A Symposium Précis

*Thomas E. Baker**

In commemoration of the Bicentennial of the Constitution in 1987, Congress established a permanent endowment at Drake University Law School "to encourage graduate study of the American Constitution, its roots, its formation, its principles, and its development."[1] The Constitutional Law Center's programs and activities seek to broaden and deepen understanding of the Constitution. Our Belin Lamson McCormick Zumbach Flynn Constitutional Law Symposium is one of the highlights of the academic year. It is named to show our appreciation to the sponsoring law firm for its generous support of the Symposium.

This year's Symposium, *The Constitution and the Internet*, was held on February 17, 2001. We gathered to contemplate how the revolution of the information age has reanimated the debate between the Constitution and technology. We invited constitutionalists, civil libertarians, lawyers, judges, and interested citizens to consider whether the Internet fits into existing constitutional paradigms or whether the Internet will affect a reconfiguration of our constitutional code. In this undertaking, we were mindful of the caution towards thoughtful moderation from one of this generation's leading constitutionalists:

> New technologies should lead us to look more closely at just what values the Constitution seeks to preserve. New technologies should not lead us to react reflexively either way—either by assuming that technologies the Framers didn't know about make their concerns and values obsolete, or by assuming that those new technologies couldn't possibly provide new ways out of old dilemmas and therefore should be ignored altogether.[2]

We set out to ask some rather profound questions: How should we think about the Constitution of the United States in the age of the World Wide Web? Can a two-century-old document keep up with a technology that is evolving at the speed of light? How do the architectures of cyberspace constrain behavior?

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1.   20 U.S.C. § 4501 (1994).
2.   Laurence H. Tribe, *The Constitution in Cyberspace*, Remarks at the First Conference on Computers, Freedom & Privacy 3 <http://www.sjgames.com/SS/tribe.html> (Mar. 26, 1991).

What sorts of different political values are reflected in the competing architectures? How do the designs of the Internet facilitate innovation, and what kind of governmental intervention is important and necessary to preserve those designs? Are these value-laden architectures properly subject to political control, or should we think of the Internet as a new language occupying a unique place beyond the power of the state to regulate? What sort of synergy might we hope for between the Internet and the traditional processes of democratic self-government? How should policymakers, lawyers, judges, and other "netizens" react when we find ourselves making law for the rest of the world, or when we find other parts of the world making law for us?

The morning was a fascinating ride along the information superhighway. Three of the most knowledgeable and original thinkers on the Constitution and the Internet facilitated the discussion of these themes and their possible implications:

> **Lawrence Lessig**, Professor of Law at Stanford Law School, teaches and writes in the areas of constitutional law, contracts, comparative constitutional law, and the law of cyberspace. He is the author of *Code and Other Laws of Cyberspace* (1999). He also is a monthly columnist for *The Industry Standard*, a regular commentator in national newspapers and magazines, and a frequent lecturer at universities in the United States and abroad. He is a board member of Red Hat Center for Open Source, an organization that promotes collaborative intellectual pursuits, the results of which are freely shared throughout society. He was named to *The National Law Journal's 100 Most Influential Lawyers in 2000* and *Business Week's 25 Top eBiz Leaders in 2000*. His previous positions include a fellowship, Wissenschaftskolleg zu Berlin; Jack N. and Lillian Berkman Professor for Entrepreneurial Studies, Harvard Law School; professor, University of Chicago Law School; visiting professor, Yale Law School; law clerk for Judge Richard A. Posner, United States Court of Appeals for the Seventh Circuit, and for Justice Antonin Scalia, Supreme Court of the United States. He received his B.A. from the University of Pennsylvania, M.A. from Trinity College and Cambridge University, and J.D. from Yale Law School.

> **David G. Post**, Associate Professor of Law at Temple University Law School and Senior Fellow, Tech Center, at George Mason University Law School, teaches and writes on Cyberspace issues. The lack of accountability of the Internet Corporation for Assigned Names and Numbers (ICANN) prompted him to co-found two organizations: ICANN Watch, a non-profit group dedicated to monitoring ICANN-related developments (www.icanwatch.org), and the Cyberspace Law Institute, a think-tank on the legal issues emerging in the global communications environment (www.cli.org). He is the author of numerous articles in scholarly journals,

including *Chicago-Kent Law Review, Computer Law Reporter, Esther Dyson's Release 1.0, Georgetown Law Journal, Journal of Legal Studies, Journal of Online Law, Stanford Law Review, University of Chicago Legal Forum, Vanderbilt Law Review,* and *Wayne Law Review.* He is a former technology columnist for the *American Lawyer.* In 1996, Professor Post, along with Professor Lessig and another colleague, conducted the first Internet-wide e-mail course, "Cyberspace for Non-Lawyers," which attracted over 20,000 subscribers. He has appeared on "The NewsHour with Jim Lehrer," "Morning Edition," "All Things Considered," "Market Place," Court TV's "Supreme Court Preview," and the PBS series "Live on the Internet." He served two times as law clerk for the Honorable Ruth Bader Ginsburg, once at the United States Court of Appeals for the District of Columbia Circuit and again at the Supreme Court of the United States. He is a former associate of Wilmer, Cutler & Pickering, Washington, D.C., where he specialized in intellectual property law and high technology commercial transaction law. He received his B.A. and Ph.D. from Yale University and his J.D. from Georgetown University.

Jeffrey Rosen, Associate Professor of Law at George Washington University Law School and legal affairs editor of *The New Republic*, teaches and writes in the areas of constitutional law, criminal procedure, and the law of privacy. He is the author of *The Unwanted Gaze: The Destruction of Privacy in America* (2000), which *The New York Times* called "the definitive text to privacy perils in the digital age." He has written numerous essays and book reviews in many national publications, including *The New York Times Magazine* and *The New Yorker*. He also appears regularly on Public Broadcasting System's "All Things Considered" and "The NewsHour with Jim Lehrer," as well as major network and cable television news programs. He also has testified before Congress on privacy, technology, and constitutional issues. He received an A.B. from Harvard University and a B.A. from Balliol College, Oxford University, where he was a Marshall Scholar, and received his J.D. from Yale Law School.

The talks of these three presenters are published in these pages as a lasting record of the Symposium. Our hope is to reach a wider readership and to contribute to a fuller appreciation of the Constitution and the Internet.

Professor Lessig challenges us to navigate our minds inside our PCs to appreciate the architecture of the Internet—its deep structure.[3] We need to understand the fundamentality of "code" that is the "law" which constitutes the

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3.   Lawrence Lessig, *Architecting Innovation*, 49 DRAKE L. REV. 397 (2001).

Drake Law Review [Vol. 49

Internet.[4] We need to appreciate the plasticity of the Internet—how and why its code is being reconfigured—and what that could mean for the future of the Internet, the Government, and the individual. The challenge to governing cyberspace, he says, may not be to determine the proper level of government regulation, but rather to figure out how to prevent undue private regulation. He suggests that lawmakers must learn to appreciate the relationship between architecture and policy, if social policy goals are to be fully realized and unintended consequences are to be avoided.

Professor Post asks us to consider the "ought" question: How ought we think about the Internet?[5] How should we imagine this place that is no place? He finds some insights in the expansive imagination of Thomas Jefferson and the idea of language. He asks us to follow that metaphor where it might take us. Indeed, Professor Post would insist that he is not using a metaphor, that the Internet is not merely like a language; rather, he believes the Internet is in fact a language. He raises some interesting questions about the implications of this understanding for the Internet and the Constitution. Language, after all, is the *sine qua non* for being human and for community, the medium through which we experience life and thought, the currency of exchange for politics, learning, commerce, family, *et cetera.*

Professor Rosen looks to Alexis de Tocqueville for some insights into the phenomenon of the Internet.[6] In a recent essay, historian Edward L. Ayers insists that "of all the writers on cyberspace, Tocqueville, writing in the 1830s, may have come the closest to capturing its relationship to the United States because cyberspace is a clear projection of core American hopes and anxieties."[7] Professor Rosen draws some lessons of anxiety and hope about the Internet. He is anxious about what he calls the "legalized self," the phenomenon that every dispute or disagreement, every public policy or political issue becomes legalized with the consequence that the courts are being overused to their own detriment and to the detriment of society. As through a monitor darkly, however, he imagines he sees a hopeful alternative in the Internet, a model for restoring democratic manners and a mechanism for the application of democratic shame.

We ended the Symposium with a Roundtable Discussion that afforded participants the opportunity to comment and ask questions of the three

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4.   *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

5.   David G. Post, *"The Free Use of Our Faculties": Thomas Jefferson, Cyberspace, and the Language of Social Life*, 49 DRAKE L. REV. 407 (2001).

6.   Jeffrey Rosen, *I-Commerce: Tocqueville, the Internet, and the Legalized Self*, 49 DRAKE L. REV. 427 (2001).

7.   Edward L. Ayers, *Cyberspace, U.S.A.*, *in* AMERICAN PLACES: ENCOUNTERS WITH HISTORY 3, 11 (William E. Leuchtenburg, ed. 2001).

presenters.[8] That far-ranging discussion had the stimulating quality of an HTML session of Internet surfing to highlight and then point-and-click from one interesting idea to the next interesting idea. What a marvelous display of intellect and insight these three scholars afforded us. We all came away with a better understanding of the nature of the Internet and a better appreciation for the timelessness and capaciousness of the Constitution. We are in their intellectual debt.

Considering the fact that this Symposium was about the Constitution and the Internet, it was altogether fitting and proper to continue the discussion in an online seminar co-sponsored by the Constitutional Law Center and LAW.COM.[9] The Symposium papers of Professors Lessig, Rosen, and Post were included in the online seminar library along with various other writings by members of an expanded panel that included: Moderator Eugene Volokh, UCLA Law School; Co-moderator Thomas E. Baker, Drake University Law School; Jack Balkin, Yale Law School; Robert Corn-Revere, Hogan & Hartson, Washington, DC; Michael Froomkin, University of Miami School of Law; Sanford Levinson, University of Texas School of Law; Paul Schwartz, Brooklyn Law School; Cass Sunstein, University of Chicago Law School; and Jonathan Zittrain, Berkman Center for Internet & Society, Harvard Law School. The online seminar was accredited for continuing legal education credit in twenty-five states. During the week-long seminar, February 26 to March 2, 2001, there were more than six hundred participants around the country and the world. Thus, the Constitution follows the Internet.[10]

There are many people to whom I owe thanks. My first thank you is to the members of the law firm of Belin Lamson McCormick Zumbach Flynn whose generous sponsorship made the Symposium possible. I also appreciate the encouragement and support of Roger Stetson, a member of the firm and a great friend to the Law School. Thank you to Linda Quinn for her able administrative assistance. I also want to thank Jane Baker, Becki Brommell, John Danos, Laurie Doré, John Edwards, Rachel Exline, William Hennan, Jerry Herold, Karen Hermann, Norbert Kaut, Lisa Kirkpatrick, Bill Miller, Keith Miller, Joanne Propst, Will Schultz, David Walker, and Karla Westberg for their help. At law.com, I want to thank Katherine Moser who produced the online seminar. Finally, I want to thank the members of the *Drake Law Review*—especially

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8. Thomas E. Baker, moderator & editor, *A Roundtable Discussion with Lawrence Lessig, David G. Post & Jeffrey Rosen*, 49 DRAKE L. REV. 441 (2001).

9. *See* law.com, *Can the Constitution Keep Up With the Internet?* <http://www.law.com /cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=ZZZRGQ220KC &live=true&cst=1&pc=0&pa=0&s=News&ExpIgnore=true&showsummary=0> (Mar. 7, 2001).

10. *See generally A Bibliography of Online Resources on the Law of the Internet*, 49 DRAKE L. REV. 457 (2001); *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574 (1999).

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