

Puzzling Logic: The Constitutionality of Congress's "Logic Puzzle" E-Mail Filters

"E-mail has become the preferred way to contact your representatives in today's society. Postal mail takes too long and must be screened, and not everyone can make a personal visit or get through with a phone call. Now, some representatives want to make even that form of communication more difficult. It is ironic that, in the year when ethics issues have plagued Congress because of relationships with high-paid lobbyists, instead of shutting down that gravy train, Members of Congress have decided to shut their constituents out.

*Congress long ago did away with the literacy test qualification to vote. Apparently, Members of Congress acknowledge you should not have to pass a test to vote for them, but they do not want you to contact them without taking a quiz."*¹

"I think what we—the collective we—have done the past few years has been to introduce volume into the discussion, but we have not substantially given the people any more voice

*Perhaps more people are involved and politicized but the unintended consequence has been that we have so devalued the available communications channels that they are worthless. We make it easy to assuage or outrage, and in the end, that outrage is impotent—just go to this Web site and click this link to send a letter to your congressperson. Now you're done, your sins are absolved."*²

I. INTRODUCTION

Anyone with a Hotmail or Yahoo account is well acquainted with the inconvenience and irritation of e-mail inboxes brimming with unwanted offers of opportunities to earn thousands while working from the comfort of home, ways to improve sexual stamina, or miracle weight-loss pills.³ Spam, the

1. ACLU to House: Don't Block Constituent Email, <https://www.aclu.org/freespeech/gen/25859prs20060613.html> (last visited May 8, 2008) (printing ACLU Director's thoughts regarding logic puzzles' negative impact on political discourse).

2. Thomas Shapley, *Software to Split Wheat from E-Mail Chaff*, SEATTLE POST-INTELLIGENCER, June 27, 2006, at B6 (quoting Galvin Clabaugh's online article in Nonprofit Technology Enterprise Network blog).

3. See S. REP. NO. 108-102, at 2 (2003) (classifying spam into four major categories). The Federal Trade Commission determined that nearly all spam can be catalogued as "investment or get-rich-quick 'opportunities' (20%); pornographic websites or adult-oriented material (18%); credit card or financial offers (17%); and

common term for unsolicited commercial e-mail, has plagued both computer-savvy and technologically-challenged individuals.⁴ Most users quickly learn to identify and delete junk e-mail.⁵ Although some spammers have devised sophisticated techniques to disguise the true nature of their messages, most spam is relatively simple for recipients to spot and discard.⁶ In the workplace, spam is more problematic because it interferes with productivity.⁷ To account for this issue, businesses are forced to invest in expensive screening programs that filter the offensive material, while funneling through legitimate messages.⁸

In response to the inefficiency of sorting genuine constituent e-mail from spam, many congressional members began implementing “logic game” software to facilitate the organization of legitimate messages and block unwanted e-mail.⁹ The “logic game” is an additional filter apart from protections previously in place.¹⁰ After completing a webform with contact information and selecting a pre-approved issue, the logic-puzzle feature further compels the correspondent to solve a simple math equation.¹¹ These logic puzzles are CAPTCHA filters, similar to those used on commercial Web sites

health products and services (10%).” *Id.*

4. *See id.* (examining spam increase in early 2000). Spam represented 8% of all e-mail in 2001, but escalated to an estimated 91% of all e-mail in 2008. *Id.*; *see also* DENNIS W. JOHNSON, CONGRESS ONLINE: BRIDGING THE GAP BETWEEN CITIZENS AND THEIR REPRESENTATIVES 110 (2004) (observing prevalence of spam); Press Release, Postini, Postini Message Security and Management Update for October Reveals That Spam Is Back with a Vengeance (Nov. 6, 2006), *available at* http://www.postini.com/news_events/pr/pr110606.php (noting rising spam rates). America Online identified spam as its number one subscriber complaint and reported blocking 780 million e-mails each day. *See* JOHNSON, *supra*, at 110. Research firm Juniper Media Matrix predicted each e-mail user would receive 3,800 spam e-mails by 2006. *Id.*

5. *See* David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 344 (2001) (describing end-user filtering as simplest approach); Seth Grossman, Note, *Keeping Unwanted Donkeys and Elephants Out of Your Inbox: The Case for Regulating Political Spam*, 19 BERKELEY TECH. L.J. 1533, 1540 (2004) (noting user self-help measures often inadequate).

6. *See* S. REP. NO. 108-102, at 3-4 (discussing ways spammers trick users into opening unwanted mail). Forty-two percent of spam messages have deceptive subject lines. *Id.* at 4. Most e-mail literate individuals realize that messages that do not come from a personal acquaintance are commercial bulk e-mail, or spam.

7. *See* S. REP. NO. 108-102 at 7 (citing research suggesting spam causes \$4 billion in employee productivity losses).

8. *See* S. REP. NO. 108-102, at 7 (suggesting corporations spend large sums thwarting spam). In 2003, analysts predicted that by the end of 2004, 50% of all e-mail that large corporations receive would be spam. *Id.* Other costs to business include maintaining personnel and system administrators to manage the deluge of e-mail. *Id.* Businesses with corporate networks typically spend between one and two dollars per employee per month to block unwanted e-mail and salvage productivity. *Id.*

9. Jeffrey H. Birnbaum, *Finding Fault with Logic of Congress’s E-Mail Plan*, WASH. POST, June 12, 2006, at D01 (presenting Congress’s reasons for instituting logic-puzzle filters).

10. *Id.* (enumerating steps constituent must follow on “Write Your Representative” Web page). An individual already must go to the House member’s website; select the “Write Your Representative” option; enter a valid zip code for the representative’s district; provide his or her name, address, phone number, and e-mail address; and often select a subject from a list of approved topics. *Id.*

11. *See* Birnbaum, *supra* note 9 (citing logic-puzzle examples). The Congressperson’s Web site might prompt the correspondent: “‘What is 5 minus 1?’ or, ‘24: What number appears at the beginning of this question?’ or, ‘Please solve the following math problem: 3 x 1?’” *Id.*

such as Ticketmaster or Paypal, which deter automated registration and ensure that the e-mailers are human and not computers with distorted text only humans can decode.¹² CAPTCHAs, named as an acronym for Completely Automated Public Turing Test to Tell Computers and Humans Apart, are automatically generated tests designed to allow humans to pass and computer programs to fail.¹³

Logic-puzzle filters that limit the messages a congressperson receives implicate fundamental First Amendment concerns, including citizens' freedom of speech and the right to petition the government.¹⁴ When Congress enabled constituents to contact representatives via e-mail in 1995, it arguably turned congressional inboxes into designated public fora.¹⁵ A designated forum,

12. See Luis von Ahn et al., *Telling Humans and Computers Apart Automatically: How Lazy Cryptographers Do AI*, COMM. OF THE ACM, Feb. 2004, at 57 (stating popular Web sites use images with distorted text to prohibit automated computer access). The puzzles on the congressional Web sites are conceptually similar to the typical CAPTCHA filters that use distorted text. See 29 U.S.C. § 794d(a)(1)(A) (2000) (establishing standards for accessible electronic and information). Section 508 of the Rehabilitation Act required congressional regulatory compliance and establishment of Web site accessibility for those with disabilities, including the visually impaired. Rehabilitation Act of 1973 § 508, 29 U.S.C. § 794d(a)(1)(A) (2000). Because the computer technology that assists low-vision or blind persons cannot depict distorted text, number sequences were considered a better alternative. See *Computer Pioneer Aids Spam Fight*, BBC NEWS, Jan. 8, 2003, available at <http://news.bbc.co.uk/2/hi/technology/2635855.stm> (describing filters cause difficulties for visually-impaired individuals); John McArdle, *House Puts Up Mass E-mail Block*, ROLL CALL, June 12, 2006, available at http://www.rollcall.com/issues/51_135/news/13759-1.html?type=pf (explaining Congress intended to minimize burden on constituents). Some scientists are developing CAPTCHAs that use sound, although this could potentially marginalize the hearing-impaired. *Computer Pioneer Aids Spam Fight*, *supra* (discussing new CAPTCHA's use of sound, rather than visuals).

13. See von Ahn et al., *supra* note 12, at 58 (explaining acronym's origins). Scientist Alan Turing developed the original Turing Test, which consists of a human judge probing a human player and a computer player to ascertain which of the two is human. See *id.*; *Computer Pioneer Aids Spam Fight*, *supra* note 12 (outlining Turing Test). Turing believed computers would be deemed truly intelligent only when they could convince a human into thinking he or she was conversing with another person instead of a machine. See *Computer Pioneer Aids Spam Fight*, *supra* note 12 (summarizing how Turing Test developed into filters thwarting software robots). CAPTCHAs function similarly to the original test, except that the assessor is a computer. See von Ahn et al., *supra* note 12, at 58. Carnegie Mellon students developed Gimpy, the most familiar form of this reverse Turing Test, which "selects a word from an 850-word dictionary and converts it to a mangled image of itself, warping letters and adding distracting ink spots, colors and backgrounds." *Researchers Battle E-mail Stealing Web Bots with Identity Checks*, USA TODAY, Dec. 24, 2002, http://www.usatoday.com/tech/news/2002-12-24-web-bots_x.htm (describing how CAPTHCAs operate). As early as 2002, scientists were already designing robots that could circumvent these types of filters. *Id.* As Turing Tests became increasingly more complex, computer technologists invented better ways to beat them. See *id.* Luis von Ahn, the creator of Gimpy, expressed concern even before the recent advancement of logic-puzzle filters, stating that although "tests could be made more difficult by using longer words or making users take multiple tests . . . making them too confusing or frustrating would weed out humans as well." *Id.*; see also McArdle, *supra* note 12 (noting potential bias in logic puzzles). Other critics questioned whether a math quiz is the best means to determine whether an e-mail is from a genuinely concerned citizen or a computer. See Posting of Jeffrey Birnbaum to K Street Confidential, <http://www.washingtonpost.com/wp-dyn/content/discussion/2006/06/08/DI2006060801051.html> (June 12, 2006, 12:30 EST) (questioning whether problem necessitates logic puzzles).

14. See U.S. CONST. amend. I (securing freedom of speech, religion, assembly, and petition); *infra* Parts II.A-II.B, III (discussing relationship of logic-puzzle filters to freedoms of speech and petition).

15. See CONGRESSIONAL MANAGEMENT FOUNDATION, COMMUNICATING WITH CONGRESS: HOW CAPITOL

unlike a traditional public forum, is a space that the government affirmatively opens for public discourse and expression.¹⁶ Public forum status greatly limits Congress's ability to restrict messages based on content and imposes a heightened level of scrutiny on time, place, and manner regulations.¹⁷ Although the Supreme Court has refused to expand the concept of traditional public fora, which includes public parks and streets, to encompass modern technologies, congressional e-mail inboxes could qualify as designated public fora because they were specifically instituted to allow the public to communicate with Congress.¹⁸

The influx of junk e-mail in congressional inboxes is a valid concern as congressional offices today receive more than 300 million messages a year, close to a 600% increase from 1995.¹⁹ Unfortunately, the logic-puzzle filter purges more than commercial messages: the software also blocks mass

HILL IS COPING WITH THE SURGE IN CITIZEN ADVOCACY 14 (2005),

http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/communicatingwithcongress_report1.pdf [hereinafter COMMUNICATING WITH CONGRESS] (observing Congress first used Internet and e-mail in 1995); see *infra* notes 45-50 and accompanying text (describing legal development of public forum).

16. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003) (defining designated public forum).

17. See *infra* notes 45-57 and accompanying text (delineating scrutiny levels for restrictions based on content and time, place, or manner).

18. See *infra* note 48 (noting courts disinclined to broaden traditional public forum definition). The Supreme Court has classified a traditional public forum as one that has "immemorially been held in trust for the use of the public and . . . [has] been used for purposes of assembly, communicating of thoughts between citizens, and discussing public questions." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992). In contrast, a designated public forum is one that the government intentionally opens for such purposes. See *Am. Library Ass'n*, 539 U.S. at 206 (characterizing designated public forum as space government deliberately opens as public forum). In *American Library Association*, the Supreme Court held that Internet access at library computer terminals is not a traditional or designated public forum because the governmental purpose in their installation was to facilitate learning and research, not to provide the user or the web publisher with a forum to express ideas and opinions. *Id.* at 206-07. The Court only examined the purpose of library Internet use, rather than the nature of the Internet as a medium. *Id.* Unlike the Internet terminals in *American Library Association*, however, here, Congress willingly and intentionally initiated e-mail service on Capitol Hill specifically to provide citizens with an additional means to communicate with their representatives and to "encourage a diversity of views from private speakers." See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995); COMMUNICATING WITH CONGRESS, *supra* note 15, at 16 (discussing purpose of Internet terminals and congressional e-mail). In contrast to the congressional e-mail system meant to permit its users to speak about political topics, Web access in libraries allows library patrons to pursue a range of Internet-based activities, many of them not implicating speech. Compare *Am. Library Ass'n*, 539 U.S. at 206-07 (explaining government intent behind library internet access), with COMMUNICATING WITH CONGRESS *supra* note 15, at 16 (noting purpose behind Capitol Hill e-mail). Therefore, courts should consider congressional inboxes as designated public fora. COMMUNICATING WITH CONGRESS, *supra* note 15, at 16.

19. See Marla E. Nobles, *Advocacy Groups Fight Attempts To Limit Email: Acts by Elected Can Be "Puzzling"*, NON-PROFIT TIMES, Aug. 1, 2006 (citing Congressional Management Foundation survey). E-mail to the House reached 99 million from 2000 to 2004, a 200 percent increase, and the quantity of e-mails to the Senate tripled within the same time frame. See Birnbaum, *supra* note 9; see also CONGRESS ONLINE PROJECT, E-MAIL OVERLOAD IN CONGRESS: MANAGING A COMMUNICATIONS CRISIS 2 (2001), http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/e-mailoverload.pdf [hereinafter E-MAIL OVERLOAD] (elucidating reasons for upsurge in constituent e-mails). During the 1998 Clinton impeachment process, people wanted to express their views to their representatives quickly and conveniently, so the quantity of e-mail skyrocketed from a few dozen a week to up to a thousand per day. E-MAIL OVERLOAD, *supra*, at 2.

petitions from advocacy organizations and prevents individuals with language barriers or learning disabilities from expressing their opinions to their respective elected officials.²⁰ Congress intended that the filters target lobbyist groups that allow citizens to sign online petitions from their Web sites or send electronic postcards to Members of the House.²¹ Of the 8,262 views of the logic-puzzle feature in a single day, only 1,568 of the equations were solved.²² Although one could attribute this disparity to CAPTCHA's success rate in preventing computers from transmitting e-mail messages, the disparity may also represent the alarming rate at which the filters deter prospective correspondents from participating in the political process.²³

This Note will explore the First Amendment implications of the logic-game software filters.²⁴ It will first examine whether the "Write Your Representative" e-mail system is a designated public forum, and if so, whether the logic games infringe on constituents' First Amendment rights through unlawful content-based or unlawful time, place, or manner restrictions.²⁵ This

20. See Nobles, *supra* note 19 (explaining filter seeks to eliminate mass-produced e-mail); see also Britney Pescatore, *CAPTCHA . . . if you can*, CAMPAIGNS AND ELECTIONS, Aug. 1, 2006 (noting filters hinder math illiterates and advocacy groups). Advocacy groups and constituents alike have expressed concern that restricting mass e-mails removes aggrieved citizens from the relevant background information. See Pescatore, *supra*.

21. See Nobles, *supra* note 19 (explaining filters on "Write Your Representative" webpage). According to the House of Representatives,

[w]ith the advent of email communication, some organizations have begun to use automated programs to send messages to Congress on behalf of constituents—better known as 'SPAM.' To prevent this practice we ask that you answer the question below. When you enter the correct response it ensures that the message is coming from a real person and helps your Representative respond to you as quickly as possible.

Id. Congress mischaracterizes mass petitions and e-cards from advocacy groups as commercial e-mail. See John McArdle, *Advocacy Groups Protest 'Logic Puzzle'*, ROLL CALL, June 22, 2006 (indicating spam definition disputed); see also Posting of Alan Rosenblatt to Drdigipol, <http://www.drdigipol.com/2006/06/28/seattle20post-intelligencer20staff20directory/> (June 28, 2006, 13:55 EST) [hereinafter Rosenblatt] (describing mass petition e-mails as "facilitated" rather than "automated"). Rosenblatt argues,

these are not "automated" messages to Congress . . . but facilitated. There is a big difference. These emails, whether they are form messages or personalized missives are from REAL constituents exercising their First Amendment right to petition the government with grievances. And while form emails may not rise to the top of the persuasive pile, they should not be dismissed since they are from real citizens.

See Rosenblatt, *supra*.

22. See Birnbaum, *supra* note 9 (citing 19% success rate).

23. See Birnbaum, *supra* note 9 (suggesting possible reasons for low success rate). Birnbaum hypothesizes that this statistic likely reflects a combination of two factors: the filters impeding robots from accessing congressional inboxes and the human frustration with the system. *Id.*

24. See generally *infra* Part III (analyzing congressional inboxes as potential designated public fora).

25. See *infra* Part II.B (outlining appropriate public forum analysis for content and time, place, or manner restrictions).

Note will then analyze whether the logic-game software's e-mail filter would survive strict or intermediate-level scrutiny.²⁶ Finally, this Note will consider the policy concerns indicating that alternative measures are necessary to enhance communication between elected officials and the public without obstructing political speech.²⁷

II. HISTORY

A. *History of Communication Between the Government and Its People*

Most citizens consider communication technologies such as e-mail and cellular phones as mere modern conveniences, detached from concepts of democracy or political engagement.²⁸ Communication, however, is a historically significant democratic tool, with the postal system playing an integral role in the formation of the U.S. government.²⁹ Courts should examine these new devices that facilitate the government's ability to hear the democratic voice within the context of their predecessor, the U.S. mail system.³⁰

Although most countries had instituted state-controlled mail systems by the nineteenth century, the role of correspondence in the United States was uniquely intertwined with the "democratic value of communication between citizens and elected officials, [which] has its roots in the town hall meeting, where . . . constituents have been coming together with their elected representatives to discuss the issues that most concern them."³¹ Since its

26. See *infra* notes 55-65 and accompanying text (analyzing scrutiny levels based upon content and time, place, or manner restrictions).

27. See *infra* notes 142-152 and accompanying text (arguing policy concerns outweigh benefits of logic-puzzle filters).

28. See Posting of Mark E. Kann to Networked Publics, http://networkedpublics.org/digital_democracy/more_or_less_democracy_in_the_internet_age (Oct. 6, 2005, 20:26 EST) (commenting on technology users' preference for commerce and entertainment). But see *infra* note 31 and accompanying text (addressing importance of dialogue between government and its people).

29. See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981) (summarizing role of postal system during Revolutionary War). In 1775, Benjamin Franklin led the effort to formalize a postal system to facilitate wartime correspondence between the states and to provide Army revenue. *Id.* Later, as pioneers traveled westward in the nation's quest to expand and develop, the Post Office acquired emblematic status as "the most visible symbol of national unity," illustrating the symbolic value of the ability to communicate. *Id.* The postal system was also integral in improving public roads and the development of new means of transportation for delivering mail. *Id.*

30. See *supra* note 29 and accompanying text (highlighting importance of postal system to government-constituent communication).

31. See E-MAIL OVERLOAD, *supra* note 19, at 14 (emphasizing importance of communication in democratic government). Such communication was particularly important because an elected official's position is contingent on his popularity. *Id.* Whereas a monarch need not deign to interact with his or her public, the livelihood of democratic politicians requires communication with the public they represent. *Id.* The concept of representative democracy that the Founders envisioned required representatives to have knowledge of their constituents' opinions through home visits, mail, and the press. See Donald R. Wolfensberger, *Can Congress Cope with IT: Deliberation and the Internet*, in CONGRESS AND THE INTERNET 78, 81-82 (James A.

creation, constituents have used the mail system to convey their opinions, provide feedback, and praise or reprimand their elected representatives when town meetings were not practicable.³² With the invention of the telephone, telegraph, and fax machine, a myriad of ways to reach a government official emerged, including the advent of e-mail in the 1990s.³³ During the Clinton impeachment hearings, the volume of constituent e-mail that Congress received increased dramatically from a few dozen per week to over a thousand per day.³⁴

Politicians, eager to court voters, recognized the importance of electronic communication and began to use Web sites and e-mail as an inexpensive and quick grassroots means of gaining political influence.³⁵ Ironically, despite Congress's frustration with spam and mass e-mails from advocacy organizations, many public figures have used forms of unsolicited political e-mail to reach prospective voters.³⁶ Although opponents of political spam regulation scoff at the notion that politicians would use such an unpopular

Thurber & Colton C. Campbell eds., 2003) (explaining how Founders viewed representative government). The influx of constituent e-mail, however, compromises the deliberative process, compelling elected officials to be overly beholden to the "passions" of public opinion. *Id.* at 86-87.

32. See E-MAIL OVERLOAD, *supra* note 19, at 14 (comparing town hall meetings with other communication modes); David Dreier, *We've Come a Long Way . . . Maybe*, in CONGRESS AND THE INTERNET, *supra* note 31, at 52, 57-58 (commenting e-mail and Internet increase efficiency for representatives). Communication with constituents via e-mail and Web pages reduces the amount of time elected officials need to dedicate to town-hall style meetings and appearances. Dreier, *supra*, at 58. While visibility within district will remain important, utilization of Web pages and e-newsletters can decrease travel-related costs and the time expended to travel to the district. *Id.* at 58-59.

33. See *Greenburgh*, 453 U.S. at 121 (listing communication methods that followed traditional paper mail, including e-mail).

34. See E-MAIL OVERLOAD, *supra* note 19, at 2 (assessing climbing e-mail rates). Although the deluge crested in January 1999, during the peak week of Clinton's impeachment hearings, and the volumes subsequently declined, the quantity of e-mail sent to the House and the Senate has steadily increased. *Id.*; see also Dennis W. Johnson, *Communicating with Congress: Citizens, E-mail, and Web Sites*, in CONGRESS AND THE INTERNET, *supra* note 31, at 123, 125 (noting impeachment proceedings prompted creation of Moveon.org). Congress received 500,000 electronic signatures from this "flash campaign" during the Clinton impeachment proceedings. See Johnson, *supra*, at 125.

35. See Grossman, *supra* note 5, at 1536 (documenting politicians using political spam). As voters began recognizing email's value as a way to contact representatives quickly and inexpensively, representatives started exploiting this mode of communication to access voters. *Id.* (noting spam used during 1998 elections)

36. See Grossman, *supra* note 5, at 1536-39 (explaining politicians utilize spam to reach constituents). Howard Dean, the early frontrunner in the 2004 Democratic presidential primary, is only one example of a politician employing grassroots Web campaigning effectively, though he also admitted to spamming voters. See *id.* at 1538 (noting Howard Dean used spam during 2004 primary); see also CNN.com, *The Up and Down of Howard Dean*, <http://www.cnn.com/ELECTION/2004/special/president/candidates/dean.html> (last visited May 6, 2008) (naming Howard Dean as early frontrunner in 2004 primary). Joseph Lieberman, though a sponsor of the CAN-SPAM Act, also employed spam to connect with voters. See Grossman, *supra* note 5, at 1538. A 2004 study approximated that voters would have accumulated 1.25 billion pieces of political spam that year. See Birnbaum, *supra* note 9 (noting proliferation of political spam). One member of the public alleged in a chatroom that the Republican National Convention went so far as to offer to reduce the amount of e-mails it would send a particular person in exchange for a donation. See Posting of Washington, D.C. to K Street Confidential, <http://www.washingtonpost.com/wp-dyn/content/discussion/2006/06/08/DI2006060801051.html> (June 12, 2006, 12:30 EST) (bemoaning solicitation).

device to reach prospective voters, such political spamming is routine.³⁷

Despite the historical role of communication between the public and its governmental representatives in the United States, the Constitution does not guarantee the interaction itself.³⁸ In *Minnesota State Board for Community Colleges v. Knight*,³⁹ the Supreme Court refused to expand the First Amendment protections of free speech, assembly, and petition to encompass the right to a governmental audience.⁴⁰ The Court echoed an earlier sentiment in the 1915 case of *Bi-Metallic Investment Co. v. State Board of Equalization*,⁴¹ which recognized that the government would not be able to function efficiently under such constraints.⁴² While government officials may entertain public discourse on matters of general concern, the Constitution does not mandate them to do so, making voting the only recourse for the general public.⁴³

B. Public Fora

While the First Amendment does not typically safeguard communication between voters and their representatives, the Constitution limits governmental restrictions of speech that occurs in a public forum.⁴⁴ Whether the public may use government property for private speech hinges on the classification of the space as a traditional, designated, or nonpublic forum.⁴⁵ A traditional public forum is a place which “ha[s] immemorially been held in trust for the use of the public, and time out of mind, ha[s] been used for purposes of assembly,

37. See Grossman, *supra* note 5, at 1536 (noting political spam’s discrepancies between attitudes and use). One commentator stated that “[w]ith spam less popular than the Ebola virus, savvy politicians aren’t likely to use it.” Jonathan Turley, *Uncle Sam and Spam*, MILWAUKEE J. SENTINEL, Apr. 28, 2003, at 13A. Politicians, however, continue to use this means of mass marketing despite negative reactions from recipients. See Grossman, *supra* note 5, at 1536 (noting use for fundraising, dispersing information, and negative campaigning).

38. See *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283-84 (1984) (rejecting argument public bodies must provide public with forum for providing input).

39. 465 U.S. 271 (1984).

40. *Id.* at 285 (indicating First Amendment does not require policymakers to listen to public).

41. 239 U.S. 441 (1915).

42. *Id.* at 445 (noting allowing debate between politicians and constituents on every matter impossible).

43. *Knight*, 465 U.S. at 285 (suggesting constituents demonstrate disapproval of public officials through electoral process). Writing for the majority in *Knight*, Justice O’Connor stated that “[i]t is inherent in a republican form of government that direct public participation in government policymaking is limited. Disagreement with public policy and disapproval of officials’ responsiveness . . . is to be registered principally at the polls.” *Id.*

44. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (holding free speech denial in public forum unconstitutional).

45. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (labeling three fora: traditional, designated, and nonpublic); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981) (observing First Amendment does not guarantee access to government-owned property); 16A AM. JUR. 2D *Constitutional Law* § 519 (2006) (summarizing public forum analysis). Governmental authority to restrict access to the property is curtailed if the property is a traditional or limited public forum. *Greenburgh*, 453 U.S. at 129.

communicating thoughts between citizens, and discussing public questions.”⁴⁶ Streets and public parks are notable examples.⁴⁷

The Supreme Court has been reluctant to expand the traditional public forum beyond its historical origins.⁴⁸ The government, however, can open a nonpublic forum to the public for communicative purposes and thus transform a space into a designated public forum.⁴⁹ Here, a court will rely on two principal factors to evaluate whether the state has opened a place for public discourse.⁵⁰ First, a court should ascertain whether the government intended to authorize the space as a public forum.⁵¹ Second, a court should examine the nature and features of the property to ensure that the space is compatible with expressive activity.⁵² Once the court concludes that the government has opened a space as a public forum, the regulation is subject to the same scrutiny as with a traditional public forum.⁵³ A space that does not comply with the requirements of either a traditional or limited public forum is a nonpublic forum.⁵⁴

46. See *Hague*, 307 U.S. at 515 (describing traditional public fora as historically-rooted).

47. *Id.* (identifying parks and street as traditional public fora). The public has used such spaces for “assembly, communicating thoughts between citizens, and discussing public questions.” *Id.*

48. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (refusing to expand traditional public forum beyond established categories).

49. See, e.g., *Forbes*, 523 U.S. at 677 (establishing public forum analytical framework); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (making same distinction); *Cornelius*, 473 U.S. at 802 (making same distinction). Both physical and metaphysical spaces can qualify as public fora. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (recognizing university-granted subsidies for student publications as limited public forum).

50. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-47 (1983) (setting forth two-part analysis for limited public forum).

51. See *id.* at 47 (stressing government does not create public forum through inaction or by permitting limited dialogue).

52. Compare *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding university allowing meeting space for student groups created designated public forum), with *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (determining city did not intend opening city bus advertising space as public forum), and *Adderley v. Florida*, 385 U.S. 39, 41 (1966) (explaining expressive activity incongruent with prison’s function). These cases exemplify the two-pronged approach with which the court must examine both the intent of the government and the character of the space. See *Lehman*, 418 U.S. at 302-03 (analyzing government intent and nature of space); *Adderley*, 385 U.S. at 41 (applying two-pronged analysis).

53. See *Perry Educ. Ass’n*, 460 U.S. at 46 (explaining traditional and designated public fora analyzed in same manner). Even with this test in place, the Court remains reticent to grant this designation. See *Am. Library Ass’n*, 539 U.S. at 205-06 (refusing to give public-forum status to library Internet terminals). In *American Library Association*, the Supreme Court held that a library did not provide Internet access as a means for self-expression, but as a research and learning tool. *Id.* at 206. Similarly, in *Greenburgh*, in which a civic association sought to distribute flyers into personal letterboxes without paying postage, the Court declined to examine the entire mail system as a whole, but instead limited the public-forum inquiry to the postal letterboxes to which the Civic Association sought access. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 128 (1981) (using narrow scope in applying public-forum inquiry). Keeping the subject of the analysis narrow allowed the Court to deny public forum status. *Id.* at 128-29. The Ninth Circuit adhered to this limited approach to public-forum analysis in holding that the proper scope of the inquiry was the general delivery service, not the mail system as a whole, which homeless individuals were seeking to access. *Currier v. Potter*, 379 F.3d 716, 727 (2004) (examining general delivery service as potential public forum).

54. See *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678-79 (stating government regulation of

The next step in the public forum analysis is determining whether the governmental restraint on the forum is based on limiting content or the time, manner, or place of speech.⁵⁵ In a traditional or designated public forum, the government may only exclude speech based on the content of the expressive activity if it demonstrates that the regulation is “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁵⁶ In contrast to traditional or designated public fora, speech regulations on a nonpublic forum are subject to a less exacting level of constitutional inquiry.⁵⁷ In a nonpublic forum, the government may specifically limit the uses of a space so long as the restriction is reasonable and not intended to discriminate against a particular viewpoint.⁵⁸

Courts apply a much less rigorous level of scrutiny to time, place, or manner restrictions imposed on the speech.⁵⁹ In *Perry Education Association v. Perry Local Educators’ Association*,⁶⁰ the court prescribed the appropriate analysis as three-fold: the regulation must not discriminate based on content, must be narrowly tailored to serve a significant government interest, and must preserve alternative avenues of communication.⁶¹ In *Turner Broadcasting System, Inc. v. FCC*,⁶² the Court asserted that “a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”⁶³ This intermediate level of scrutiny applies to fundamental rights and is more demanding than that

nonpublic fora subject to lesser scrutiny).

55. See *Perry Educ. Ass’n*, 460 U.S. at 45 (distinguishing levels of scrutiny for content-based and procedural restrictions).

56. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (explaining scrutiny level dependent on whether restriction characterized as content-based or time, place, or manner); *Carey v. Brown*, 477 U.S. 455, 461-62 (1980) (pointing out content-based regulations subject to strict scrutiny).

57. See *Greenburgh*, 453 U.S. at 131 n.7 (elucidating scrutiny level required when analyzing speech regulation on nonpublic forum).

58. *Id.* at 132 (upholding validity of time, place, and manner restrictions). Here, the Court determined that a postal letterbox was a nonpublic forum, which requires only that the government regulation be reasonable and not intended to discriminate based on viewpoint. *Id.* The government restricted the use of letterboxes to Postal Service mail, which cannot be used without payment of a fee. *Id.* at 128. The Court determined that the efficient operation of the Postal Service was a “significant” government interest that demands uniform regulations applicable to the entire United States and that such a restriction was content-neutral and, hence, constitutional. *Id.* at 133.

59. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981) (describing lesser level of scrutiny for time, place, or manner restrictions).

60. 460 U.S. 37 (1983).

61. See *id.* at 45 (outlining three-part test to determine constitutionality of time, place, or manner restriction on speech); see also *Thomas v. Chicago Park Dist.*, 34 U.S. 316, 324 (2002) (listing analytical framework for testing constitutionality of time, place, or manner restrictions); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying same analysis on procedural restrictions); *Greenburgh*, 453 U.S. at 132 (examining governmental intent and nature of space in evaluation of restriction’s constitutionality).

62. 520 U.S. 180 (1997).

63. See *id.* at 189 (applying intermediate level of scrutiny for content-neutral regulation).

of mere rational basis, which requires only an important government interest and a reasonable fit between the governmental objective and the means imposed to achieve it.⁶⁴

Another requirement of intermediate scrutiny is narrow tailoring, which demands a direct relation between the governmental regulation and the accomplishment of its articulated goals.⁶⁵ A court views a regulation as narrowly tailored if it “focus[es] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils.”⁶⁶ Narrow tailoring does not require that the government use the least restrictive means available to carry out its aims.⁶⁷ Justice Kennedy has explained,

Even on the doubtful assumption that a narrower but still practicable . . . rule could be drafted to exclude all instances in which the Government’s interests are not implicated, our cases establish that content-neutral regulations are not ‘invalid simply because there is some imaginable alternative that might be less burdensome on speech.’⁶⁸

The Court posits that it will not invalidate a regulation if it has a marginally less intrusive alternative unless it burdens substantially more speech than necessary.⁶⁹ Courts award significant deference to the judgment of government officials imposing time, place, or manner restrictions.⁷⁰

In *Turner*, the cable network provider sought to nullify a congressional provision that required cable television systems to carry local broadcast television stations, claiming that such a regulation violated the First Amendment.⁷¹ The cable network provider contended that the regulation burdened substantially more speech than necessary, and suggested less intrusive alternatives.⁷² The Court rejected these proposals, explaining that the

64. See *id.* at 213-14 (defining intermediate-level scrutiny).

65. See *Ward*, 491 U.S. at 782-83 (articulating narrowly tailored means not overly broad in achieving purposes); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasizing importance of narrow tailoring).

66. *Clark*, 468 U.S. at 297 (defining “narrowly tailored”).

67. *Id.* at 299 (refuting least-restrictive-alternative approach in public-forum analysis).

68. *United States v. Albertini*, 472 U.S. 675, 689 (1985) (noting reasonable-alternative availability does not automatically invalidate regulation).

69. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 217-18 (1997) (declining to invalidate regulations based on suggested less restrictive options).

70. See *Clark*, 468 U.S. at 299 (refusing to contradict Park Service’s judgment regarding best means for protecting park).

71. See *Turner*, 520 U.S. at 185-86 (explaining litigation’s background).

72. *Id.* at 217-20 (evaluating proposed cable system alternatives). The Court dismissed the first proposal as representing a disagreement between *Turner* and Congress about the extent of protection necessary for local broadcast television stations and the public’s ability to access such programming. *Id.* at 219. The Court similarly rejected the A/B switch proposition, reasoning many households lack the necessary equipment. *Id.* at

government need not adhere to the least speech-restrictive alternative as the regulation is not overly broad.⁷³

Although the Court was quick to dismiss the least-restrictive alternative analysis in *Turner*, Justice O'Connor's dissent aptly noted the importance of strictly construing "narrow tailoring."⁷⁴ While agreeing with the appropriate definition of "narrow tailoring" as targeting the "evil the Government seeks to eliminate," Justice O'Connor argued for a stricter construction of the "narrow tailoring" requirement, insisting that the majority was overly dismissive of less speech-restrictive alternatives.⁷⁵ O'Connor highlighted that the case had been originally remanded for further findings on less restrictive means of achieving the government's interest, indicating that remanding would have been unnecessary if irrelevant to the inquiry.⁷⁶ Although the Court had not compelled the Government to use the least restrictive means available, the quantity and practicability of other options should establish "a benchmark" for determining whether a regulation is broader than necessary.⁷⁷

The availability of alternative channels of communication will depend on the particular medium that the speaker opts to use.⁷⁸ In *Reno v. ACLU*,⁷⁹ the Supreme Court held that a statute prohibiting "indecent" or "patently offensive" communications on the Internet is unconstitutional because such a statute precludes the speaker from using an entire mode of communication.⁸⁰ To pass constitutional muster, a court must determine that the speaker has alternatives within his or her preferred medium.⁸¹

219-20.

73. *Id.* at 218 (discounting applicability of least restrictive means analysis). The Court determined that the disputed must-carry provision was not overly broad because although it "may require carriage in some instances where the Government's interests are not implicated," only a few hundred network affiliates would rely on must-carry for transmission, a number that is statistically insignificant. *Id.* at 216-17.

74. *Id.* at 250-53 (O'Connor, J., dissenting) (disputing majority conclusions regarding weight of alternatives and scope of "narrow tailoring").

75. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 250-52 (1997) (O'Connor, J., dissenting) (contending impropriety of concluding statute narrowly tailored without evidence of anticompetitive nature of carriage decisions). Some speech may be permissibly restricted as a result of a regulation even though it is not contributing to the "evil" the government seeks to extricate. *Id.* Justice O'Connor expressed discomfort in applying the regulation uniformly without first determining whether "most adverse carriage decisions are anticompetitively motivated." *Id.* Justice O'Connor further recognized that "[p]ositing the effect of a statute as the governmental interest 'can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored.'" *Id.* at 251 (quoting *Simon & Schuster, Inc. v. Members of N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 120 (1991)).

76. *Id.* (O'Connor, J., dissenting) (questioning purpose of remand).

77. *Id.* (O'Connor, J., dissenting) at 252-53 (interpreting majority as suggesting viable alternatives cannot establish overbreadth).

78. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1136-37 (2005) (suggesting "alternative avenues" hinge on communication means).

79. 521 U.S. 844 (1997).

80. See *id.* at 880 (maintaining communication within given medium imperative). To comply with the First Amendment, the speakers must have alternatives within the same medium. *Id.* at 879-80.

81. *Id.* (noting critical speaker's medium choice); *Schneider v. New Jersey*, 308 U.S. 147, 151-52 (1939)

C. Anti-Spam Regulation

The states' inconsistent legislative response to spam proliferation led to Congress passing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act).⁸² The Act prohibits the transmission of "materially false or materially misleading" electronic messages and requires that the sender provide a "clear and conspicuous" opportunity to opt-out of receiving future messages.⁸³ Additionally, the e-mail must include the sender's physical postal address and a "clear and conspicuous" identification of the subject matter, distinguishing it as an advertisement or solicitation.⁸⁴ The Act applies to commercial electronic messages, excluding those with "transactional or relationship" messages.⁸⁵ The Act grants enforcement authority to the Federal Trade Commission (FTC), other federal agencies, and state attorneys general.⁸⁶ Further, Internet service providers (ISPs) may bring CAN-SPAM actions for violations that adversely affect their businesses.⁸⁷ Penalties can be either civil or criminal and consist of actual damages, statutory damages, and imprisonment for egregious violations.⁸⁸

D. Perspectives of Congress and Citizens

Capitol Hill is ill-prepared to manage the beleaguering problems resulting from the overall increase in e-mail communications.⁸⁹ Unlike businesses in the private sector that can rapidly adapt their technology and resources to handle an increase in electronic correspondence, the congressional budget constrains congressional offices' ability to improve technology or hire more staff.⁹⁰

(holding availability irrelevant when not in speaker's chosen medium).

82. See Maria A. Hoehn, *Has CAN-SPAM Really Canned Spam?*, 828 PLI/PAT 565, 569 (2005) (providing CAN-SPAM's historical context).

83. See 15 U.S.C. § 7704(a)(1)-(a)(3) (2000) (enumerating statutory requirements for transmission of bulk messages); 15 U.S.C. § 7704(a)(5)(A)(ii) (requiring necessary opt-out mechanisms).

84. See 15 U.S.C. § 7704(5)(A)(i)-(iii); 15 U.S.C. § 7704(2) (requiring warnings in unsolicited message). Deceptive subject headings are prohibited and adult-oriented materials must caution in the subject line that the message is sexually explicit. 15 U.S.C. § 7704(d)(1); see also 16 C.F.R. § 316.4 (2005) (listing requirements for e-mails containing sexual content).

85. See Hoehn, *supra* note 82, at 569 (describing CAN-SPAM Act scope).

86. See 15 U.S.C. § 7706(b)(1)-(10), (f)(1) (2000) (listing entities and individuals with enforcement power); see also Hoehn, *supra* note 82, at 575-76 (further summarizing enforcement provisions).

87. See 15 U.S.C. § 7706(g)(1) (granting ISPs private cause of action).

88. See 15 U.S.C. § 7706(g)(1)-(4) (enumerating damages for act violation).

89. See E-MAIL OVERLOAD, *supra* note 19, at 1-3 (explaining factors contributing to Congress's inability to cope with e-mail influx); COMMUNICATING WITH CONGRESS, *supra* note 15, at 14 (illustrating graphically increase in e-mail messages to Congress). Since Congress began using the Internet in 1995, total postal and electronic mail correspondence has increased from fifty to 200 million in 2004, although postal mail correspondence has halved. *Id.*; see also Johnson, *supra* note 34, at 126 (illustrating rise in e-mail). As early as "May of 2001, Congress was receiving a million e-mails per day—roughly twelve messages every second." Johnson, *supra* note 34, at 126; see also E-MAIL OVERLOAD, *supra* note 19, at 1 (explaining e-mail traffic slowed servers following John Ashcroft's nomination as Attorney General).

90. See E-MAIL OVERLOAD, *supra* note 19, at 1 (listing particular problems Congress faces with

Despite increasing demands, they have received insufficient budget increases to meet these challenges.⁹¹

In 2000, to combat the volume of mass petitions received, many congressional offices eliminated public e-mail addresses and began using webforms requiring the name, address, and zip code of the sender to more easily sort and distinguish between constituents and nonconstituents.⁹² This transition obstructed many mass e-mail petitions because advocacy organizations needed to navigate congressional webforms.⁹³ Since this initial move to webforms, Congress enacted additional filters to facilitate sorting messages and to block mass e-mail petitions.⁹⁴ CAPTCHA logic-puzzle filters are only the most recent development, a temporary hindrance that advocacy group service vendors will soon bypass.⁹⁵

communications increase).

91. See COMMUNICATING WITH CONGRESS, *supra* note 15, at 7 (indicating stagnant personnel levels); E-MAIL OVERLOAD, *supra* note 19, at 1, 3 (noting slight decrease in staffing levels and admitting 9.6% budget increase helped cope with staff and technology shortfalls).

92. See Congressional Management Foundation, *The Reasoning Behind Logic Puzzles*, CONGRESS ONLINE, July 17, 2006, at 2, available at http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/cmfspecialreport_logicpuzzles.pdf [hereinafter *Logic Puzzles*] (noting congressional transition from public e-mail addresses to web forms); see also JOHNSON, *supra* note 4, at 111-12 (discussing switch to filtering systems containing webforms). Prior to the use of webforms, the average House staffer spent three hours per week sorting constituent e-mail from nonconstituent before it was read or answered. See JOHNSON, *supra* note 4, at 122. Senate offices allotted three hours per day. *Id.*

93. See *Logic Puzzles*, *supra* note 92, at 2-3 (stating congressional webforms aimed at eliminating form e-mails from advocacy groups). In fact, this modification sparked the creation of advocacy service vendors to facilitate ways around the webforms. *Id.* at 2. Beyond the lack of attention that politicians have given mass petitions, advocacy organizations also have experienced difficulties with service vendors. See DENNIS W. JOHNSON, CONNECTING CITIZENS & LEGISLATORS 1 (2006), available at <http://connectingcitizens.org> (reporting on effectiveness of vendor communications). Typically, the client advocacy group sends an e-mail to its members via the vendor, directing them to the group's Web site, where they are invited to complete a response form to "take action." *Id.* at 5. The vendor then forwards the form to the appropriate representative. *Id.* Johnson's study, however, demonstrates that six out of the ten vendors surveyed "could not deliver 50 percent of the e-mail through their systems." *Id.* But see Posting of Tom Belford to The Agitator, <http://www.theagitator.net/index.php?archives/358> (Oct. 5, 2006 18:00 EST) (suggesting advocacy groups indifferent to lost member communications). Belford posits that e-campaigns are really just a "fundraising strategy" designed to build a listserv for solicitation purposes. *Id.* Perhaps even more problematic is the fact that few of the vendors inform citizens when the message transmission fails. *Id.*; see also Jeffrey H. Birnbaum, *Study Finds Missed Messages on Capitol Hill*, WASH. POST, Oct. 2, 2006, at D01 (recounting Capitol Advantage study and implications for Congress and advocacy organizations). To ensure receipt, Birnbaum notes that some Web site operators have resorted to faxing copies of the e-mails to the representatives, despite the fact that faxes receive even less credence than e-mails on Capitol Hill. *Id.*

94. See Birnbaum, *supra* note 93 (enumerating different filtering devices used by Congress). Constituent correspondence is categorized by zip code, subject, keyword, or campaign, and then by a list of preselected subjects. *Id.* Despite these efforts, the advocacy community, with the assistance of service vendors, has discovered ways to circumvent them. *Id.*

95. See *Logic Puzzles*, *supra* note 92, at 1, 5 (speculating "arms race" between Congress and grassroots community will continue to escalate absent diplomacy). The Congressional Management Foundation predicts that if a mutually agreeable medium is not instituted, Congress will continuously implement increasingly restrictive e-mail filters and advocacy organizations will continually find ways around them. *Id.*

Advocacy groups' and lobbyists' mechanisms of sending mass e-mail petitions to elected officials account for a large portion of the congressional e-mail influx.⁹⁶ Because so many groups flood congressional offices with paperless correspondence, elected officials have doubted the authenticity of form e-mail messages.⁹⁷ Congressional offices also perceive e-mail correspondence as less important than other forms of communication such as postal mailings, telephone calls, and faxes.⁹⁸ Representatives presume that e-mails are quick, unformed thoughts and that a voter would use a different medium of communication for a matter of consequence.⁹⁹ A discrepancy, however, exists between this perception and that of constituents, who prefer e-mail as their primary mode of communication.¹⁰⁰ A 1999 survey by Juno Online Services, Inc. and e-advocates showed that 93% of those who use the Internet believe that Congress should treat e-mail with the same level of

96. See E-MAIL OVERLOAD, *supra* note 19, at 3 (discussing role lobbying groups play in promoting mass e-mail communications with government). Although advocacy groups recognize that mass e-mail petitions via e-mail are less effective than personal letters, they still regard them as an important tool in influencing politicians because staffers sometimes count the messages. See *id.*; see also COMMUNICATING WITH CONGRESS, *supra* note 15, at 28 (comparing effectiveness of form mail with individualized postal mail). When an elected official is undecided on an issue, "44% of staff surveyed said that individualized postal communications have 'a lot' of influence, compared to only 3% for identical form communications." COMMUNICATING WITH CONGRESS, *supra* note 15, at 28. Although mass petitions may wield less influence than personally written correspondence, many politicians still give them some regard. *Id.* Ryan Ozimek, founder of PICnet, a firm that hosts Web sites for nonprofits and some members of Congress, stated that "the impact of mass or form e-mails is sometimes . . . a tally on an intern's post-it" and suggested that occasionally staffers confronted with a teeming inbox hit delete, losing individualized e-mails in the process. See Posting of Shannon to frogloop, <http://www.frogloop.com/care2blog/2006/7/19/netsquared-dc-beyond-the-logic-puzzle.html> (July 19, 2006, 10:04 EST) (reporting on logic puzzles and their effect on public communications with elected officials); Rosenblatt, *supra* note 21 (remarking tally indicates district sentiment).

97. See COMMUNICATING WITH CONGRESS, *supra* note 15, at 31 (recognizing form messages increasingly suspect in Congress). About half of the congressional staffers who responded to the inquiry did not believe that form messages were "being sent with constituents' knowledge and approval, and an additional 25% percent weren't sure." *Id.* The reason for this skepticism is based upon the fact that elected officials are sometimes unable to discern whether constituents sent the messages or whether an organization's membership list automatically generated them. See *Logic Puzzles*, *supra* note 92, at 2. Staffers also mentioned that occasionally, after responding to an e-mail petition, they receive messages from constituents claiming not to have sent the initial e-mail. *Id.*; see Rosenblatt, *supra* note 21 (offering reasons for discrepancy). Rosenblatt posits that during the lengthy time it takes for congressional offices to respond to the original message, the constituent may have forgotten sending it. Rosenblatt, *supra* note 21. Furthermore, Rosenblatt contends that these complaints are anomalous and not indicative of a system-wide problem. *Id.*

98. See E-MAIL OVERLOAD, *supra* note 19, at 5 (suggesting most congressional members undervalue citizen e-mail). But see James A. Thurber & Colton C. Campbell, *Introduction: Congress Goes On-Line*, in CONGRESS AND THE INTERNET, *supra* note 31, at 1, 4 (noting many legislators urged constituent e-mail, rather than postal mail, following 9/11 terrorist attacks). The subsequent anthrax scare temporarily halted postal mail to Congress and caused delays due to necessary testing. See JOHNSON, *supra* note 4, at 9, 47, 160-61 (noting irradiation of postal mail caused significant delays). Since September 11, 2001, all mail to Congress is first diverted to either Ohio or New Jersey for irradiation, which postpones its receipt for four to six days. See *id.* at 47 (discussing anthrax scare's impact on congressional mail system).

99. See E-MAIL OVERLOAD, *supra* note 19, at 5 (explaining politicians relegate e-mail beneath other modes of communication).

100. See E-MAIL OVERLOAD, *supra* note 19, at 5 (noting differing opinions of Congress and public).

attention as phone calls or letters, and 58% of the survey participants state that they would rather send an e-mail to their representative than write a letter or place a phone call.¹⁰¹

The difference between congressional and societal views about e-mail is particularly problematic from the perspective of advocacy organizations that use e-mail to express their positions to the Legislature.¹⁰² E-mail can be a valuable resource for such groups, but Congress's continued view of its diminished importance limits the impact of the communication.¹⁰³ The filtering mechanisms Congress enabled impede citizens from communicating with their elected officials by hampering communications from organized campaigns.¹⁰⁴ Grassroots campaigns empower citizens because they facilitate political involvement and provide information about current issues.¹⁰⁵ Logic-puzzle filters potentially will disenfranchise individuals who use organizational Web sites to communicate with Capitol Hill.¹⁰⁶ Lastly, a "simple logic puzzle" has

101. See E-MAIL OVERLOAD, *supra* note 19, at 5 (confirming Internet users view e-mail as comparable to other communication forms); see also Graeme Browning, *The Internet, Congress, and Educational Outreach, in CONGRESS AND THE INTERNET*, *supra* note 31, at 177, 179 (noting increased Internet and e-mail use by Americans). The author states that as of 2003, more than 500 million e-mail inboxes existed and of those surveyed who used e-mail, the majority noted that they used the telephone and U.S. mail with less frequency. *Id.*

102. See *Logic Puzzles*, *supra* note 92, at 4 (noting concerns of advocacy groups). On June 19, 2006, over 100 diverse groups banded together to write a joint letter to Congress protesting e-mail filters. See Press Release, More Than 100 Diverse Groups Call on Congress to Immediately Disable Technology that Blocks E-Mails from Constituents (June 19, 2006), <http://www.consumersunion.org/pub/2006/06/003545print.html> [hereinafter Press Release] (announcing letter from advocacy groups advocating disabling filters). In the letter, the groups expressed concern that the filters are a "very significant threat to our democratic process" and that they "denigrate the important role that organizations play in the political process. Individual citizens, who raise their voices together, with the support and leadership of organizations they choose to join for that purpose, are driving democracy – not peddling spam." *Id.* Advocacy groups include associations, non-profits, corporations, unions, and third-party vendors. See *id.* (noting diverse interests represented in press release); see also Rosenblatt, *supra* note 21 (depicting crucial role of advocacy groups in representative democracy). Rosenblatt contends that an individual's choice to join an advocacy group is tied to the constitutional rights of assembly and association and that "[t]he vested interests of these groups, which come from all political perspectives, is to give a stronger voice to concerned citizens by aggregating them. This is the hallmark of American democracy." *Id.*

103. See *Logic Puzzles*, *supra* note 92, at 4 (describing advocacy groups' email use).

104. See *Logic Puzzles*, *supra* note 92, at 3 (remarking filters limit mass petitions).

105. See *Logic Puzzles*, *supra* note 92, at 4 (enumerating ways advocacy groups have encouraged political engagement of citizens). Advocacy organization Web sites often provide background information to educate the correspondent and also offer assistance with drafting effective language to use in a communication with Congress. See How is Congress Blocking E-mail?, Don'tBlockMyVoice.org, http://cu.convio.net/site/PageServer?pagename=DBMV_Facts (last visited May 7, 2008) (listing benefits associated with e-mailing from organizational Web site).

106. See Birnbaum, *supra* note 9 (noting logic filters threaten democratic process). Douglas G. Pinkham, president of Public Affairs Council stated that "[i]t seems like congressional offices are spending more time 'sealing off the borders' than dealing with the inescapable truth that most people prefer to communicate via e-mail. It makes me wonder if this is going to deter a lot of folks from contacting their members of Congress." *Id.*; see Dreier, *supra* note 32, at 63 (pointing out "annoyance factor" associated with navigating webforms). Other critics expressed apprehension that some voices may be filtered out altogether: "once you start limiting (communication), it's not a big leap before someone is tweaking that system just so. . . . So that maybe you're

an inherent bias against those who suffer from math illiteracy, those with language barriers, younger citizens who use e-mail as their primary mode of communication, and the average person who does not want to jump through additional hoops to contact his or her representative.¹⁰⁷

III. ANALYSIS

The congressional implementation of “logic puzzle” filters is both constitutionally questionable and adverse to the goal of encouraging public involvement in the political process.¹⁰⁸ Although neither individuals nor organized associations claim an absolute right to a governmental audience, elected officials regularly solicit input from their constituents to gauge public opinion.¹⁰⁹ Congress instituted its e-mail system in part to facilitate this type of communication.¹¹⁰

The Supreme Court has refused to revise the concept of the “traditional public forum” to include the Internet, although it exists as a space to exchange ideas and information.¹¹¹ If the postal system has not achieved public-forum status despite its deep roots in the national history, it seems unlikely that the medium of e-mail will acquire this classification.¹¹² A space, however, can achieve First Amendment protection from intrusion if it qualifies as a designated public forum.¹¹³ The “Write Your Representative” homepage may fulfill the requirements of the two-pronged designated public forum test because the government intended to open the forum to speech and because the

not hearing from certain people you don’t want to hear from.” See Nobles, *supra* note 19 (quoting Ted Hart, ePhilanthropy Foundation President).

107. See Nobles, *supra* note 19 (noting concern over exclusion of certain groups).

108. E-MAIL OVERLOAD, *supra* note 19, at 14 (viewing communication between citizens and representatives as American democratic value); see *supra* text accompanying note 18 (referencing potential constitutional issue). Limiting e-mail as a means of correspondence undermines this value and precludes

a more open and informative dialogue with their elected officials, improving communication, and potentially reducing the cynicism and common misperceptions that currently weaken public confidence in the government. [Correspondence] offers Members of Congress the opportunity to find new ways to fulfill the Founders’ dreams of a transparent, responsive, yet deliberative, Congress.

E-MAIL OVERLOAD, *supra* note 19, at 14.

109. See *supra* notes 38-43 and accompanying text (explaining government under no obligation to listen to public); *supra* note 31 and accompanying text (describing interactions between elected officials and people at town hall meetings).

110. See COMMUNICATING WITH CONGRESS, *supra* note 15, at 14 (discussing origin of e-mail on Capitol Hill).

111. See *supra* note 48 and accompanying text (acknowledging Court’s reticence to expand scope of traditional public forum); *supra* note 18 and accompanying text (contrasting purpose of library Internet terminals with congressional e-mail inboxes).

112. See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 128-29 (1981) (concluding postal letterbox not public forum despite postal system’s historical significance).

113. See *supra* notes 49-52 (describing criteria for designated public forum).

exchange of ideas is consistent with the nature of the Web site.¹¹⁴ Congress initiated the e-mail system to provide a more convenient way for the public to communicate with their elected officials.¹¹⁵ Moreover, unlike the prison in *Adderley*, for example, the nature of which did not lend itself to a public forum, the nature of e-communications with Congress is congruent with such speech.¹¹⁶

The mail system epitomizes the concept of a public forum.¹¹⁷ Justice Brennan's concurrence in *Greenburgh* analyzed the mail system in light of its proper historical underpinnings and criticized the majority opinion for relying on cases in which, unlike here, the nature of the space was incompatible with free expression.¹¹⁸ Justice Brennan argues that the purpose of the mailbox is to allow "the communication of information and ideas," and thus depositing unstamped mail into such a receptacle is harmonious with the objective.¹¹⁹ Like mailboxes or letterboxes, congressional e-mail inboxes were intended in part to accept information and ideas from citizens.¹²⁰ E-mail from constituents through advocacy organizations is therefore consistent with its intended purpose.¹²¹ Applying the two-part test, a Congressional e-mail inbox should overcome the first hurdle to qualify as a public forum.¹²²

The congressional inbox's classification as a public forum would trigger heightened-scrutiny analysis for any content-based regulation on speech.¹²³

114. See *supra* notes 50, 53 and accompanying text (setting forth two-part analysis for designated public forum review).

115. See COMMUNICATING WITH CONGRESS, *supra* note 15, at 14 (stating Congress first enabled e-mail system in 1995).

116. See *Adderley v. Florida*, 385 U.S. 39, 46-47 (1966) (determining protests interfered with orderly administration of prison).

117. See *Greenburgh*, 453 U.S. at 134, 137-39 (Brennan, J., concurring) (reasoning mail's historic role as communication medium renders it public forum). Despite his agreement with the outcome in *Greenburgh*, Justice Brennan wrote that the majority overlooked the postal system's role in facilitating national communication. *Id.* at 138-39. Further, Justice Brennan contended that the cases on which the majority relied did not justify its exclusion of the mail as a public forum. *Id.* at 139-40.

118. See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 139-40 (1981) (Brennan, J., concurring) (undercutting majority's reliance on inapposite cases).

119. See *id.* at 137-38 (Brennan, J., concurring) (reasoning placing unstamped mail in letterbox congruous with purpose of mail).

120. See *Logic Puzzles*, *supra* note 92, at 3 (noting Internet's role on Capitol Hill).

121. See Press Release, *supra* note 102 (disputing advocacy organization petitions from constituents constitute "spam"). The letter states that the Web-based technologies being employed are "generated by the individuals themselves" to "communicate with [representatives] on issues that they care about." *Id.* The letter further stated that "Congressional attempts to differentiate among constituent communications—accepting only unorganized communications but blocking communications where individuals are working together to deliver a strong message—raise dangerous questions about the infringement of constituents' First Amendment rights and are a disservice to you as their representative." *Id.*

122. See *supra* notes 50-52 and accompanying text (delineating two principal factors for designated public forum: governmental intent and congruence with space's purpose).

123. See *Carey*, 447 U.S. at 461 (describing level of scrutiny employed for content-based restriction in public forum). A content-based regulation must be "finely tailored to serve substantial state interests" and is subject to the least restrictive alternative approach, whereby if an option is available that burdens less speech, it

Although courts likely will not perceive logic-puzzle filters as a content-based restriction, skeptics argue that they create the potential for this danger.¹²⁴ Once a particular group of voices is eliminated, so too is the corresponding perspective.¹²⁵ Logic games may be too difficult for particular members of the population, including the learning disabled and individuals who speak English as a second language, and may therefore stifle expression from such groups.¹²⁶ Although this argument is likely too attenuated to warrant a court to find the logic puzzles unconstitutional solely on this ground, it remains an important consideration in the examination of this issue.¹²⁷

The logic-puzzle filters more easily fit the classification of a time, place, or manner restriction because they do not preclude messages dealing with particular subjects, but rather place restrictions on how a person expresses the message.¹²⁸ The logic-puzzle filters' constraints may unconstitutionally impede the correspondent's First Amendment right to free speech.¹²⁹ Although the government may impose such restraints, *Turner* requires an important governmental interest unrelated to the suppression of free speech and it must not burden more speech than necessary to achieve that objective.¹³⁰ Here, a plethora of alternatives are available to communicate with Congress, so the logic-puzzle filters may endure constitutional scrutiny.¹³¹

Although the Supreme Court has declined to accept the least restrictive alternative approach in framing the requirements of "narrow tailoring," the regulation must directly relate to the accomplishment of articulable goals and

must be used. *Id.*

124. See Nobles, *supra* note 19 (quoting ePhilanthropy CEO Ted Hart). Hart expresses concern regarding the potential for the silencing of certain voices, including the disabled and non-native English speakers. *Id.*

125. See Posting of Jeffrey Birnbaum to K Street Confidential, <http://www.washingtonpost.com/wp-dyn/content/discussion/2006/06/08/DI2006060801051.html> (June 12, 2006, 12:30 EST) (associating logic-puzzle filters with poll taxes and disenfranchisement of African Americans). Birnbaum stated, "I kept having visions of poll taxes and other subtle but nastily effective methods of preventing blacks from voting years ago." *Id.*

126. See McArdle, *supra* note 12 (noting logic puzzles impose barriers on certain individuals). J.C. Chamberlain, quoted in the article, adds that "solving a logic puzzle may pose linguistic problems for certain cultures and also may present a bias as to what a 'simple puzzle' is." *Id.*

127. See *supra* notes 125-127 and accompanying text (expressing concern about logic puzzles silencing certain viewpoints).

128. See *supra* notes 56-61 and accompanying text (defining court treatment of time, place, or manner restrictions). A time, place, or manner restriction, though subject to a less exacting level of scrutiny than a regulation governing content, must still be narrowly drawn to achieve an important governmental interest. *Id.*

129. See Press Release, *supra* note 102 (voicing apprehension over infringement of constituents' First Amendment rights).

130. See *supra* notes 63-64 and accompanying text (summarizing *Turner*'s intermediate-level scrutiny).

131. See *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 252-53 (1997) (O'Connor, J., dissenting) (postulating alternative availability should impact whether restriction burdens more speech than necessary). Adhering to O'Connor's logic, the fact that other solutions are available to resolve the e-mail influx afflicting Congress detracts from the assertion that the logic-puzzle filters do not encumber substantially more speech than necessary. See *id.* (advocating for including this factor in relevant scrutiny).

preserve alternative means of communication.¹³² Here, the logic-puzzle filters' primary objective is to eradicate spam and messages that are not genuine communications from constituents and that clog congressional inboxes.¹³³ The filter, however, automatically purges authentic constituent communications sent via organized advocacy-campaign Web sites.¹³⁴ Congress's approach to curbing spam burdens substantially more speech than necessary by precluding all correspondence that is part of an organized advocacy campaign.¹³⁵

The availability of alternative avenues of speech to constituents is an important factor in determining whether a regulation burdens substantially more speech than necessary.¹³⁶ Congress has ample available alternatives that would reduce the burden on the congressional e-mail system without sacrificing free communication with constituents.¹³⁷ Congress could devote more resources to the efficient management of its e-mail system, including adding more personnel to help administer the communication surge.¹³⁸ Using e-mail, rather than regular postal mail to respond to e-mails could assuage congressional budgetary concerns.¹³⁹ Congress could also employ internal

132. See *supra* text accompanying notes 66-68 (describing "narrow tailoring" rule). The Supreme Court explained that the means selected to resolve an issue must directly target the problem. *Id.* The logic puzzles thwart some spam, but they also obstruct legitimate constituent messages, both from individuals and advocacy organizations. See *supra* text accompanying note 107 (illustrating overly broad impact of logic puzzle filters).

133. See *Logic Puzzles*, *supra* note 92, at 2-3 (stating reasons for logic-puzzle filters). Congress anticipates that the filters will impede the use of robots, which automatically fill out Web forms. *Id.*

134. See *supra* text accompanying notes 93-94 (noting mass e-mail petitions blocked despite legitimate constituent communication form). Congress does not subscribe to the definition of spam that requires the message be commercial in nature. See Nobles, *supra* note 19 (highlighting congressional view of spam); Sorkin, *supra* note 5, at 329-332 (comparing competing definitions of spam as "unsolicited commercial e-mail" versus "unsolicited bulk e-mail"). This stands counter to Congress's definition of spam in the CAN-SPAM Act of 2003. See S. REP. NO. 108-102, at 1 (2003) (interpreting term "spam" as e-mail used for "primarily commercial advertisement or promotional purposes"). Defining spam as unsolicited commercial e-mail is advantageous because "noncommercial messages (especially political and religious messages) may be protected speech, while commercial messages can be regulated without running afoul of the First Amendment." See Sorkin, *supra* note 5, at 334-335 (emphasizing advantages associated with defining spam as unsolicited commercial e-mail). Also, bulk electronic e-mail is more difficult to regulate. *Id.* Elected officials also seem to embrace the commercial nature of SPAM when it benefits them. See Grossman, *supra* note 5, at 1574-75 (observing officials have regulated commercial spam while neglecting to regulate political spam).

135. See *supra* text accompanying notes 93-94 (indicating advocacy organization e-mails blocked by logic-puzzle filters).

136. See *supra* notes 74-77 and accompanying text (discussing Justice O'Connor's dissent contending consideration of means should weigh in analysis).

137. See E-MAIL OVERLOAD, *supra* note 19, at 6-8 (outlining procedures to streamline congressional e-mail system). The study recommends several means to manage e-mail more efficiently: instituting and transmitting e-mail policies for the staff, sending both regular and pre-emptive correspondence about hot topics to reduce the amount of incoming mail, automating the system, and promptly responding to e-mails to reduce multiple mailings. *Id.* Automating e-mail, in particular, would decrease the amount of staff-time that would need to be devoted to handling e-mail and would optimize the correspondence process in a mutually beneficial way. *Id.* at 14.

138. See *supra* note 91 and accompanying text (noting staff levels have remained constant despite greater correspondence to handle).

139. See E-MAIL OVERLOAD, *supra* note 19, at 1 (noting most congressional offices reply to e-mail with

filters to separate mass e-mail petitions by issue and advocacy group, which would permit efficient message tallying and allow staffers to identify and more thoroughly read independently written correspondence.¹⁴⁰

These options to filter e-mail could substitute the logic-puzzle filter and thus present the question of whether the current system is sufficiently narrowly tailored.¹⁴¹ Many constituents prefer e-mail over other modes communication, such as postal mail, fax, and telephone calls.¹⁴² For a constituent with computer access, e-mail is the most convenient and inexpensive mode of expressing his or her opinion to the government.¹⁴³ Expedient management of incoming e-mail would benefit the public as well as congresspeople, who could then reduce the time spent with paper mail and telephone calls.¹⁴⁴ In *ACLU v.*

stamped letters). Offices may do this to compile a database of constituents, but they are failing to use the available software to its fullest advantage. *Id.* at 3, 9. The correspondence management system (CMS), when fully integrated, can perform this function without draining office resources. *Id.* at 4. *But see* Dreier, *supra* note 32, at 66 (commenting House already devotes more money to staff technical training than legislative or procedural training). Additionally, some elected officials opt to respond with postal mail for sound reasons. *See* Dreier, *supra* note 32, at n.13; Stephen E. Frantzich, *RepresNETation: Congress and the Internet, in CONGRESS AND THE INTERNET*, *supra* note 31, at 31, 45-46 (noting postal response to e-mail allows quality control and "cooling off" period); Johnson, *supra* note 34, at 130 (indicating traditional letters more official and less subject to fraudulent alteration). As of 2003, 90% of representatives used postal mail to reply to constituent e-mail, despite having technology to respond via e-mail. Johnson, *supra* note 34, at 130. Reasons cited by staff include concerns that third parties could tamper with e-mail and widely distributed messages and also that official letterhead stationary enhances the "feel of legitimacy" of the response. *Id.* In his article, Frantzich puts forth an additional reason for a paper response: the intemperate emotions frequently expressed via e-mail. *Id.* at 45. Responding by regular mail provides the constituent with a "cooling off" period. *Id.* Some elected officials are also concerned about encouraging "pen pal[s] . . . pesky, frequent writers, bothering already overburdened staff with superfluous correspondence." *See* JOHNSON, *supra* note 4, at 120 (listing "pen pal syndrome" as reason for congressional use of paper mail as response vehicle).

140. *See* E-MAIL OVERLOAD, *supra* note 19, at 9-10 (describing technical processing and staff interface for constituent e-mail). Software systems already installed in congressional offices, including Intranet Quorum and Capitol Correspond, have end-user filters that can organize incoming e-mail. *Id.* at 9. These programs can perform sorting functions, such as "separat[ing] constituent messages from non-constituent messages; sort[ing] messages by topic; creat[ing] or add[ing] to constituent contact records in office databases; assign[ing] form letters; and rout[ing] e-mail to appropriate staffers." *Id.* The study estimates that this automated data entry will reduce the amount of time spent to process and respond to a message by half. *Id.* at 10.

141. *See* *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 252-53 (1997) (O'Connor, J., dissenting) (suggesting Court should factor availability of alternatives in conducting intermediate-scrutiny analysis); *see also supra* note 137 and accompanying text (delineating cost and time-efficient options in lieu of logic puzzles).

142. *See* E-MAIL OVERLOAD, *supra* note 19, at 13 (explaining importance of e-mails to constituents and noting their preference for e-mail).

143. *See* E-MAIL OVERLOAD, *supra* note 19, at 5 (noting many constituents primarily use e-mail to communicate). "E-mail can be easier, quicker, less formal, shorter, and less carefully crafted than postal mail, but e-constituents do not view e-mail as shorthand. They view it as their primary and preferred form of written communication." *Id.*

144. *See* E-MAIL OVERLOAD, *supra* note 19, at 5-6 (recognizing e-mail can save time and resources once automated). The study proposes that if congressional offices implement automated e-mail systems, staffers will devote less time to data entry and management of information, and offices can save costs on postage, paper, and printing. *Id.* Also, by using e-mail to regularly update avid correspondents on controversial issues, Congress can preempt questions and reduce incoming communication. *Id.* at 7.

Reno, the Supreme Court struck down a statute prohibiting “offensive” communications via the Internet because it foreclosed an entire medium, despite a myriad of alternative avenues for the communication.¹⁴⁵ Although *Reno* involved a content-based restriction, the analysis also applies to content-neutral regulations.¹⁴⁶ Here, the logic-puzzle filters similarly proscribe an entire medium for a particular purpose: mass e-petitions to Congress.¹⁴⁷ The Court made clear in *Schneider v. New Jersey* that courts cannot preclude an entire mode of communication merely because another venue is available for the message.¹⁴⁸

If a congressional e-mail inbox qualifies as a designated public forum, the government can abandon it any time it sees fit, although it would surely face public consternation for eliminating it.¹⁴⁹ As long as Congress preserves the system, however, it cannot impose unconstitutional restrictions upon its accessibility.¹⁵⁰ Given e-mail’s popularity and the way that it has empowered citizens and special-interest groups, Congress should anticipate that technological experts will invent “bots” to outwit the logic puzzles.¹⁵¹

145. See *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (holding foreclosing particular content on entire medium unconstitutional). The Supreme Court states:

The Government’s position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafleting on the streets *regardless of* their content, we explained that ‘one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.’

Id. (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)).

146. See *Schneider*, 308 U.S. at 163 (recognizing content-neutral ordinances prohibiting distribution of leaflets unconstitutional due to restraint on speech).

147. See *Reno v. ACLU*, 521 U.S. 844, 879-80 (1997) (noting strict-scrutiny analysis applicable due to restriction’s content-based nature); see also Press Release, *supra* note 102 (expressing frustration over filters impairing constituents’ participation in organized advocacy campaigns); *supra* note 106 (indicating constitutional rights of association and assembly potentially implicated).

148. See *Schneider*, 308 U.S. at 151-2 (pronouncing alternative cannot justify abridgement of speech rights).

149. See *United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (advocating rights in designated public fora). “The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues. . . .” *Id.*

150. See *supra* notes 63-64 and accompanying text (establishing public-forum regulations cannot burden substantially more speech than necessary).

151. See von Ahn et al., *supra* note 12, at 60 (stating programmers’ aim to defeat artificial intelligence problems). The assumption behind the CAPTCHA filters is that the programmed robot cannot answer a problem with greater accuracy than what the artificial intelligence community currently knows. *Id.* at 58. This notion challenges security experts and those with malevolent intentions to try trumping the puzzles. *Id.* at 58, 60. For computer programmers, this process is a “win-win situation: either the CAPTCHA is not broken and there is a way to differentiate humans from computers, or the CAPTCHA is broken and a useful AI problem is solved.” *Id.* at 60. Vendors that service the advocacy community are also capitalizing on this arms race by finding ways to circumvent the CAPTCHA obstacles. See *Logic Puzzles*, *supra* note 92, at 2 (noting rise in service vendors capitalizing on “arms race” between Congress and grassroots community). Although profitable

Therefore, if Congress maintains and continually updates its logic-puzzle filters, the situation will eventually backfire and create a communications arms race that will likely disenfranchise and disillusion the public in the process.¹⁵²

IV. CONCLUSION

Regarded in the best possible light, Congress's imposition of logic-puzzle filters suppresses some public speech. In the worst light, it raises serious constitutional concerns about the ways in which the government can lawfully impede the communication between correspondents and their elected officials. Additionally, these filters create the impression that the public's concerns are unimportant, fostering a general climate of distrust in the political system.

The Internet has facilitated public participation in the political process and thus reinvigorated public interest in politics. E-mail, for example, allows individuals and advocacy campaigns to conveniently contact a representative. Logic-puzzle filters that force correspondents to solve math equations are demeaning, particularly for those who may struggle to solve them. These filters embody the schism between politicians and those they represent, deterring correspondents from speaking out.

Logic-puzzle filters illustrate the disconnect between Congress and its constituents. Advocacy groups and individuals will continue to find ways to be heard. Some of these methods, including flooding political offices with mail, phonecalls, faxes, and visits, and improving technology to sidestep security measures, might drain congressional resources far more than e-mails. Moreover, the constant need to update CAPTCHAs to retain filter efficiency will exacerbate the overall costs of maintaining the system.

The CAPTCHA filters on the "Write Your Representative" Web page may be unconstitutional as a "time, place, or manner" restriction. The logic-puzzle filters suppress more speech than reasonably necessary by precluding advocacy campaigns and others wishing to e-mail elected officials from using an entire mode of communication. Although not dispositive, the availability of alternative measures that would better manage the e-mail influx bolsters the argument that the logic-puzzle filters are overly burdensome. Given its precedent, the Supreme Court may defer to the government's substantial

for scientists and vendors, the logic puzzles are not really benefiting the advocacy community or Congress: "[t]he logic puzzles and other captcha tools are just the most recent—and most challenging—phase in the arms race, but this continual escalation only raises the stakes. It doesn't solve the problem." *Id.* at 2-3; *see also Nonprofits Protest Barrier to Emailing Congress*, OBM WATCH, June 27, 2006, <http://www.obmwatch.org/article/articleview/3480/1/84/?TopicID=2> (suggesting communications vendors used by advocacy groups already have "work around" for logic puzzles).

152. *See* Birnbaum, *supra* note 9 (reporting public disapproves of logic-puzzle filters). According to Eli Parser, the executive director of Moveon.org, "[w]e should be living in the golden age of politics—an age in which every member of Congress can easily have a two-way conversation with his or her most engaged constituents. Instead, [we are] seeing bunkerization." *Id.* Moreover, constituents might think twice before participating in political dialogue with a government they perceive as unresponsive to their opinions. *Id.*

interest in separating legitimate constituent messages from spam and analyze the filters under intermediate-level scrutiny. Even with the judiciary's endorsement, however, Congress would be better served economically and could even enhance its public image by eliminating logic-puzzle filters and using an alternative filtering strategy. The CAN-SPAM Act deemed sufficient to protect the public from unwanted solicitation should be sufficient for Congress as well, particularly when applied in conjunction with other systematic measures to streamline e-mail. Congress's current policy regarding constituent e-mail hurts more than it helps.

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