuit.⁹ The passage of the bill, the ensuing lawsuit (which some have speculated will be appealed to the United States Supreme Court),¹⁰ and Davis continue to receive mainstream media coverage.¹¹

⁸ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013), *rev'g* 951 F. Supp. 2d 891 (W.D. Tex. 2013); Erik Eckholm, *In Reversal, Court Allows Texas Law on Abortion*, N.Y. TIMES (Oct. 31, 2013) <http://www.nytimes.com/2013/11/01/us/most-of-law-on-abortion-is-reinstated-in-texas.html> (“Only three days after a federal judge blocked a new Texas law that threatened to shut down many of the state’s abortion clinics, the United States Court of Appeals for the Fifth Circuit, in New Orleans, reversed the decision, saying the rule should take effect while the case is argued in the months to come.”).

⁹ *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 734 F.3d at 418; Eckholm, *supra* note 8.

¹⁰ Rick Jervis, *Texas Abortion Ruling Could Lead to National Fight*, USA TODAY (Nov. 1, 2013, 9:30 PM), <http://www.usatoday.com/story/news/nation/2013/11/01/texas-abortion-ruling-supreme-court/3358269/> (“The fact that the 5th Circuit strayed from other rulings on this issue makes the case a likely candidate for the U.S. Supreme Court, [policy analyst with the Guttmacher Institute Elizabeth] Nash said. ‘It’s a huge sea-change,’ she said. ‘To allow this kind of law to go into effect during a court case is a very different approach to what we’ve been seeing in other court cases on the same subject.’”); Becca Aaronson, *Final Arguments Made in Case on Abortion Regulations*, TEX. TRIB. (Oct. 23, 2013), <http://www.texastribune.org/2013/10/23/Court-hears-debate-constitutionality-abortion-law/>.

Yeakel will be the first judge—but probably not the last—to rule on whether the provisions are constitutional. Yeakel, who gave no specific indication Wednesday on when he would rule, said Monday that he expects that whichever side is disappointed with his ruling to appeal the decision, probably all the way to the U.S. Supreme Court.

Id.

¹¹ *E.g.*, Jay Root, *Spotlight on Davis, Democrats’ Big Hope*, TEX. TRIB. (Sept. 1, 2013), <http://www.texastribune.org/2013/09/01/spotlight-democrats-big-hope/>; Molly Hennessy-Fiske, *Strict Texas Abortion Law Takes Effect*, L.A. TIMES (Oct. 31, 2013, 10:21 PM), <http://www.latimes.com/nation/la-na-texas-abortion-20131101.0,5492316.story#axzz2jWOWShSY>; William M. Welch, *Court Reinstates Most of Texas’ Abortion Restrictions*, USA TODAY (Oct. 31, 2013, 11:27 PM),

Had Davis not incorporated a social media campaign alongside her filibuster, the Act, although extremely controversial in its own right because of the anti-abortion measures it contains, may not have entered the public's consciousness as significantly.¹²

Davis's filibuster and coordinated social media campaign serve as an interesting model for examining the use of social media in the legislative process and the modern application of the Speech or Debate Clause of Article One of the United States Constitution.¹³ The

<http://www.usatoday.com/story/news/nation/2013/10/31/texas-abortion/3331201/>; Catalina Camia, *Wendy Davis Taps Veteran Dem Strategist for Campaign*, USA TODAY (Oct. 28, 2013, 11:37 AM),

<http://www.usatoday.com/story/onpolitics/2013/10/28/wendy-davis-johanson-texas-governor/3286107/>.

¹² Dewey, *supra* note 4 (“When Texas State Senator Wendy Davis began her 13-hour filibuster against a Texas anti-abortion bill yesterday, none of the major networks w[ere] watching. But thanks to a groundswell of support on social media, Davis became not only national news, but also a serious political contender and popular meme, shooting into Twitter’s worldwide trends on Tuesday night and earning more than half a million mentions on the site.”); Kate Summers-Dawes, Op-Ed, *The Wendy Davis Filibuster: A Win for New Media*, MASHABLE (June 27, 2013), <http://mashable.com/2013/06/27/wendy-davis-win-new-media-democracy/> (“As the tweets, Facebook posts, and Vine videos rolled in, Tuesday became a huge day for new media and, on a larger scale, democracy itself. People were engaged. In that moment, they didn't have Rachel Maddow or Bill O'Reilly on 24-hour cable news to tell them what they should be up in arms about or how they should think about it. They took to the Internet, watching, commenting, and getting their hands dirty in the political discourse as history was made, in what otherwise would have been a largely ignored issue germane only to one state of many.”).

¹³ U.S. CONST. art I, § 6, cl. 1.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Id.

U.S. Supreme Court has not considered the Speech or Debate Clause since the 1970s,¹⁴ other than when denying certiorari to cases concerning the same.¹⁵ However, the addition of social media to the legislative process may allow the Court to reconsider the meaning of “speech,” as applicable in the Speech or Debate Clause, and the availability of immunity to members of Congress when they use social media to express opinions about topics related to their legislative role.¹⁶

Although Davis did not post any social media messages herself while filibustering, this social media campaign raises the question of what limitations exist on legislators’ social media usage when on or off the house or senate floor. Since social media, cell phones, and constant internet access were concepts certainly not in the minds of the drafters of the Constitution, interpreting the Constitution to accommodate these societal developments is a necessity. The goal of this Comment is to explore how social media usage by legislators interacts with the Speech or Debate Clause, the Westfall Act, and the First Amendment concepts of legislative immunity and free speech. This Comment contemplates whether actions could be brought against legislators for their social media speech from fellow legislators and the general public for claims including defamation, libel, or related torts, such as infliction of emotional distress.

¹⁴ See William M. Howard, Annotation, *Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions*, 24 A.L.R. 6th 255 (2007); see also Charles W. Johnson IV, *The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence*, 43 CATH. U. L. REV. 535, 537 (1994).

¹⁵ E.g., U.S. v. Rayburn H. Off. Bldg., Room 2113, Washington, D.C., 20515, 497 F.3d 654 (D.C. Cir. 2007), *cert denied* 552 U.S. 1295 (2008); U.S. v. Jefferson, 546 F.3d 300 (4th Cir. 2008), *cert denied* 556 U.S. 1236 (2009); U.S. v. Renzi, 651 F.3d 1012 (9th Cir. 2011), *cert. denied* 132 S. Ct. 1097 (2012).

¹⁶ U.S. CONST. art I, § 6, cl. 1.; Kilbourn v. Thompson, 103 U.S. 168, 203 (1880) (“I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office.”).

This Comment will examine the possible interpretations of the Speech or Debate Clause as it applies to the use of social media by state legislators and members of Congress. Part I gives background on the importance of social media in today's world, a general overview of popular sites, and data on legislators' use of these platforms. Part II provides a brief history of the Speech or Debate Clause and Supreme Court interpretations and applications of its language. Part III examines how states have incorporated the federal Speech or Debate Clause into their constitutions and applied the privilege to state legislators. Part IV introduces the Westfall Act, which greatly expands legislative immunity from torts, making the Speech or Debate Clause's limitations much less authoritative. Part V describes the relevant First Amendment concepts that are applicable to interpreting what constitutes speech in the Internet and social networking context.

Finally, Part VI argues that a legislator's use of social media during the legislative session is akin to unprotected press releases and statements to the media, as analyzed using the Speech or Debate Clause. However, since the Westfall Act likely grants legislative immunity for comments to the media and the First Amendment provides for the free flow of communication, most legislators' social messaging and social media actions are not likely actionable.

This analysis requires the examination of the layers of protection for legislators provided by different legal doctrines. The Speech or Debate Clause establishes the concept of legislative immunity and broadened by the Westfall Act. The First Amendment defines speech in the social media context. In the federal sphere, the layers of legislative immunity developed by the various concepts likely protect most of Congressional members' social media speech; however, lack of Westfall Act protection at the state level potentially leaves state legislators exposed to liability.¹⁷

I. SOCIAL MEDIA DEFINITIONS AND USAGE

¹⁷ See *infra* Parts III, IV, VI.

Social media includes a variety of websites that serve as platforms of communication and information sharing.¹⁸ One scholar gave social media the following description:

Social networking sites provide online communities via a web-based service that enables users to interact, connect, reconnect, communicate, and collaborate in various ways—such as through audio, words, pictures, or video—with friends, family, acquaintances, professional colleagues, and others.¹⁹

According to a Pew Research Center study, by May 2013, 72% of “online adults” use a social media website, and 40% of cell phone users access social media through their phone.²⁰ Pew’s research also shows that 39% of all American adults engage in “civic or political activities with social media.”²¹

These statistics are just one set of data showing the widespread usage of social media websites that crosses demographics. Social media is likely to continue to grow and be an ever-present aspect of

¹⁸ E.g., Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 4 (2011) (defining social media as “a catch phrase that describes technology that facilitates interactive information, user-created content and collaboration.” (citation omitted)); Craig Estlinbaum, *Social Networking and Judicial Ethics*, 2 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 2, 7 (2012) (stating “[t]he terms ‘social media,’ ‘social network,’ and ‘social networking’ are used interchangeably in this Essay to refer to ‘web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system[;] (2) articulate a list of other users with whom they share a connection[;] and (3) view and traverse their list of connections and those made by others within the system.’” (citation omitted)).

¹⁹ Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 358 (2010) (citation omitted).

²⁰ *Social Networking Fact Sheet*, PEW RESEARCH CENTER, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Apr. 19, 2015).

²¹ Lee Rainie, et al., *Social Media and Political Engagement*, PEW RESEARCH CENTER (Oct. 19, 2012), <http://pewinternet.org/Reports/2012/Political-engagement/Summary-of-Findings.aspx>.

nearly all American lives.²² This provides a platform through which legislator constituents are readily accessible.

An understanding of how social media websites work is useful to examine how politicians and members of the legislature can utilize these sources to reach out to their constituents. Facebook is a website where people “connect” with other people by becoming online “friends” where they can post a “status,” pictures, and video. Facebook friends can like, comment, and share other people’s posts with their network.²³ Facebook self-reports “890 million daily active users on average for December 2014”²⁴ and is considered the most popular and highly trafficked social networking site.²⁵

Twitter is another heavily utilized social media site for engaging in conversation and spreading information. Unlike Facebook, where users generally know the people they connect with, Twitter allows users to “follow” virtually anyone with an account.²⁶ Twitter users

²² Laura J. Thalacker & Courtney Miller O'Mara, *Public Employees and the First Amendment: The Intersection of Free Speech Rights and Social Media*, NEV. LAW., Nov. 2012, at 13 (“Social media has fundamentally changed the way we communicate and impacts almost every part of our lives, from personal, to professional, to commercial.”); Estlinbaum *supra* note 18 at 4 (“Historians will likely mark the first decade of the twenty-first century as the dawn of the Social Media Age. Memberships on social network sites...like Facebook, Twitter, Google+, YouTube, and LinkedIn increased exponentially each year since their humble beginnings...” (citations omitted)).

²³ See Karen Tanenbaum, *Should the Default Be "Social"? Canada's Pushback Against Over-Sharing by Facebook*, 40 GA. J. INT'L & COMP. L. 275, 280-83 (2011); Tal Harari, *Facebook Frenzy Around the World: The Different Implications Facebook Has on Law Students, Lawyers, and Judges*, 19 ILSA J. INT'L & COMP. L. 1, 3-5 (2012).

²⁴ *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Apr. 18, 2015).

²⁵ Lee Rainie, et al., *Coming and Going on Facebook*, PEW RESEARCH CENTER (Feb. 5, 2013), <http://pewinternet.org/Reports/2013/Coming-and-going-on-facebook.aspx> (stating “[t]wo-thirds of online American adults (67%) are Facebook users, making Facebook the dominant social networking site in this country.”(citation omitted)); Tanenbaum, *supra* note 23, at 277; Harari, *supra* note 23, at 3-5.

²⁶ While most accounts are public, a Twitter user may set his account as private, requiring other users to request access to follow him. See *Getting Started with*

write “tweets” limited to 140 characters that can include links, images, and videos; these tweets can be “retweeted” from one user to another user’s Twitter feed.²⁷ The feed displays all of the tweets posted by the accounts the user follows and is updated in real time.²⁸ Users can include a “hashtag” within their tweet, which is a pound sign followed by words; this makes their tweet searchable by the hashtag.²⁹ In 2011, Twitter reported over 200 million accounts³⁰ and approximately 140 million tweets per day.³¹ Twitter is a popular platform for celebrities and public figures to interact with their fans; news sources also frequently monitor these figures’ Twitter usage.³²

Twitter, TWITTER, <https://support.twitter.com/groups/50-welcome-to-twitter/topics/204-the-basics/articles/215585-twitter-101-getting-started-with-twitter> (last visited Nov. 3, 2013); *The Twitter Glossary*, TWITTER, <https://support.twitter.com/groups/50-welcome-to-twitter/topics/204-the-basics/articles/166337-the-twitter-glossary> (last visited Nov. 3, 2013); Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT’L & COMP. L. REV. 145, 148 (2012).

²⁷ *Getting Started with Twitter*, *supra* note 26.

²⁸ *Id.*

²⁹ *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309-what-are-hashtags-symbols> (last visited Nov. 3, 2013).

³⁰ Bianca Bosker, *Twitter: We Now Have Over 200 Million Accounts (Updated)*, HUFFINGTON POST (June 28, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/04/28/twitter-number-of-users_n_855177.html.

³¹ Catharine Smith, *Twitter User Statistics Show Stunning Growth*, HUFFINGTON POST (May 25, 2011, 6:40 PM), http://www.huffingtonpost.com/2011/03/14/twitter-user-statistics_n_835581.html.

³² See, e.g., Alicia Adejobi, *Best Celebrity Twitter and Instagram Posts of the Week: Chris Brown, Madonna, Zoella and Alfie*, INT’L BUS. TIMES (Apr. 17, 2015, 11:51 AM), <http://www.ibtimes.co.uk/best-celebrity-twitter-instagram-posts-week-chris-brown-madonna-zoella-alfie-1496937>; Kristin Harris, *The 10 Most Popular Celebrities on Twitter in 2014*, BUZZFEED, (Dec. 10, 2014, 1:50 PM) <http://www.buzzfeed.com/kristinharris/the-most-popular-celebrities-on-twitter-in-2014#.lXRjzmV6B>; Katy Steinmetz, *Main Tweet: Researchers Dig Into The Intersection of Politics and Twitter*, TIME (Aug. 14, 2013), <http://swampland.time.com/2013/08/14/main-tweet-researchers-dig-into-the-intersection-of-politics-and-twitter/>; Sean Sullivan, *What Twitter Has Meant for Politics (and What it Hasn’t)*, WASH. POST (Mar. 21, 2013),

According to Twitter, there are 155 members of Congress with official Twitter accounts as of early 2015.³³ However, a study by the Congressional Research Service found that 78.7% of members of Congress have official Twitter accounts and 87.2% have Facebook accounts.³⁴ Facebook created an official “best practices” guide for new members of the 113th Congress on how to create official pages, follow other members of Congress,³⁵ target followers with advertising based on zip codes,³⁶ and “explain the votes you take.”³⁷

Members of Congress typically use their official Twitter pages to post about legislation they do or do not support, describe actions they are taking in Congress, mention meetings or appearances they are attending, and disclose personal information.³⁸ The Congressional Research Service study ranked the most popular ways members of Congress use social media, finding that expressing a “position on a policy or political issue” is most common, followed by comments about their district or state, and then messages that “described or

<http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/21/what-twitter-has-meant-for-politics-and-what-it-hasnt/>; Matthew Jacobs, *Obama's Twitter Followers Outnumbered By Four Celebrities*, HUFFINGTON POST (Mar. 21, 2013, 1:50 PM), http://www.huffingtonpost.com/2013/03/21/obama-twitter-followers_n_2923612.html; Kelly Phillips Erb, *When Politics and Hollywood Intersect: Actress Tweets Tax Policy Among Criticism*, FORBES (Sept. 10, 2012, 10:28 AM), <http://www.forbes.com/sites/kellyphillipserb/2012/09/10/when-politics-and-hollywood-intersect-actress-tweets-tax-policy-among-criticism/>.

³³ *US Congress: A Public List by Verified Accounts*, TWITTER, <https://twitter.com/verified/us-congress/members> (last visited Mar. 25, 2015).

³⁴ MATTHEW ERIC GLASSMAN ET AL., SOCIAL NETWORKING AND CONSTITUENT COMMUNICATIONS: MEMBERS' USE OF TWITTER AND FACEBOOK DURING A TWO-MONTH PERIOD OF THE 112TH CONGRESS, CONG. RESEARCH SERV., 5 (Mar. 22, 2013), available at <http://www.fas.org/sgp/crs/misc/R43018.pdf>.

³⁵ FACEBOOK WASHINGTON DC, FACEBOOK GUIDE FOR THE 113TH CONGRESS (Nov. 29, 2012), available at <http://www.scribd.com/doc/114953498/facebook-guide-for-the-113th-congress> (“Subscribe to the ‘U.S. House’ interest list to keep tabs on what other offices are posting to Facebook”).

³⁶ *Id.* (“Buy ads to promote your page. You can target the zip codes in your district to reach just your constituents”).

³⁷ *Id.* (showing examples of how a member of Congress posted statuses about his position on a bill.).

³⁸ GLASSMAN ET AL., *supra* note 34, at 4.

recounted an official or congressional action.”³⁹ Over a two-month period in 2011, members of Congress tweeted 30,765 times and posted to Facebook 16,239 times.⁴⁰ It is likely that this number has increased over the past two years.⁴¹ The Congressional Research Services study highlights the value that legislators place on using social media to communicate with their constituents.⁴²

Just as the speechwriter is in the arsenal of nearly every politician, many legislators have hired specialists to handle their social media accounts.⁴³ In a study by the Congressional Management Foundation, 59% of congressional staffers are of the opinion that “social media is worth the time their offices spend on it,” and 55% believe there are “more benefits than risks” involved with using social media.⁴⁴ Of those staffers surveyed, thirty identified themselves as “social media managers,” responsible for the office’s “social media practices.”⁴⁵ This group consists of “communications directors, press secretaries or new media directors.”⁴⁶ Overall, staffers, especially Democratic staffers, believe more time should be devoted to connecting with constituents via social media, especially increasing the number of videos posted and adding content to official blogs.⁴⁷

With the emphasis legislators have placed on using social media for the good it can do in spreading their message, there is also a large potential for a legislator or staff member to make an error when

³⁹ *Id.* at 8-11.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ CONGRESSIONAL MANAGEMENT FOUNDATION, #SOCIALCONGRESS: PERCEPTIONS AND USE OF SOCIAL MEDIA ON CAPITOL HILL 2 (2011), available at http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress.pdf.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 2, 10.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 12. Merriam-Webster defines “blog” as “a Web site that contains online personal reflections, comments, and often hyperlinks provided by the writer.” *Blog*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/blog> (last visited Apr. 20, 2015).

posting to social media. Consequently, the legislative privilege is an area of law that needs to be reexamined for the modern social media era.

II. HISTORY AND INTERPRETATION OF THE SPEECH OR DEBATE CLAUSE

The development of the Speech or Debate Clause and the Supreme Court's interpretations of it are highly instructive of the purpose and limits of the legislative privilege.

The origins of the Speech or Debate Clause are traced to the English Parliament's need for freedom from the monarchy as a sovereign law-making body.⁴⁸ The Speech or Debate Clause is found in Article One, Section Six, Clause One, and reads,

The Senators and Representatives shall...be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.⁴⁹

In 1880, the Supreme Court first considered the meaning and protections of the Speech or Debate Clause in *Kilbourn v. Thompson*.⁵⁰ The defendants, several members of the House of Representatives including the Speaker of the House, were charged with falsely imprisoning a citizen that was part of a bankruptcy investigation regarding a U.S. government contract.⁵¹ The Court

⁴⁸ *United States v. Johnson*, 383 U.S. 169, 177-78 (1966) (“The language of that Article, of which the present clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689: ‘That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.’”); *Johnson IV*, *supra* note 14, at 539.

⁴⁹ U.S. CONST. art. I, § 6, cl. 1.

⁵⁰ 103 U.S. at 168.

⁵¹ *Id.* at 173-174.

found that the defendants did not have the power to arrest citizens, but the Speech or Debate Clause provided the House members immunity because ordering the arrest was a legislative act.⁵² The Court stated that the immunity privilege of speech or debate extends to legislative actions “generally done in a session of the House by one of its members in relation to the business before it.”⁵³

In choosing a broad interpretation of the legislative privilege,⁵⁴ the Court relied on the historical development of a need for the legislative body to be able to make and execute laws, a duty “which the Constitution has conferred on them.”⁵⁵ The *Kilbourn* Court determined the “reason of the rule” applied as much to “words spoken in debate” as to writings, reports, resolutions, reproductions of speeches, and votes.⁵⁶

The broad interpretation of the legislative privileges continued when the Court next considered the legislative privilege in the 1951 case *Tenney v. Brandhove*.⁵⁷ At issue were defamatory comments

⁵² *Id.* at 204-05.

⁵³ *Id.* at 204.

⁵⁴ *Id.*

⁵⁵ *Id.* at 183.

The advocates of this power have, therefore, resorted to an implication of its existence, founded on two principal arguments. These are, 1, its exercise by the House of Commons of England, from which country we, it is said, have derived our system of parliamentary law; and, 2d, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them.

Id. at 183-84. (quoting *Coffin v. Coffin*, 4 Mass. 1, 7 (1808), which interpreted the Constitution of Massachusetts that included the language “‘The freedom of deliberation, speech, and debate in either House of the legislature is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other Court or place whatsoever.’”).

⁵⁶ *Id.* at 204.

⁵⁷ 341 U.S. 367, 367 (1951).

during a hearing of the California Legislative Tenney Committee.⁵⁸ The plaintiff argued that the hearing was meant to “intimidate and silence the plaintiff, and prevent him from effectively exercising his constitutional rights of free speech.”⁵⁹ The Court found that the legislators “were acting in the sphere of legitimate legislative activity” in holding hearings and including information about the plaintiff in discussions and the record.⁶⁰ In holding so, the Court noted that “an unworthy purpose does not destroy the privilege” because the reasoning for the privilege is to allow legislators to speak openly when making legislation.⁶¹

United States v. Johnson was the first Supreme Court case to consider the applicability of the Speech or Debate Clause in a criminal matter.⁶² The Court’s analysis concluded that inquiries as to whether former Congressman Thomas F. Johnson wrote a speech himself and inquiries into the motives behind the speech, allegedly a bribe, were impermissible under the Speech or Debate Clause.⁶³ Inquiries into the motives of a Member of Congress’s speech was “precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.”⁶⁴ The Court stated it was not foreclosing the possibility of a “narrowly drawn statute” that would allow Congress “to regulate the conduct of its members.”⁶⁵ *Johnson*

⁵⁸ *Id.* at 370-71.

⁵⁹ *Id.* (internal quotations omitted).

⁶⁰ *Id.* at 375-76.

⁶¹ *Id.* at 377.

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.

Id. at 372.

⁶² *United States v. Johnson*, 383 U.S. 169, 179 (1966).

⁶³ *Id.* at 173-77.

⁶⁴ *Id.* at 180.

⁶⁵ *Id.* at 185.

indicates that the Supreme Court could narrow Congressional immunity,⁶⁶ but if this were to happen, *Johnson* indicates that it would be limited to a criminal context.

The Supreme Court changed course in *United States v. Brewster* by further defining that the immunity provided by the Speech or Debate Clause is limited to “legislative activity” that is not “political in nature.”⁶⁷ Unprotected political activity, according to the Court, includes communications with constituents, such as “news releases, and speeches.”⁶⁸ The Court reached this conclusion by stating that these “legitimate ‘errands’” are part of a Congress Member’s actions as a legislator,⁶⁹ but are not activities normally engaged in during “the process of enacting legislation,”⁷⁰ the only activity that the Court has previously intended the Speech or Debate Clause to protect.⁷¹ The Court noted the purpose of legislative immunities is not for the “personal or private benefit of Members of Congress, but to protect the integrity of the legislative process,”⁷² which allows legislators to act egregiously,⁷³ but only when related to activities that are integral

⁶⁶ *Id.*; *United States v. Brewster*, 408 U.S. 501, 510 (1972) (noting the “narrow scope” of the *Johnson* Court’s holding).

⁶⁷ *Brewster*, 408 U.S. at 512.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 514.

⁷¹ *Id.* at 512-15. Clarifying, the Court stated,

Emphasis is placed on the statement that ‘there are cases in which (a Member) is entitled to this privilege, when not within the walls of the representatives’ chamber.’ But the context of *Coffin v. Coffin* indicates that in this passage Chief Justice Parsons was referring only to legislative acts, such as committee meetings, which take place outside the physical confines of the legislative chamber.

Id. at 514-15.

⁷² *Id.* at 507.

⁷³ *Id.* at 516-17.

to the legislative process, such as committee meetings and floor speeches.⁷⁴

The Supreme Court reiterated that “legislative acts are not all encompassing” in *Gravel v. United States*,⁷⁵ issued in the same session as *Brewster*. In *Gravel*, the Court extended legislative immunity to legislative aides.⁷⁶ Senator Gravel’s aide was subpoenaed by a federal grand jury to testify about the efforts by Senator Gravel and the aide to publish highly secretive reports about actions in Vietnam, known as the Pentagon Papers.⁷⁷ The Court found that legislative aides are effectively the “alter egos” of Members of Congress because of “the complexities of the modern legislative process,” which requires nearly constant attention to “matters of legislative concern.”⁷⁸ However, legislative immunity did not protect Senator Gravel or his aide from answering questions posed by a federal grand jury. Privately publishing the government study was “in no way essential to the deliberations of the Senate,” so Senator Gravel and his aide were not protected and questioning related to this issue did not violate their Speech or Debate Clause rights.⁷⁹

Justice Douglas dissented in the opinion, arguing that Senator Gravel’s introduction of the Pentagon Papers into the record inherently made them public.⁸⁰ Additionally, Justice Douglas argued publishing the Pentagon Papers with a private publishing house falls within the informative function and duty of Members of Congress.⁸¹

⁷⁴ *Id.* (“In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process.”).

⁷⁵ 408 U.S. 606, 625 (1972).

⁷⁶ *Id.* at 616 (“We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be “treated as one.” (internal citation omitted)).

⁷⁷ *Id.* at 608-09.

⁷⁸ *Id.* at 616-17.

⁷⁹ *Id.* at 625-26.

⁸⁰ *Id.* at 633-36 (Douglas, J., dissenting).

⁸¹ *Id.*

Justice Douglas argues that educating and informing the public about legislative and executive actions through congressional records and exhibits is a core “philosophy” of the Speech or Debate Clause.⁸² A second dissent, written by Justice Brennan and joined by Justices Douglas and Marshall, argued that the majority opinion would “endanger the continued performance of legislative tasks that are vital” by preventing legislators from providing information to a “wider audience,” which is an essential legislative activity.⁸³

*Doe v. McMillan*⁸⁴ further defined the breadth of the Speech or Debate Clause by protecting Members of Congress and Congressional Committees from a libel action brought by parents of school children from an underperforming school.⁸⁵ The parents brought the action after information about the children’s academic performance was used as evidence in committee reports, which the committee planned to disseminate to the public.⁸⁶ The Court found the committee’s actions are clearly protected by the Speech or Debate Clause as “legislative acts.”⁸⁷ The Court clarified that if a member of Congress republished the libelous information themselves, the legislator could be found liable for violating federal and state libel laws because publishing the information in a situation not related to a legislative act is not covered by the official immunity doctrine.⁸⁸

A few years later, the Court considered another case involving a libel charge in *Hutchinson v. Proxmire*,⁸⁹ in which Senator Proxmire sent a press release to members of the media containing remarks he was making to the Senate awarding Hutchinson, a scientist, with the “Golden Fleece of the Month Award” for “wasteful government spending.”⁹⁰ Senator Proxmire began giving out the Golden Fleece of

⁸² *Id.* at 636.

⁸³ *Id.* at 648-49 (Brennan, J., dissenting).

⁸⁴ 412 U.S. 306 (1973).

⁸⁵ *Id.* at 308-09.

⁸⁶ *Id.* at 309, 312-13.

⁸⁷ *Id.* at 312. (quoting *Gravel*, 408 U.S. at 618).

⁸⁸ *Id.* at 315-19.

⁸⁹ 443 U.S. 111 (1979).

⁹⁰ *Id.* at 114.

the Month Award in March 1975 to expose what he believed was the biggest waste of government funding.⁹¹ Referencing similar arguments made in the *Gravel* dissents⁹² and by Senator Proxmire,⁹³ the Court defined the “informing function” of the legislature to exclude Members of Congress from having the duty to inform their constituents or the public about legislative action.⁹⁴ Rather, legislators inform themselves of executive branch actions through committee hearings.⁹⁵ Applying this interpretation, the Court made clear that press releases are not protected under the Speech or Debate Clause, thereby committing to a narrow interpretation of protected communications and publications deemed necessary for legislative decision-making.⁹⁶

III. STATE SPEECH OR DEBATE CLAUSES

The federal Constitution’s Speech or Debate Clause only applies to Members of Congress⁹⁷ and many perceive it as indispensable to the legislative branch’s independence. Legislative independence has been an integral part of the United States’ democratic system since the country’s founding,⁹⁸ and many states incorporated variations of the constitutional clause into their state constitutions to preserve the separation of powers.⁹⁹ As noted in

⁹¹ *Id.*

⁹² *Gravel v. United States*, 408 U.S. 606, 633-49 (1972) (Douglas, J., and Brennan, J., dissenting).

⁹³ *Hutchinson*, 443 U.S. at 132.

⁹⁴ *Id.* at 132-33.

⁹⁵ *Id.*

⁹⁶ *Id.* at 133 (“Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.”).

⁹⁷ *United States v. Gillock*, 445 U.S. 360, 374 (1980) (“The Federal Speech or Debate Clause, of course, is a limitation on the Federal Executive, but by its terms is confined to federal legislators.”).

⁹⁸ *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880)

⁹⁹ *Id.*

Kilbourn, the intent of the federal Speech or Debate Clause was actually drawn from language used in Massachusetts where the drafters adopted wording for their clause almost directly from English Parliament protections.¹⁰⁰

Most states incorporate a version of the Speech or Debate Clause that provides similar immunities to their state legislators as the immunities provided by the federal Speech or Debate Clause.¹⁰¹

However, the states have adopted language with some variations to the federal version.¹⁰² Although most of the clauses read the same as the federal constitutional language,¹⁰³ there are some states that use “deliberation, speech or debate.”¹⁰⁴ Other states use “for words spoken or used in debate.”¹⁰⁵ Some states use the slightly narrower “liable to answer” for any speech or debate, written or oral.¹⁰⁶

¹⁰⁰ *Id.* at 202-03.

¹⁰¹ Supreme Court of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719, 732 (1980) (“We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.”); Tenney v. Brandhove, 341 U.S. 367, 375 (1951). There are seven states without Speech or Debate Clauses: California, Florida, Iowa, Mississippi, Nevada, North Carolina, and South Carolina. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 237 n.54 (2003) (discussing the various forms of legislative privilege, and that most states without Speech or Debate Clause’s recognize a “common-law privilege of free legislative debate.”); see also Gary L. Starkman, *State Legislators, Speech or Debate, and the Search for Truth*, 11 LOY. U. CHI. L.J. 69, 69 (1979).

¹⁰² Huefner, *supra* note 101, at 236-39.

¹⁰³ *Id.* at 236; accord Ala. Const. art. IV, § 56; Ark. Const. art. V, § 15; Colo. Const. art. V, § 16; Conn. Const. art. 3, § 15; Del. Const. art. II, § 13; Ind. Const. art. 4, § 8; Kan. Const. art. 2, § 22; Ky. Const. § 43; La. Const. art. 3, § 8; Mich. Const. art. IV, § 11; Minn. Const. art. IV, § 10; Mo. Const. art. III, § 19; Mont. Const. art. V, § 8; N.J. Const. art. IV, § IV, para. 9; N.M. Const. art. IV, § 13; N.Y. Const. art. III, § 11; Ohio Const. art. II, § 12; Okla. Const. art. V, § 22; Pa. Const. art. II, § 15; R.I. Const. art. VI, § 5; Tenn. Const. art. II, § 13; Va. Const. art. IV, § 9; Wyo. Const. art. 3, § 16.

¹⁰⁴ Huefner, *supra* note 101, at 236; accord Mass. Const. pt. 1, art. XXI; N.H. Const. pt. 1, art. 30; Vt. Const. ch. I, art. XIV.

¹⁰⁵ Huefner, *supra* note 101, at 236-37; accord Ariz. Const. art. IV, pt. 2, § 7; Idaho Const. art. III, § 7; Md. Const. art. III § 18; Md. Const. of 1867,

Similar to the relatively few cases regarding the Speech or Debate Clause considered by the U.S. Supreme Court, there is a similar lack of state jurisprudence considering the interpretation of Speech or Debate Clauses.¹⁰⁷ There is also a general lack of legal scholarship providing a thorough analysis of these state clauses.¹⁰⁸ However, despite the slightly different language that the minority of states adopted, the general scholarship and relative lack of jurisprudence on the subject matter seem to form a consensus that most state constitutional speech or debate clauses are proxies for the federal Clause.¹⁰⁹

Declaration of Rights, art. X; Neb. Const. art. III, § 26; N.D. Const. art. IV, § 15; Or. Const. art. IV, § 9; S.D. Const. art. III, § 11; Tex. Const. art. III, § 21; Utah Const. art. VI, § 8; Wash. Const. art. II, § 17; W. Va. Const. art. VI, § 17; Wis. Const. art. IV, § 16.

¹⁰⁶ Huefner *supra* note 101, at 237; *accord* Ga. Const. art. III, § IV, para. IX; Ill. Const. art. IV, § 12; Me. Const. art. IV, pt. 3, § 8; Alaska Const. art. II, § 6; Haw. Const. art. III, § 7.

¹⁰⁷ Huefner *supra* note 101, at 225 (“By contrast, judicial interpretations of the legislative privilege at the state level have been infrequent to date, and in almost every state the jurisprudence remains unsettled.”). *Contra* State ex rel. Stephan v. Kansas H. of Reps., 687 P.2d 622, 631 (Kan. 1984) (determining the viability of a state legislator using the state’s Speech or Debate clause as a defense); Oates v. Marino, 106 A.D.2d 289, 290 (1984) (citing to U.S. Supreme Court cases to support argument that New York senator’s allegedly defamatory comments were immune from suit).

¹⁰⁸ There are only a handful of legal works available that comment on the topic, most of which do not provide an in-depth comparative analysis of state constitutional clauses. *See* Robert Drean, *Modern Kansas Legislative Strategies: The Blackmail Gambit*, 35 WASHBURN L.J. 157 (1995); Natalie A. Finkelman, Note, *Evidence and Constitutional Law—Evidentiary Privileges for State Legislators—in Re Granite Purchases for State Capital*, 821 F.2d 946 (3d Cir. 1987) *Cert. Denied*, 108 S. Ct. 749 (1988), 61 TEMP. L. REV. 1015 (1988); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973); Starkman, *supra* note 98, at 69. *But see* Huefner, *supra* note 101, at 236-39.

¹⁰⁹ *E.g.*, Supreme Court of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719, 733 (1980) (“We generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution.”); Star Distrib., Ltd. v. Marino, 613 F.2d 4, 9 (2d Cir. 1980) (“We therefore conclude that state legislators, to the same extent as their federal

For the purposes of this Comment, the analysis will utilize the acceptance that the majority of state speech or debate clauses are interpreted in the same manner as the federal Speech or Debate Clause. There are, however, two notable exceptions in which states have broadened the scope of the legislative privilege with regard to comments to the media that may be of interest in the discussion of social media. In a 1956 Oklahoma case,¹¹⁰ the Oklahoma court fully protected allegedly defamatory statements a state senator made in a floor speech that were printed in a press release¹¹¹ as “publications or communications made in any legislative proceeding.”¹¹²

The Hawaii Supreme Court¹¹³ also extended legislative immunity to a senator charged with slander when a reporter interviewed him in his office after delivering a speech on the Senate floor.¹¹⁴ The Court found that the remarks, naming members of the University of Hawaii faculty that he believed were apathetic towards education,¹¹⁵ were of “a subject matter that was of legitimate legislative concern” because they clarified the statements made in the legislative session.¹¹⁶ Distinctly different from U.S. Supreme Court analysis,¹¹⁷ the Hawaii Supreme Court stated the remarks were protected because the statement “not only fulfills his duty to keep the public informed, but serves the public interest.”¹¹⁸

counterparts, are immune from suit under s 1983 for injunctive relief as well as damages based on their activities within the traditional sphere of legislative activity.”); *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003) (“The scope of state legislators’ immunity is ‘coterminous’ with the absolute immunity afforded to members of Congress under the Speech or Debate Clause, Art. I, § 6, of the United States Constitution.” (internal citations omitted)).

¹¹⁰ *State ex rel. Oklahoma Bar Ass’n v. Nix*, 295 P.2d 286 (Okla. 1956).

¹¹¹ *Id.* at 288-91.

¹¹² *Id.* at 291.

¹¹³ *Abercrombie v. McClung*, 525 P.2d 594 (Haw. 1974).

¹¹⁴ *Id.* at 594-96.

¹¹⁵ *Id.* at 594.

¹¹⁶ *Id.*

¹¹⁷ *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

¹¹⁸ *Abercrombie*, 525 P.2d at 600.

It is notable that the Oklahoma and Hawaii Court decisions came before the Supreme Court decided *Hutchinson*, which reached the opposite conclusion regarding press releases.¹¹⁹ Nevertheless, these cases pose interesting lines of analysis that other states may employ when considering social media speech by state legislators.

IV. WESTFALL ACT: MAKING FEDERAL SPEECH OR DEBATE IMMUNITY RESTRICTIONS IRRELEVANT?

In addition to the Speech or Debate Clause, members of Congress receive immunity from tort claims, including defamation, under the Federal Employees Liability Reform and Tort Compensation Act of 1988.¹²⁰ Congress enacted the law after the Supreme Court refused to extend absolute immunity to a federal employee charged with a state-law tort in *Westfall v. Erwin*.¹²¹ The Westfall Act, as it is commonly known,¹²² now provides that employees, including legislators, “acting within the scope of his office or employment” are immune from suit, and the action becomes one against the United States.¹²³ The scope of the Westfall Act overlaps with and goes beyond immunity protection provided to Members of Congress from the Speech or Debate Clause, as Courts have interpreted it. Although the “acting within the scope” language¹²⁴ is somewhat similar to the “legislative act” standard used by the Supreme Court for granting Speech or Debate privilege,¹²⁵ Courts

¹¹⁹ See *Hutchinson*, 443 U.S. at 111-15.

¹²⁰ 28 U.S.C. § 2679 (2012).

¹²¹ 484 U.S. 292, 300 (1988) (“We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful.”).

¹²² *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419 (1995).

¹²³ 28 U.S.C. § 2679(d)(1).

¹²⁴ *Id.*

¹²⁵ See *supra* Part II.

have interpreted “scope of employment” broadly¹²⁶ to encompass actions that would otherwise not be protected by the Speech or Debate Clause.¹²⁷ Overall, the Act gives expanded privileges to Members of Congress compared to the general citizen by protecting Members of Congress from most tort actions.

Two U.S. Court of Appeals cases from the District of Columbia Circuit interpreting the Westfall Act are pertinent to the discussion of social media postings by legislators.¹²⁸ In both cases, the Court found that the Westfall Act protected possibly defamatory statements made to reporters and published because the Congressmen were acting in the scope of their duties as legislators.¹²⁹ In *Council of American Islamic Relations (CAIR) v. Ballenger*, U.S. Representative Ballenger’s statement that CAIR was a fund-raising arm of terrorist group Hezbollah to a reporter in an interview about his recent divorce from his wife¹³⁰ was protected because there was a “clear nexus” between his performance as a legislator and his personal life.¹³¹ To determine the scope of his employment, the Court determined if the actions were similar general nature as that authorized or secondary to the work authorized.¹³² Another factor considered is if the purpose is to “serve the master.”¹³³ These are factors taken from the Restatement of Agency Law.¹³⁴ Because Representative Ballenger’s comments were made during “regular work hours in response to a reporter’s inquiry” the Circuit Court found the comments to be within the scope of the congressman’s duties and, thusly, protected the comments.¹³⁵

¹²⁶ See *Gutierrez de Martinez*, 515 U.S. at 435-37 (1995); *Osborn v. Haley*, 549 U.S. 225, 238-53 (2007); *Wuterich v. Murtha*, 562 F.3d 375, 383 (D.C. Cir. 2009); *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006).

¹²⁷ See *supra* notes 84-88 and accompany text (discussing coverage of statements to the media).

¹²⁸ See *Wuterich*, 562 F.3d at 377-78; *Ballenger*, 444 F.3d at 661-62.

¹²⁹ *Wuterich*, 562 F.3d at 377-79; *Ballenger*, 444 F.3d at 661.

¹³⁰ *Ballenger*, 444 F.3d at 662.

¹³¹ *Id.* at 665-66.

¹³² *Id.* at 664.

¹³³ *Id.* at 665.

¹³⁴ *Id.* at 663-66.

¹³⁵ *Id.* at 664.

The same Court considered a similar case a few years later in *Wuterich v. Murtha*, when a U.S. Marine sued a Congressman for statements made to various national reporters.¹³⁶ Congressman Murtha's remarks allegedly gave the impression that Staff Sergeant Wuterich murdered innocent Iraqi civilians in a comparison to war crimes committed at Mai Lai during the Vietnam War.¹³⁷ Wuterich argues these comments were made "based on inaccurate information" from congressional briefings about the event.¹³⁸

Following the *Ballenger* analysis,¹³⁹ the Court decided Westfall Act protections were appropriate for Congressman Murtha because they were made in his congressional district and were "not campaign related" or serving a personal interest.¹⁴⁰ Instead the comments were "unquestionably" the type of remarks expected to be made by the Congressman given that he was "the Ranking Member of the Appropriations Committee's Subcommittee on Defense and had introduced legislation to withdraw American troops from Iraq."¹⁴¹

These cases serve as an interesting examination of the split between the Speech or Debate Clause and the Westfall Act. The Westfall Act's expanded legislative immunity, which differs from the Speech or Debate Clause interpretation of what falls within the legislator's official capacity, thus deserving protection, could cause tension in the social media context.

The standards established in *Ballenger* and *Wuterich*,¹⁴² as to what falls within the scope of legislative activity, provide a rather broad grant of immunity under the Westfall Act compared to the Speech or Debate Clause. In the Speech or Debate context, "legislative activity" does not include press releases,¹⁴³ whereas the Westfall interpretation of scope includes an interview with a

¹³⁶ *Wuterich v. Murtha*, 562 F.3d 375, 377-78 (D.C. Cir. 2009).

¹³⁷ *Id.* at 378-79.

¹³⁸ *Id.* at 378.

¹³⁹ *Id.* at 381.

¹⁴⁰ *Id.* at 379.

¹⁴¹ *Id.* at 384-85.

¹⁴² See *supra* notes 128-141 and accompanying text.

¹⁴³ See *Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979).

journalist.¹⁴⁴ Arguably, there is no meaningful distinction between a press release and an interview with a journalist in this context since they both serve the similar purpose of communicating with the public. The difference in how the Speech or Debate Clause and Westfall Act cover communications with the public shows the dichotomy between the two: the Westfall Act largely covers areas of activity the Speech or Debate Clause does not provide immunity for. Hence, this Comment contemplates the Westfall Act provides legislative privilege for most causes of actions in a social media context, such as the torts of defamation or infliction of emotional distress.

V. INTERNET SPEECH: ANALYSIS OF HOW FREE SPEECH CONCERNS HAVE BEEN INTERPRETED IN REGARD TO SOCIAL NETWORKING

The Supreme Court has considered a number of cases of defamation under the First Amendment that legislators have tried to defend, both successfully and unsuccessfully, using the Speech or Debate Clause.¹⁴⁵ The Speech or Debate Clause does not deal directly with the First Amendment free speech doctrine,¹⁴⁶ but an understanding of how Internet communication is regulated and interpreted by the courts informs the discussion of how legislators' online speech may be interpreted.

Reno v. American Civil Liberties Union is the first case to consider free speech as it pertains to the Internet.¹⁴⁷ The Court considered censorship of indecent material online from minors under the Communications Decency Act.¹⁴⁸ The Court compared electronic communication, such as e-mails, listservs, and chatrooms, to "a note

¹⁴⁴ See *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006).

¹⁴⁵ See *infra* text accompanying notes 153-160; see also *supra* text accompanying notes 67-74.

¹⁴⁶ "Congress shall make no law. . . abridging the freedom of speech." U.S. CONST. amend. I.

¹⁴⁷ 521 U.S. 844 (1997).

¹⁴⁸ *Id.* at 844.

or letter.”¹⁴⁹ Throughout the analysis, the Court compared the Internet obscenity statutes in the Communications Decency Act to obscenity rulings in traditional media, like broadcasting, distribution of pornographic materials, and a zoning ordinance.¹⁵⁰ Despite the Court’s comparison of online communication to traditional media, the Court noted that the Internet is not “subject to the type of government supervision and regulation” needed for other communication platforms because Internet users easily control the information they access online based on what they search and look at, which is unique from telecommunications and print media.¹⁵¹

An issue of importance in analyzing online speech that the Supreme Court has not yet considered is the usage of actions that do not involve actual messages, such as liking and sharing on Facebook, and re-tweeting a tweet on Twitter.¹⁵² The Fourth Circuit recently considered whether a Facebook “like” constitutes speech¹⁵³ and protected the action as both “pure speech” and “symbolic expression” under the First Amendment.¹⁵⁴ The case considered whether Sheriff Office employees could be fired in retaliation for liking the Facebook campaign page for the opposing Sheriff in an election,¹⁵⁵ which caused a comment to appear on the employees’ Facebook pages showing the Facebook like.¹⁵⁶ The court applied the First Amendment balancing test for public employees, balancing the need for efficient government operations with the rights of public employees to enjoy free speech as private citizens.¹⁵⁷ Finding that the employees were acting in their private capacity,¹⁵⁸ the court concluded liking the page and the subsequent “statement” on the user’s Facebook profile comprised a “substantive statement” that amounted to the same

¹⁴⁹ *Id.* at 851-52.

¹⁵⁰ *Id.* at 864-68.

¹⁵¹ *Id.* at 868-69.

¹⁵² *See supra* Part I.

¹⁵³ *Bland v. Roberts*, 730 F.3d 368, 380 (4th Cir. 2013).

¹⁵⁴ *Id.* at 386.

¹⁵⁵ *Id.* at 372-73, 384-85.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 373-74.

¹⁵⁸ *Id.* at 387.

“constitutional significance” as actually writing out the statement of support.¹⁵⁹ Additionally, the like is protected as symbolic speech because the thumbs-up symbol displayed is the equivalent of “displaying a political sign in one’s front yard.”¹⁶⁰

Another aspect of Internet communication that could play a role in legislative immunity under the Speech or Debate Clause is service provider liability for publishing legislators’ social media speech.¹⁶¹ Section 230(c)(1) of the Telecommunications Act of 1996 states: “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁶² The Fifth Circuit interpreted this language to mean service providers can choose to “publish, withdraw, postpone or alter content.”¹⁶³ Following Congress’s intention to prevent tort claims such as defamation and to protect the generally unregulated nature of Internet communications, the Fifth Circuit has interpreted these terms broadly.¹⁶⁴ In the Speech or Debate Clause context, allowing claims only against the legislator who engaged in the speech disincentives service providers from censoring content on websites such as Facebook and Twitter.¹⁶⁵

¹⁵⁹ *Id.* at 386.

¹⁶⁰ *Id.*

¹⁶¹ *See supra* notes 98-102 and accompanying text.

¹⁶² 47 U.S.C. § 230(c)(1) (1998).

¹⁶³ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹⁶⁴ *Id.* *See generally* 47 U.S.C. § 230(b) (stating “the policy of the United States [is]...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”); Jack M. Balkin, *The Future of Free Expression in A Digital Age*, 36 PEPP. L. REV. 427, 433 (2009) (“In other words, people who deliver Internet traffic, like broadband companies, cannot be held liable for the traffic that flows through their networks. Even more important, people who operate websites or online services on which other people provide content, like chat rooms, blogging services, website hosting services, search engines, bulletin boards, or social networking sites like Facebook and MySpace, cannot be held liable for what other people say when others use these networks, services, or sites.”).

¹⁶⁵ *See supra* Part II.

VI. LEGISLATORS' SOCIAL MEDIA SPEECH OR DEBATE CLAUSE RESTRICTIONS

In the few years since social media has been integrated into American culture by the daily use of social messaging platforms, lower courts have generally hesitated to regulate the free flow of communication.¹⁶⁶ One important exception is the Supreme Court, which has taken small steps to limit complete immunity for members of Congress by establishing a standard that only protects legislators for legislative acts.¹⁶⁷ On the other hand, the additional protections of the Westfall Act for federal actors provides a layer of protection to enable legislators to communicate with their constituents without constant fear of tort litigation for possibly defamatory comments.¹⁶⁸ There are legislators who utilize modern technologies to provide constituents with continuous updates regarding their official duties, but there is also a concern that their communication is designed for political gain rather than a legislative purpose.

Legislators may frequently find themselves in a gray area: the legislators' social media postings are comments or explanations about actions taken during the legislative session, but the underlying reasoning for the post is to promote their stance in a campaign or attack a political opponent. If the content of the post is interpreted as directly related to legislative activity, then the "unworthy purpose" of the message cannot be questioned per *Tenney v. Brandhove* and *United States v. Johnson*.¹⁶⁹ The Speech or Debate Clause protection, therefore, may include postings with an inherently political purpose so long as they, even tangentially, relate to a legitimate legislative purpose. The cases interpreting the Westfall Act imply that politically motivated speech, including campaign speech, will normally be deemed within the scope of the employment of the federal

¹⁶⁶ See *supra* Part I.

¹⁶⁷ See *supra* Part II.

¹⁶⁸ See *supra* Part IV.

¹⁶⁹ *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951); *accord* *United States v. Johnson* 383 U.S. 169, 180 (1966).

legislator.¹⁷⁰ Therefore, in most cases there is likely protection for online speech loosely related to lawmaking, even if it is ostensibly said for a non-lawmaking purpose.

Although there are only a handful of Supreme Court cases interpreting the Speech or Debate Clause, it seems apparent that the modern Court leans towards limiting protection under the Speech or Debate Clause. Limitations include: (1) speech not made in a legislative session or in actions directly related to enacting legislation, such as in committee sessions; (2) debate over a bill and language included in the Congressional Record; and (3) lack of protection for comments made to reporters.¹⁷¹

Given these limitations, it seems the Court may take a restrictive approach to granting members of Congress immunity from defamation or other torts in a social media context. If the post relates directly to the motivations behind proposed legislation, however, including a vote or a speech delivered on the floor of Congress, the precedent of *Kilbourn* and *Johnson* may require that these comments be protected because the Court explicitly protected inquiries into legislators' motivations for legislative acts.¹⁷² On the other hand, under *McMillan* and *Hutchinson*, if the legislator is posting information unrelated to an official legislative act, the Court likely will qualify it as an unprivileged legislative errand.¹⁷³

Arguably, the main function of social media is providing information. The Supreme Court explicitly did not recognize informing constituents as a legitimate legislative act covered by the Speech or Debate Clause.¹⁷⁴ It seems to follow that social media will be lumped into the category of the press release as part of the unofficial informing function of the legislative office that is not protected by the Speech or Debate Clause.¹⁷⁵ In the social media context, updating the public on statements made in debate or the

¹⁷⁰ See *supra* Part IV.

¹⁷¹ See *supra* Part II.

¹⁷² See *supra* notes 50-66 and accompanying text.

¹⁷³ See *supra* notes 84-96 and accompanying text.

¹⁷⁴ See *Hutchinson v. Proxmire*, 443 U.S. 111, 132-33 (1979).

¹⁷⁵ *Id.*

legislator's support for a bill that is up for vote could be interpreted as simply informing the public, or it could be directly related to the legislator's duty of enacting legislation that benefits their constituents.¹⁷⁶ Consequently, it appears that protection for social media postings could fall on either side of the protected line depending on how liberally legislative act is interpreted in modern Courts.

Additionally, Speech or Debate Clause immunity for legislators' social media postings could vary depending on who is actually making the posts. As discussed earlier, under *Gravel*, immunity was extended to legislative aides that were essentially the alter ego of the legislator.¹⁷⁷ In a study by the Congressional Management Foundation about the impact of social media and online communication, including e-mail and social network sites, a survey of Congressional staff revealed that "three-quarters" of Washington, D.C. staffers are involved in "managing constituent communications" in some capacity.¹⁷⁸ The study found that although some Congressional offices are hiring new staff to focus on electronic communications, most are spreading out these duties to current staffers.¹⁷⁹ Who is posting tweets and Facebook statuses for legislators is unclear to the constituent and varies by office,¹⁸⁰ complicating the matter of when staffers, a dedicated social media coordinator, or the legislator are protected by the Speech or Debate Clause immunity. If the legislator posted the communication himself or herself, and falls within a "legislative act," then immunity is applied easily.¹⁸¹

However, would a social media coordinator, communications deputy, or press relations staffer fall under the category of "alter

¹⁷⁶ *Id.*

¹⁷⁷ *Gravel v. U.S.*, 408 U.S. 606, 616-17 (1972).

¹⁷⁸ CONGRESSIONAL MANAGEMENT FOUNDATION, COMMUNICATING WITH CONGRESS: HOW CAPITAL HILL IS COPING WITH THE SURGE IN CITIZEN ADVOCACY 15-16 (2005), *available at* http://www.congressfoundation.org/storage/documents/CMF_Pubs/cwc_capitolhillcoping.pdf.

¹⁷⁹ *Id.* at 4.

¹⁸⁰ GLASSMAN ET AL., *supra* note 34, at 12.

¹⁸¹ *See supra* Part II.

ego[]?”¹⁸² The *Gravel* Court extended immunity to legislative aides if the actions taken by the aide would be protected if the legislator would be immune performing the same act.¹⁸³ Hence, it would make sense that if a staffer manages the legislator’s social media accounts, then they should be protected in the same manner as the legislator.

However, a Court has not considered this type of question, so it is highly speculative that the Court would view any type of staffer as the alter ego of a legislator when posting online on the legislator’s behalf. Based on the interpretation of alter ego provided by the *Gravel* Court, a staffer whose sole or major role is to make social media postings for the legislator should be seen as the alter ego deserving protection because they are acting as the legislator to the public.¹⁸⁴

But, if the account is framed in a way that makes it clear the posts represent the legislator’s office’s views, meaning not coming from the legislator’s first person perspective, it could be reasonable to make the distinction that the social media staffer is not presenting the views, thoughts, or words of the legislator. In most cases it is likely that the account is written by a staffer who is presenting the public with the legislator’s speech, since a point of social media accounts is to make the public feel personally connected with the legislator.

The Westfall Act likely fills in whatever gaps the Speech or Debate Clause leaves open in providing immunity to legislators’ social media communication. As the D.C. Circuit Court opinions show, the term scope of employment includes comments made to newspapers if the information is pertinent to their constituents and there is a nexus to their positions as a legislator.¹⁸⁵ Given how broadly nexus was interpreted in these two cases and the vague discussion of nexus by the Supreme Court on the meaning of the term,¹⁸⁶ most Members of Congress will likely be able to rely on Westfall Act protection in order to avoid liability for any defamatory social media

¹⁸² *Gravel*, 408 U.S. at 616-17.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006); *Wuterich v. Murtha*, 562 F.3d 375, 384-85 (D.C. Cir. 2009).

¹⁸⁶ See *Osborn v. Haley*, 549 U.S. 225, 250 n. 14 (2007).

communication. This is bolstered by the First Amendment Internet jurisprudence, which, since its advent, has been continually championed as a source of freedom of communication and is highly regarded by many scholars and legislators,¹⁸⁷ including substantial utilization in President Obama's campaigns,¹⁸⁸ as an essential new tool for democracy.¹⁸⁹

Additionally, the Westfall Act's inclusion of the informative function of the legislator further supports integration of social media communication as deserving of the legislative privilege. This inclusion is important because social media messaging is currently unparalleled in its ability to foster constant and instant communication amongst people all around the country and the globe.¹⁹⁰

The Speech or Debate Clause and First Amendment's interest in promoting democratic discussions and broad interpretations for

¹⁸⁷ See *supra* Part I.

¹⁸⁸ Sally Katzen, *Governing in the Information Age: Technology As A Tool of Democratic Engagement*, 32 CARDOZO L. REV. 2285 (2011) ("Whether or not you view President Obama as a transformational person, he was the first candidate for the presidency to truly exploit technology in furtherance of his campaign. Use of the Internet and social media worked for him, and it is clear from the 2010 mid-term election campaigns that many on both sides of the aisle took this page from his playbook and emulated, or even expanded on, his example."); William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427, 428 (2013) ("The successful presidential campaigns of Barack Obama can be attributed, in part, to the masterful use of social media and other technologies."); Jenny Wortham, *The Presidential Campaign on Social Media*, N.Y. Times (2012), http://www.nytimes.com/interactive/2012/10/08/technology/campaign-social-media.html?_r=0.

¹⁸⁹ See generally Jack M. Balkin, *Commentaries: Digital Speech and Democratic Culture: A Theory of Freedom of Expression For the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Muriel Morisey, *Fifty Years After the Sit-Ins: Events, Trends, and Recommendations*, 18 VA. J. SOC. POL'Y & L. 82 (2010); Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. Int'l & Comp. L. Rev. 145 (2012); Note, Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185 (2011).

¹⁹⁰ See Ali, *supra* note 189, at 185-90.

legislative duty, combined with the Westfall Act's protection of the informative function, supports a conclusion that the legislative privileges originally contemplated extend to social media in much the same way as to traditional speech.

There is one pitfall in relying on the Westfall Act as the source of legislative privilege, which is the lack of such a tort immunity act in state codes.¹⁹¹ If states continue to follow the federal interpretation of the Speech or Debate Clause, then possibly only tweets that are defamatory but are based on a clear legislative action will be protected, as discussed in the federal context.¹⁹² But, since some states have already interpreted their state constitutional clauses in different ways from the federal Courts,¹⁹³ as in Hawaii and Oklahoma where protection has extended to interviews with the media,¹⁹⁴ there is a possibility that state courts may stray from federal court interpretation in order to facilitate the continued democratic expression and openness of government that social media fosters.

This is where legislators like Wendy Davis could influence the way that states, and possibly even the federal Courts, interprets the Speech or Debate Clause, or could possibly inspire state legislation explicitly extending legislative immunity for state legislators. As discussed earlier, Davis sparked a movement because of tweets her team sent out before she filibustered on the Texas Senate Floor for close to thirteen hours to stop the passage of a bill.¹⁹⁵ Although Davis did not tweet from the floor while she was filibustering or publish tweets that were defamatory,¹⁹⁶ her prior tweets and the social media movement that they generated gave her cause more national attention than it likely would have received otherwise, since most mainstream

¹⁹¹ See 28 U.S.C.A. § 2679(d)(1) (2008).

¹⁹² Huefner, *supra* note 100 at 236-39; see *supra* Parts II and III.

¹⁹³ See *supra* Part III.

¹⁹⁴ State ex rel. Oklahoma Bar Ass'n v. Nix, 295 P.2d 286, 291 (Okla. 1956); Abercrombie v. McClung, 525 P.2d 594, 594 (Haw. 1974).

¹⁹⁵ Hoppe, *supra* note 1; Fernandez, *supra* note 1.

¹⁹⁶ Summers-Dawes, *supra* note 12.

media outlets did not cover the event until the following day, after the filibuster ended.¹⁹⁷

Up until this point, I have not made a distinction between social media usage while the legislator is actually on the congressional floor, in a congressional hearing, or in their congressional office, compared to being elsewhere. From a Westfall Act perspective, the difference of location likely does not have any bearing on the legislative immunity, so long as the Member of Congress is acting in their official capacity, not for personal or political reasoning, and is motivated, at least in part, by their role as a legislator.¹⁹⁸ If using a public twitter account associated with their official capacity, then likely the Member of Congress is always acting in their role as legislator, especially since they can communicate with constituents from anywhere and at any time.

However, in the Speech or Debate context, there may be a difference in how social media postings are treated depending on where the legislator was located when they posted online. For the U.S. Congress, this may not be an issue because Senate decorum rules currently prohibit cell phones and laptops, which presumably would also include tablets, from the Senate Chamber.¹⁹⁹ However, the U.S. House of Representatives recently considered amending the decorum rules to allow these technologies into the chamber after a representative used a tablet to aid him in delivering a speech.²⁰⁰

¹⁹⁷ See, e.g., Dewey, *supra* note 4.

¹⁹⁸ *Wuterich v. Murtha*, 562 F.3d 375, 384 (D.C. Cir. 2009); *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006).

¹⁹⁹ RICHARD A. BAKER, TRADITIONS OF THE UNITED STATES SENATE 17 (<http://www.senate.gov/reference/resources/pdf/Traditions.pdf>) (last visited Nov. 14, 2013); Tim Gray, *iPad in the House! Congress May Embrace the Tablet*, LIVESCIENCE (Dec. 30, 2010, 3:46 AM), <http://www.livescience.com/10355-ipad-house-congress-embrace-tablet.html>; Kathryn Lucero, *Twoops! Romney-Ryan Ticket Has Some Lawmakers Violating Congressional Twitter Rules*, SUNLIGHT FOUND, REPORTING GROUP (Aug. 15, 2012, 6:11 PM), <http://reporting.sunlightfoundation.com/2012/deleted-tweets-supporting-rep-ryan-romneys-running-mate/>.

²⁰⁰ Gray, *supra* note 199.

Given that many people consider these technologies indispensable in their day's activity, a change to these decorum policies may not be far off. If this comes to fruition, social media messages may be considered protected by virtue of the legislator making them from the chamber. This would be a very liberal reading of the term "legislative act." If being present in the House Chamber is considered a legislative act in and of itself because the representative is participating in the creation of legislation simply by being present and listening to debate, then it is possible that any social media messaging posted would be protected based on this notion, regardless of the content of the post.²⁰¹

To illustrate the interaction of the Comment's overall analytical framework, consider the following example. A federal legislator publishes a defamatory tweet and Facebook status about one of her fellow members of Congress. The defamed member of Congress would pursue lawsuits against Twitter and Facebook for publishing libel, and the member of Congress making the remarks for libel. The claims against Twitter and Facebook would fail because Twitter and Facebook are protected under the First Amendment as service providers that are not responsible for editing the content its users post.²⁰² The cause of action that the defamed Member of Congress is more likely to win would be that the legislator posting the tweet did not make the defamatory remark in the course of legislative activity. If the United States' courts perceive the online speech made with a nexus of connection to the official duties of the Member of Congress, then there is no liability under the Westfall Act.²⁰³ However, if the actor in question is a state legislator posting online, then there is no Westfall protection, narrowing the scope of protected legislative activity, and opening the legislator to a greater likelihood of liability.²⁰⁴

²⁰¹ See *Kilbourn v. Thompson*, 103 U.S. 168, 204-05 (1880); *United States v. Johnson*, 383 U.S. 169, 179 (1966)

²⁰² See *supra* notes 162-165 and accompanying text.

²⁰³ See *supra* Part IV.

²⁰⁴ See *supra* Parts II and VI.

CONCLUSION

Social media has changed the world that we live in by being able to make constant updates on life as it happens, and the capacity to interact with people all over the world. Social media also impacts how legislators interact with their constituents by allowing constituents to have much greater access to their representatives. In return, government is becoming a more interactive process as people like Wendy Davis capitalize on this medium to build a broader network of people that listen and interact with legislators' ideas. Old frameworks, like the Speech or Debate Clause of the Constitution, have not yet been interpreted in this new context. As legislatures use social media, there will inevitably be misuses, which would require a new light to shine on these doctrines. However, legislators, at least on a federal level, may find adequate protection in the existing structures. The general acceptance of social media by nearly all legislators makes social networking a vital part of their platform to fairly serve and protect their country.