

# Journal of the American Society of Legislative Clerks and Secretaries

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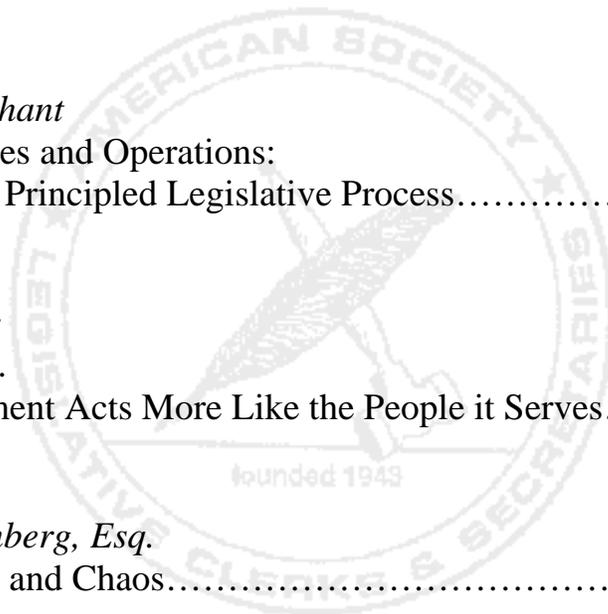
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## STYLE AND FORMAT

Specialized jargon should be avoided. Readers will skip an article they do not understand.

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Number all references as endnotes in the order in which they are cited within the text. Accuracy and adequacy of the references are the responsibility of the author.

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## **Legislative Rules and Operations: In Support of a Principled Legislative Process**

*Robert J. Marchant\**  
*Chief Clerk and Director of Operations, Wisconsin Senate*

American state legislatures collectively employ over 28,000 permanent employees.<sup>1</sup> In various ways, these employees bolster the capacity of state legislatures to govern.<sup>2</sup> Many of these employees ensure that the legislature has expert fiscal, legal, and policy information. Such information helps the legislature provide more effective oversight of the executive branch, independently develop legislative proposals, respond to constituent inquiries, understand and respond to court decisions interpreting statutory law, and analyze information from interest groups. A smaller number of these employees are responsible for the internal operations of the legislature. One such employee is the Chief Clerk or Secretary of the legislative chamber (hereinafter “Legislative Clerk or Secretary”). In many chambers, the Legislative Clerk or Secretary serves as the chief operating officer and parliamentarian, having administrative oversight of both business and legislative operations.

From the perspective of a Legislative Clerk or Secretary, the legislature primarily has two distinct, though interrelated functions. The first function is to fulfill the legislature’s constitutional duty to make laws that provide for the general welfare.<sup>3</sup> Legislative activities that exemplify the fulfillment of this duty include the variety of ways the legislature receives and develops ideas for legislation, as well as the parliamentary process the legislature follows to debate and vote upon legislation. The National Conference of State Legislatures, an organization in which many Legislative Clerks or Secretaries participate, has recognized this function as key to the mission of the legislature.<sup>4</sup>

The second function is to serve constituents. Unlike the lawmaking power described above, which is explicitly conferred upon the legislature by provisions in the state constitution, the duty to provide constituent services is more of an implied responsibility. This duty arises from the fact that legislators must stand for election. In the American system, constituents determine who will represent them in the legislature. Because constituents play such an integral role, they have an expectation that the elected legislator will take into account their interests. Thus, constituents bring to their legislator’s attention problems that the legislator may be able to address (and, sometimes, problems the legislator is powerless to remedy). Constituents communicate these problems not only during an election campaign but also during the legislator’s term of office. Legislators, for their part, are inclined to help constituents with their problems in order to provide representation to each constituent’s interests and thereby enhance their chances to win re-election.

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The lawmaking and constituent services functions of the legislature are interrelated due to the manner in which strong constituent services can inform the legislature's lawmaking activities. Although many constituent concerns, perhaps even the vast majority, merely require a legislator's office to provide a constituent with assistance interacting with other agencies of state or local government, some constituent concerns deal with issues of broader application. Addressing these more general concerns may require making changes in public policy and, as a result, may give rise to legislation. Furthermore, by being receptive to constituents who need help, a legislator encourages those constituents to be involved in the process the legislature follows to debate and vote upon legislation. A constituent who finds a receptive ear when he or she contacts a legislator to discuss a problem is more likely to go through the trouble of trying to discuss his or her views on proposed legislation with the legislator or testify at a public hearing on legislation. A legislature that is well-equipped to act as the "complaint department" of state government is a legislature that is also more able to adequately perform its role as the lawmaking institution of state government.

### **Caretakers of the Legislative Process**

The Legislative Clerk or Secretary has a wide range of responsibilities but foremost among them is the responsibility to help ensure that the legislature is equipped and prepared to perform these two primary functions.<sup>5</sup> Put another way, the Legislative Clerk or Secretary is responsible for protecting and enhancing the legislative process itself.<sup>6</sup> For purposes of this essay, the "legislative process" includes all parliamentary procedures and legislative operations that the legislature implements to make public policy decisions and provide services to constituents.

Advising legislators on the proper functioning of the legislative process is difficult business. The Legislative Clerk or Secretary often advises on matters that are not governed by law or written policy. For example, one person's idea of a properly functioning legislature is another person's idea of an institution that is slow to move and unresponsive or, to the contrary, an institution that moves too quickly and fails to adequately consider all relevant information. Furthermore, the political interests that inform the legislature's activities are sometimes focused on other concerns, such as the end result of legislation or the retention or capture of a majority of elected seats, and not on the process used to reach that result. The grey area in which the Legislative Clerk or Secretary works is demonstrated by the following two hypothetical examples:

#### **The Informed Debate**

The general election for legislative seats is a mere 6 weeks away. The legislature is in the final week of the last general business floor period preceding the election. On the agenda is the hottest issue of the session, a proposed property tax rebate. The majority party in the House, which has been fully briefed on the fiscal impact of the bill, would like to debate and pass the measure in time to have their action reported during the evening news. However, the House is in recess for purposes of a closed-door minority party caucus. The ostensible purpose of the caucus is to receive a briefing from legislative fiscal experts on how the bill affects the overall state budget. Should the majority party leadership, using procedures contained in the House Rules, pull the minority party legislators out of caucus and force a vote on the matter? Or should they allow the minority party legislators additional time for caucus? The Speaker herself, as well as the

Majority Leader and other senior majority party legislators are in favor of forcing an end to the caucus and a subsequent vote. They sense a major political victory is in the offing and are looking to maximize media coverage of the vote. Also, they generally distrust the motives of the minority party legislators, suspecting that the minority may be using the fiscal briefing as a tactic to delay a vote on the issue. Before deciding how to proceed, the Speaker turns to the Clerk of the House, who has been quietly observing the discussion. “Mr. Clerk,” she says, “what do you think we should do?”

### **The Budget Cut**

Party control of the legislature changed in the most recent election and the state is facing a fiscal crisis. As its first order of business, the new legislature enacts an emergency spending bill, requiring all state agencies to cut payroll by 10% for the remainder of the fiscal year. The legislative payroll, which consists mainly of the personal staff of each legislator, is subject to the cuts in the bill. These staff persons provide administrative support within the legislator’s office, do policy research, clerk legislative committees, and help constituents who are having problems with state and local government. The majority party leadership of each house, after much discussion, arrives at two options for implementing the cut. The first option would treat all staff relatively equally, cutting the pay of all staff by 10% for the remainder of the fiscal year. Some within the leadership view this option as preferable, believing that constituents of each party inhabit every legislative district and those constituents have an equal right to receive the services of the legislator’s office. The second option would protect all majority party staff, requiring each minority party legislator to immediately terminate the employment of one staff person in his or her office. Some within the leadership view this option as preferable, not only because it is likely to be more popular with other majority party legislators but also because it demonstrates loyalty to majority party staffers. Furthermore, they view the entire budget shortfall as the fault of the prior majority party. Before deciding how to proceed, though, the Speaker and Majority Leader turn, respectively, to the Clerk of the House and the Secretary of the Senate. “Well,” the Speaker and Majority Leader say, “which option do you think we should implement?”

When confronted with a situation like those described in the hypothetical examples, a Legislative Clerk or Secretary may intuitively feel that important principles are at stake. For example, if the minority party in the first hypothetical is prevented from receiving a full briefing on the fiscal effect of the property tax proposal, the constituents of those districts will be less likely to receive full representation during the floor debate and subsequent vote. In addition, the end-product may not receive the proper amount of vetting to ensure that unintended consequences are avoided. Yet, if the minority party is merely using the briefing as a delaying tactic, that tactic would be delaying a result that a majority of the elected representatives, and their constituents, have a right to achieve.

Similarly, if the budget cuts in the second hypothetical are imposed only on minority party offices, those offices will have less staff available to receive and address constituent concerns. Also, the minority party legislators will become more reliant on sources outside of the legislature for analysis and advice, as the trusted staff are let go. Furthermore, such a reduction in staff

would likely have long-term repercussions within the legislature, particularly when the majority changes yet again and the incoming majority seeks retribution. Yet, because the budget shortfall developed under the watch of the minority party, it could be argued that the staffing cuts would in the long run protect the legislature by providing a powerful disincentive to allow such a problem to develop in the future. The cuts would also likely increase the loyalty of majority party staff persons, who frequently volunteer their time to take part in political campaigns.

Although a Legislative Clerk or Secretary, when facing a hypothetical like those above, may sense that important principles are at stake, he or she has little help determining what those principles might be. Principles such as respect for the representation of constituent interests and the exercise of care in legislating generally are not expressed in an explicit way in the parliamentary rules or operational policies of the chamber. In fact, as the hypothetical examples indicate, the rules or policies of the legislative chamber often explicitly allow for actions that seem to violate these types of principles. Furthermore, there appears to be little scholarship on the principles that a properly functioning legislative process should support. Yet, if the Legislative Clerk or Secretary and others involved in the legislative process are to do their jobs well, they need to understand the important principles that are at stake as the legislature makes decisions about the process it will use in performing its work.

One scholar, though, has recently shed light on this subject. Professor Jeremy Waldron, in two published papers, discusses what he terms “principles of legislation.”<sup>7</sup> Waldron has identified seven principles that a properly functioning legislative process should support.<sup>8</sup> The remainder of this essay analyzes these principles and identifies procedures and practices in American state legislatures that show those principles at work.<sup>9</sup> This discussion demonstrates that the legislative process can support these important principles. In addition, the essay discusses why the legislative process should support these principles. It is hoped that this discussion will have the practical result of equipping Legislative Clerks or Secretaries, and others involved in the legislative process, with the ability to provide better advice and, thereby, facilitate more informed decisions on procedural matters.

## **Waldron’s Principles of Legislation**

### *Explicit Lawmaking*

This principle requires law to be made or changed “explicitly, through a process and in an institution publicly dedicated to that task.”<sup>10</sup> This principle is manifested in openness. An open legislature is accessible to interested constituents and groups. Openness is important because it allows the public, who in a sense are the owners of the law, an adequate opportunity to take part in the discussion concerning what the law should be.<sup>11</sup> Many common legislative operations and procedures exemplify openness. One example is the basic requirement that decisions be made at a meeting and that the meeting be adequately noticed.<sup>12</sup> Strong community relations tools, such as databases that track interactions with constituents, toll-free phone lines, information technology infrastructure supporting the use of email, and a system for using the U.S. mail also encourage openness by facilitating dialogue between constituents and legislators. Televised legislative proceedings, which are provided in many state legislatures, give citizens the ability to

monitor legislative debates and actions. Furthermore, many legislatures have made extensive use of the Internet to provide for more open and explicit lawmaking.<sup>13</sup> For example, some legislatures use Websites to list all proposals that have been introduced, list committee and floor debate schedules, provide links to the text of legislation, list the procedural history of legislation, provide live and on-demand streaming video of legislative proceedings and information, allow citizens to register for or against proposals, or even allow citizens to subscribe to notification services that will email a notification if the legislature schedules action on certain topics.

The principle of explicit lawmaking is also manifested by transparency. Transparency means that the potential outcome of the legislature's deliberations is understandable. Probably the most important example of transparency is the requirement that laws be changed or enacted via consideration of a written document.<sup>14</sup> Another example of transparency is the collection of practices that facilitate the comparison of proposed legislation with current law. Thus, drafting legislation in a way that makes it easy to identify which text is proposed for deletion, creation, or retention helps not only legislators but also citizens understand the effect of proposed legislation. Transparency is also fostered by the requirement, applicable in some legislatures, that each bill include a plain language, narrative description of the bill's intended legal effect.<sup>15</sup> Some legislatures use information technology to increase transparency, as well. For example, sometimes, the only way to determine the effect of an amendment is to rewrite the bill as if the amendment was adopted (in other words, produce a draft of the engrossed bill). Technology can be used to automate this process, allowing members and citizens to easily select amendments that are under consideration and preview what the final statute would look like if those amendments were adopted and the bill was enacted into law.

### *Duty of Care*

This principle acknowledges that lawmaking can do substantial harm to people and, thus, should be done thoughtfully and carefully.<sup>16</sup> This principle underlies those aspects of legislative operations that ensure legislators have the resources and time to adequately consider legislation. The services of professional legislative staff are perhaps the key manner in which legislators can be supported in exercising their duty of care. Expert drafting, legal, fiscal, and audit services can provide legislators with information that is crucial to the reasoned consideration of policy alternatives. Also, expert policy advice from trusted staff helps legislators develop alternative policies to address the concerns of the community. The development of professional legislative staffing is often framed within the context of making the legislature institutionally strong enough to check the power of the executive branch and maintain a healthy skepticism toward information provided by the lobby corps. However, the use of professional staff also serves the deeper purpose of empowering each legislator to exercise the level of care necessary to ensure that laws are properly tailored to meet the needs of society.

Legislative procedures and practices also exist to help legislators fulfill their duty of care. Strong constituent relations tools, such as those discussed above in the section on explicit lawmaking, help legislators become informed about the interests of their constituents, as do adequate mechanisms for receiving public testimony in committee. In addition, rules that slow down the legislative process give legislators the time necessary to analyze and deliberate over proposed legislation. Such rules include those requiring bills to be read three separate times before

passage<sup>17</sup>, those requiring bills to be noticed for a minimum period of time before being considered<sup>18</sup>, and those permitting the legislative body to reconsider its decisions.<sup>19</sup>

### *Representation*

This principle requires a proposed new law to be debated and decided upon by a large assembly that represents a range of viewpoints, roughly reflective of the diversity of interests throughout the jurisdiction.<sup>20</sup> As Waldron says, “the idea is that new law emerging from this institution cannot claim its authority on the basis of any cozy consensus among like-minded people.”<sup>21</sup> To satisfy the principle of representation, the legislature must follow procedures that allow each member an adequate opportunity to support the interests of their districts.

This principle is exemplified in the procedures that govern the scheduling of proposals for debate in the chamber. For example, the rules of some houses require any proposal that is reported out of committee with a positive recommendation to be placed on the calendar for debate by the entire body.<sup>22</sup> By contrast, many legislative bodies centralize the scheduling function in a leadership committee.<sup>23</sup> This centralization can serve an important function of allowing the majority party to efficiently control its agenda. However, this centralization creates a risk of violating the principle of representation. For example, a bill may be supported by a substantial number of members, yet fail to be supported by the leaders who schedule business before the body. In this situation, the scheduling authority may stymie efforts to schedule such a bill for debate in the chamber. These types of road blocks may happen even when the bill is supported by a majority of the members or a majority of the majority party members. Of course, there may be good and valid reasons for refusing to schedule such a bill. However, in the face of such a road block, members intuitively feel that they are being prevented from representing the interests of their constituents. Members will argue, for example, that they stood for election on this particular issue and that their constituents expect them to do something about it.

Even in these circumstances, however, procedural rules often do protect the principle of representation. For example, the rules may include a procedure allowing members to bypass the central scheduling authority. Thus, a member whose bill is stuck in a scheduling committee may make a motion to pull the bill from committee and bring it to the floor for debate. Such a motion allows the body to, in effect, overrule the central scheduling authority. Furthermore, even if such a motion is ultimately unsuccessful, it may provide at least a limited opportunity for debating the underlying merits of the proposal that is stuck in committee. Even when the rules prohibit debate on such a motion, members may provide the courtesy of granting unanimous consent to speak to the issue of why the bill should be taken up on the floor.

### *Respect for Disagreement/Loyal Opposition*

This principle requires structures to exist within the legislative process that enable dissenting viewpoints to be aired.<sup>24</sup> Respect for disagreement is similar to the principle of representation, in that both regard diversity as a positive force within the legislative process and seek to capitalize on the information provided by individuals with diverse perspectives. This principle is exemplified in many of the processes and practices that govern the relationship between the majority party and the minority party. For example, the practice of allowing minority caucus

leadership to provide input into the scheduling of debate in the chamber respects the role of the minority in presenting ideas in debate. Similarly, the role of the loyal opposition is respected when the majority refrains from the use of time limits in debate.

Amendment procedures are critical examples of a legislative body's respect for disagreement. Amendments are one of the main legislative vehicles for presenting dissenting policy alternatives. The degree to which amendments are facilitated varies. For example, some legislative bodies require that a committee consider and dispose of each pending amendment before reporting a bill out to the full body.<sup>25</sup> Thus, even unpopular viewpoints must be discussed, debated, and voted upon in committee. Of course, amendments are also debated and voted upon on the floor of the chamber during consideration of bills by the full body. State legislative bodies generally provide solid institutional support for dissenting views, by allowing any member to introduce amendments during the floor debate and by requiring that all pending amendments be disposed of prior to any vote on passage of the legislation.<sup>26</sup> This procedure differs from the one sometimes used in the U.S. House of Representatives, where the Committee on Rules brings major legislation to the floor of the House with special rules limiting or even prohibiting the consideration of amendments.<sup>27</sup> Although this latter procedure allows the majority to more effectively prioritize debate, it also enables the majority to discount certain viewpoints and make them more difficult to communicate.

### *Responsive Deliberation*

This principle requires that “opinions should be held and defended in a spirit of openness to argument and consideration.”<sup>28</sup> In many legislative chambers, it would be naïve to think that the floor debate is the key factor in determining a member's vote. Although important, the floor debate is often more of a rhetorical exercise. In terms of responsive deliberation, the real debate takes place in a much larger forum than simply the floor of the legislative chamber. The debate is carried out, for example, in hallways, offices, and partisan caucus meetings. The ways in which a legislature facilitates these “off-the-floor” conversations support the principle of responsive deliberation. Legislative events that bring together legislators of different ideological beliefs, such as receptions, ceremonies, and seminars, can help generate this type of conversation and bolster a culture of communication and responsiveness.

It is interesting to note that, in some ways, the opportunities for such conversations are in danger of disappearing. For example, budgetary constraints may limit the ability of legislators to attend conferences and network with one another away from the “fishbowl” of the capitol. Also, ethics laws, which to varying degrees restrict the ability of private entities to fund receptions and events which legislators attend, reduce opportunities for legislators to converse in a setting outside of the capitol. Although such laws play an important role in protecting the integrity of the legislative process, it is not uncommon for veteran lawmakers to recall days when more conversation took place across ideological lines at such events. Coupled with what is perceived as a general increase in partisanship in state legislative chambers, the culture of responsive deliberation is becoming more difficult to maintain.

The principle of responsive deliberation is also manifested in more formal legislative procedures, though. For example, rules allowing the legislative body to reconsider its decisions facilitate

responsive deliberation by allowing legislators an opportunity to take into account information that is communicated even after a vote.<sup>29</sup> Also, rules allowing members to put questions to one another in debate recognize the value of argument and deliberation.<sup>30</sup> Such rules typically require that the question be intended to obtain information that will aid the member in deciding upon the merits of the question before the body.<sup>31</sup> Often, the question is actually made for rhetorical purposes. But even in this case, if a member refuses to yield to the question, the result may be frustration and a sense that the member is withholding information relevant to the question before the body.

### *Legislative Formality*

This principle requires the legislature to use formal rules to govern its deliberations. Such rules are familiar to legislative parliamentarians. As Waldron notes, though, to the outside world the legislature appears to operate with “exasperating formality.”<sup>32</sup> But this formality serves an important purpose.

As Waldron reminds us, legislators actually have very little in common with one another.<sup>33</sup> In many ways, our electoral system is designed to produce legislators who are more diverse than alike. Thus, the character of a given legislative body reflects much of the geographic, cultural, religious, political, ideological, and socio-economic differences of the jurisdiction. Yet legislators are expected to come together, participate in a forum designed to air divergent viewpoints, and arrive at decisions. To illustrate the impact of this diversity on the operation of the legislature, contrast the legislature with a corporate board of directors. The shared experience, expectations, and interests of the board members lends a completely different character to the operation of that policy-making body.

Given the differences among legislators, the risk of a legislative session breaking down into chaos is great, as is the need to put in place structures that help legislators communicate with one another and focus on the heart of the matter. As Waldron puts it, “Unless it is structured by tight rules of order, deliberation is always liable to fall into futility, as people misunderstand one another, talk past one another, or lose the thread of the discussion.”<sup>34</sup> Examples of these “tight rules” include the use of motions and the consideration of specific questions,<sup>35</sup> rules governing the recognition of members in debate,<sup>36</sup> the requirement that legislation under consideration be written and distributed prior to action,<sup>37</sup> and, more generally, the use of adopted rules and a published parliamentary authority to govern legislative proceedings.<sup>38</sup>

### *Political Equality*

This principle requires the legislature to follow a decision-making rule that is fundamentally fair and politically equal.<sup>39</sup> The most typical example of a fair and equal decision-making rule in the legislature is the majority vote. The majority vote requirement is fundamentally fair because it is neutral between outcomes.<sup>40</sup> Furthermore, Waldron argues that the use of the majority vote works because it supports not only the equality of legislators vis-à-vis one another, but also the equality of constituents vis-à-vis one another.<sup>41</sup> He argues that the package of these equalities is essential. This position is validated by the scandals that occur from time to time when a member is absent from the chamber during a vote and another member presses his or her voting button as

a proxy. If the only concern were the equality of one member with another, proxy voting would be more tolerated. It is the sense that the absent member has let his or her constituents down, that voting is perhaps the most important duty a legislator performs for his or her constituents, which raises such actions to the level of scandal.

Not all majority vote requirements, though, are created equal. When examining the role of the majority vote in upholding the principle of political equality, it is important to ask the question “A majority of what?” For example, some motions may require the positive vote of a majority *of the votes cast* in order to be approved.<sup>42</sup> Such a requirement is less supportive of political equality because it allows the body to act with fewer affirmative votes than would otherwise be required. By contrast, passing a law required, in many legislatures, a majority vote *of the members elected to the chamber*.<sup>43</sup> This requirement is more supportive of political equality because it maximizes the number of affirmative votes required to carry a decision and is more likely to result in every member casting a vote.

It is also interesting to note that the principle of political equality closely interrelates with the principle of representation. This interrelation is exemplified by quorum requirements. Quorum requirements establish a threshold number of members that must be present in order for a vote to be a valid exercise of legislative power.<sup>44</sup> Such requirements demonstrate an understanding that the institution needs a base level of diverse representation in order to make legitimate decisions by majority vote.

### **Conclusion: Do These Principles Matter?**

The discussion above demonstrates that the legislative process can support Waldron’s principles of legislation. But is there any reason why the legislative process *should* support these principles? For example, some may view the legislative process as little more than an impediment to desired political outcomes. No doubt this sentiment exists in Legislatures themselves, as well as in powerful political constituencies. For example, individuals who desire to pass a particular bill may push the committee chairperson and legislative presiding officer to overturn years of procedural precedent and prohibit legislators from considering amendments when the bill is debated in committee and on the floor of the legislative chamber. Such a person would have little regard for the important role that debate and respect for the loyal opposition plays in the legislative chamber. Yet, Legislative Clerks or Secretaries sometimes encounter this type of sentiment as they recommend procedures that facilitate the will of energetic and powerful majorities. Even legislative majorities themselves are sometimes pushed by interests outside of the legislature to suppress dissenting viewpoints and, in a rhetorical sense, rely simply on brute force to push their agenda through the legislature. The pressure to disregard the principles identified by Waldron within the legislative process can be great.

In addition, one might argue that the end result, the content of the laws themselves, is all that matters and that the process the legislature follows in passing laws is unimportant so long as the law itself generally reflects the desires of the majority of the populace. After all, the law-making process does not appear to protect or limit rights in as direct a manner as a statute of general application. Or one might argue that, as long as a statute is passed by a representative body that periodically stands for re-election, it matters not what process the body followed in the law’s enactment.

Waldron's principles of legislation are important, though. A legislative process that supports these principles can provide a structure to facilitate group decisions that take into account the disparate interests that exist in our society. In addition, such a process can provide continuity within the legislature as majority or leadership control changes, allowing the incoming majority or leader to be responsive to the populace in a timely manner. Finally, and most importantly, such a process can help ensure legitimacy of and respect for our laws. Waldron observes that "any laws that we enact must do their work in a community of people who do not necessarily agree with them and who will therefore demand that something other than the merits of their content—something about the way they were enacted—be cited in order to give them an entitlement to respect."<sup>45</sup> A legislative process that supports Waldron's principles of legislation can enhance this respect for the rule of law by providing citizens with a meaningful opportunity to take part in the lawmaking process, by supporting the representative aspects of a legislator's duties, and by assisting legislators in making decisions only after careful consideration of all relevant information.

Together, these principles of legislation serve as a reminder of the important role the legislative process can play in our society. It is not enough that we choose to govern ourselves through laws that are legislated. Rather, our ability to govern ourselves is enhanced by choosing to legislate in a particular way. Also, these principles are particularly important for Legislative Clerks or Secretaries who, in large part, are the caretakers of the legislative process. By understanding some of the reasons why the legislature should operate a certain way, these legislative professionals will be better able to provide advice to legislators as those legislators make decisions about the process the legislature will use to do its work.

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<sup>1</sup> National Conference of State Legislatures, *50 State Staff Count—1979 1988 1996 2003*, available at <http://www.ncsl.org/programs/legismgt/about/staffcount2003.htm>.

<sup>2</sup> Hereinafter, references to "the legislature" are used to discuss more generally the role of state legislatures within their own state governments.

<sup>3</sup> See, e.g., **FLA. CONST.** art. III, section 1 (Legislative power of state vested in legislature); **CONN. CONST.** art. III, section 1 (Legislative power vested in general assembly); and **NEB. CONST.** art. III, section 1 (Legislative power vested in legislature). To be clear, the Legislative Clerk or Secretary should not have a role in deciding what laws the legislature should enact. Rather, the Legislative Clerk or Secretary oversees the legislative operations that facilitate legislators deciding what laws the legislature should enact.

<sup>4</sup> See, e.g., National Conference of State Legislatures, *Model Code of Conduct for Legislative Staff*, available at <http://www.ncsl.org/programs/legismgt/about/codestf.htm> (Mission of legislature is to represent the people in deliberating and deciding matters affecting common good).

<sup>5</sup> It is important to acknowledge that Legislative Clerks and Secretaries neither control nor create the activities of the legislature. After all, they are not directly elected by the people to exercise power. Although Legislative Clerks and Secretaries may have wide discretion in certain areas of legislative procedure and operations, their actions are subject to the direction of the elected legislators.

<sup>6</sup> This sentiment is reflected in official pronouncements of the American Society of Legislative Clerks and Secretaries (ASLCS). See, e.g., ASLCS, *Code of Ethics*, available at <http://www.ncsl.org/programs/legismgt/aslcs/csethcod.htm> (Purpose of American Society of Legislative Clerks and Secretaries is to strengthen the effectiveness and efficiency of American State Legislatures and thereby protect the freedoms of our people. To further this objective, every member of the society shall, among other things, make every effort to improve the professional knowledge of parliamentary procedure . . . Every member of the society shall be dedicated to the concepts of effective and democratic state government by responsible elected officials and believe that professional general management of legislatures is essential to the achievement of that goal.).

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- <sup>7</sup> See Jeremy Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373 (2003) and Jeremy Waldron, *Principles of Legislation*, in **THE LEAST EXAMINED BRANCH** 15 (Richard W. Bauman and Tsvi Kahana, eds., 2006) [hereinafter *Principles of Legislation*].
- <sup>8</sup> *Principles of Legislation*, *supra* note 7, at 18.
- <sup>9</sup> Specific examples of practices and rules are taken from a variety of states, as well as Mason's Manual of Legislative Procedure, which is the adopted parliamentary authority in numerous state legislative chambers. See **NATIONAL CONFERENCE OF STATE LEGISLATURES IN COOPERATION WITH THE AMERICAN SOCIETY OF LEGISLATIVE CLERKS AND SECRETARIES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE** (2000) [hereinafter **MASON'S MANUAL**].
- <sup>10</sup> *Principles of Legislation*, *supra* note 7, at 22.
- <sup>11</sup> *Id.* at 22-23.
- <sup>12</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 448-49 (Committee can act only at a meeting and not by separate consultation and consent); **RULE 18 OF THE WIS. SENATE** (Requiring 18 hours' advanced notice of proposals to be considered for floor debate); **JOINT RULE 23 OF THE ALASKA LEGISLATURE** (Chairperson must post written notice of time, place, and subject matter committee meeting by Thursday preceding meeting); **RULE 66 OF THE FLA. HOUSE OF REPRESENTATIVES** (2 days' advanced notice generally required for committee meeting during first 45 days of session, 24 hours' advanced notice generally required after first 45 days of session).
- <sup>13</sup> Pam Greenburg, *25 Great Online Ideas Worth Stealing*, **STATE LEGISLATURES**, July/August 2007, at 59.
- <sup>14</sup> **MASON'S MANUAL**, *supra* note 9, at 109, 113 (Every question submitted to legislative body must be a definite proposition; bills are used for making statutory enactments). Many state constitutions require that laws be enacted only by consideration of bills. See, e.g., **NEV. CONST.** art. IV, section 23 (No law shall be enacted except by bill) and **ILL. CONST.** art. IV, section 8 (Same).
- <sup>15</sup> See, e.g., **WIS. STATS.** section 13.92 (1)(b)2. (2005) (Legislative drafting agency must include a plain language analysis of each original measure, to be printed with the measure when introduced); **NEV. REV. STAT.** section 218.249 (2005) (Each bill must include a concise and clear summary of any existing laws directly related to bill and a summary of how the bill would affect existing law); **RULE 13.02 OF THE OREGON SENATE** (Each measure introduced must contain an impartial summary of the measure's content, describing the proposed new law and any changes to existing law).
- <sup>16</sup> *Principles of Legislation*, *supra* note 7, at 23.
- <sup>17</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 507 (Ancient parliamentary practice and most state constitutions require that bills be read three separate times on three separate days in each house of the legislature before passage); **RULE 16 OF THE ARIZ. SENATE** (Bill must be read on three separate days unless otherwise directed by two-thirds vote); **RULE 10.6 OF THE L.A. SENATE** (Bill must be read at least by title in open session on three separate days).
- <sup>18</sup> See *supra* note 12.
- <sup>19</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 299, 315 (Every legislative body generally has inherent right to reconsider a vote on an action. Effect of motion to reconsider is to suspend all action on the subject of the motion until reconsideration is acted upon); **JOINT RULE 16 OF THE MICH. LEGISLATURE** (Every bill passed by either house must be transmitted to other unless notice is given that motion to reconsider will be made.); **RULE 18 OF THE N.C. HOUSE** (When question has been decided, any member may move reconsideration on the same or the succeeding legislative day, except that if the vote was a recorded vote, only a member of the prevailing side may move for reconsideration.).
- <sup>20</sup> *Principles of Legislation*, *supra* note 7, at 24-25.
- <sup>21</sup> *Id.* at 25.
- <sup>22</sup> See, e.g., **RULE 40 OF THE OHIO SENATE** (Generally requiring all bills reported out of committee with recommendation of passage to be placed on calendar).
- <sup>23</sup> See, e.g., **RULE 18 OF THE WIS. SENATE** (All bills reported out of standing committee are placed in the committee on senate organization, which establishes the calendar); **JOINT RULE 18 OF THE ALASKA LEGISLATURE** (Rules committee is responsible for establishing the daily calendar).
- <sup>24</sup> *Principles of Legislation*, *supra* note 7, at 26.
- <sup>25</sup> See, e.g., **RULE 40 OF THE ILL. HOUSE** (Timely committee amendment must be considered by committee or subcommittee before committee considers bill to which amendment relates); **MASON'S MANUAL**, *supra* note 9, at 84, 443 (When main question is under debate and amendment is proposed, amendment becomes

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question under consideration and must be disposed of before main question. Committee may recommend adoption or rejection of pending amendments and make such further recommendations and propose such other amendments as it may choose).

- <sup>26</sup> See, e.g., *supra* note 25 (discussing provisions of **MASON'S MANUAL** governing consideration of amendments; **RULE 69 OF THE CAL. HOUSE** (Any member may move to amend bill during second or third reading and motion may be adopted by majority vote); **RULE 49 OF THE WIS. SENATE** (When proposal is debated under second reading amendments may be offered from the floor).
- <sup>27</sup> See U.S. House of Representatives Committee on Rules Majority Office, *What Is a Special Rule?*, available at [http://www.rules.house.gov/POP/specialrule\\_is.htm](http://www.rules.house.gov/POP/specialrule_is.htm).
- <sup>28</sup> *Principles of Legislation*, *supra* note 7, at 27.
- <sup>29</sup> See *supra* note 19.
- <sup>30</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 93 (Members may ask questions of one another through presiding officer); **RULE 35 OF THE CAL. SENATE** (Member may not be asked question except through presiding officer); **RULE 7-10 OF THE N.M. SENATE** (Same).
- <sup>31</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 94 (Question of member may relate only to question before body and must be asked for purpose of obtaining information, not supplying information).
- <sup>32</sup> *Principles of Legislation*, *supra* note 7, at 28.
- <sup>33</sup> *Id.* at 28-29.
- <sup>34</sup> *Id.* at 29.
- <sup>35</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9 at 82-83 (There can be no debate unless there is a question before the house and debate is confined to the question before the body).
- <sup>36</sup> See, e.g., *Id.* at 76 (Member must be recognized by presiding officer before addressing body, offering motion, raising question, or presenting other business); **RULE 108 OF THE CAL. HOUSE** (Member must be recognized before speaking); **RULE 16 OF THE COLO. SENATE** (Senator wishing to speak must rise and be recognized by presiding officer before proceeding).
- <sup>37</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 273 (Amendments must be in writing); **RULE 42 OF THE R.I. HOUSE** (No measure without a body or substantive content shall be accepted); **RULE 7.6 OF THE LA. HOUSE** (All legislative instruments must be printed or typewritten); **RULE 507 OF THE MAINE HOUSE** (With limited exceptions, amendments may not be acted upon until printed and distributed); **RULE 20 OF THE N.H. SENATE** (Upon referral to committee all bills must be copied and distributed to members).
- <sup>38</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 19-26 and 28-29 (Discussing use of adopted rules of the house, as well as a parliamentary authority).
- <sup>39</sup> *Principles of Legislation*, *supra* note 7, at 29-30. See also, **MASON'S MANUAL**, *supra* note 9, at 96 (Rights and duties of members are derived from absolute equality of members).
- <sup>40</sup> *Principles of Legislation*, *supra* note 7, at 30; Waldron, *supra* note 7, at 382-83.
- <sup>41</sup> *Id.*
- <sup>42</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 39 (To make decision or carry proposition there must be affirmative vote of at least a majority of votes cast.); **RULE 1.05 OF THE TEX. SENATE** (Majority of votes cast required to elect officers); **RULE 34 OF THE MISS. HOUSE** (Majority of votes cast required to indefinitely postpone decision on question).
- <sup>43</sup> **MASON'S MANUAL**, *supra* note 9, at 350-51. See also, e.g., **RULE 6 OF THE N.Y. SENATE** (Majority of members elected required to adopt resolution calling for expenditure of money); **RULE 25 OF THE COLO. SENATE** (Majority of members elected required to adopt report of committee of the whole).
- <sup>44</sup> See, e.g., **MASON'S MANUAL**, *supra* note 9, at 38, 45, 154, 166-67, 335, 439 (Other than to compel attendance at a meeting or adjourn, quorum must be present for group to act on behalf of entire membership); **RULE 44 OF THE ALA. HOUSE** (Majority of House is quorum to conduct business); **RULE 28 OF THE PENN. SENATE** (Majority of Senators elected constitutes quorum to conduct business, except smaller number may adjourn from day to day and compel attendance of other Senators).
- <sup>45</sup> *Principles of Legislation*, *supra* note 7, at 32.

## **Real Life. Live. When Government Acts More Like the People it Serves**

*Paul W. Taylor, Chief Strategy Officer  
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Real life has become complicated again. The country has begun to work through a systemic credit crisis that is changing the way things work on Wall Street and Main Street – and under the capitol domes of government.

There are competing proposals about how to restructure institutions in the wake of the crisis, each reflecting different compromises on the continuum of market-based approaches to an increased regulatory environment to outright government ownership.

With crisis comes opportunity – a rare point of agreement between the theories of progressive journalist and author Naomi Klein<sup>1</sup> and libertarian economist Milton Friedman. Klein believes the opportunity is for mischief, while Friedman sees it as a catalyst for meaningful change, “Only a crisis, real or perceived, produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around.”<sup>2</sup>

One of the ideas that are lying around is what was once popularly known as e-government. Unlike naked ideas – those that exist only in the minds and proposals of their creators – e-government has an installed base and a growing universe of Internet partisans that want more and better public services delivered through this channel.

The portal and online service delivery -- what were once pegged as alternatives -- are now more than just mainstream but the default channel for cost effective, sustainable and (when done right) compelling experiences for the public that government serves. That, coupled with continuing technological innovation under the rubric of Web 2.0, suggests that e-government may be lying around. That is not to say that e-government is not delivering public value. It is. E-gov is lying around only in the sense of its still largely latent potential to change the cost structure and service delivery stance of government. If not e-gov, then what? If not now, when?

Government now serves a firmly ensconced digital majority, where 70 percent or more of American households (including all gender, race and age demographic cohorts) are connected to the Internet<sup>3</sup> – and over half have broadband access.<sup>4</sup> Americans with broadband access – estimated at over 45 million -- spend half of their spare time online.<sup>5</sup> Sooner or later, they are going to bump into a government website. Will it meet their needs and expectations for getting something real done at a time and place of their choosing?

The new conventional wisdom is to point to Web 2.0 and its social networking qualities -- user-generated media rich content and interactive communities of interest – as the answer. Indeed, there are opportunities to leap frog in the transformation of certain aspects of service delivery. Curiously, Web 2.0 is often pitted against its predecessor – you know, the Web that didn't have a

version number. But there is no need to reconcile friends. The innovations of the Web – new and old – have matured into a platform for governing, for doing the public’s business.

As a companion to a previous whitepaper from the Center for Digital Government called *This Old Portal*, which detailed the structural and design components of developing, maintaining and renovating (as needed) the online platform, this whitepaper – *Real Life. Live* – looks forward to a time when government acts more like the people it serves. And that time should be now ... or, at least, soon.

*Real Life. Live* takes a long view of the coming digital landscape, and its three defining directions:

- I. Going Local: A Portal and a Platform for Hyper Localized Service Delivery**
- II. Going Mobile and Going Social: Government as Your BFFL<sup>6</sup> -- Anytime, Anywhere**
- III. Going Green and Going Home: Sustainability by Saving Trips at Both Ends of the Transaction.**

Each will be discussed in turn.

**I. Going Local: A Portal and a Platform for Hyper Localized Service Delivery**

In a word, progress toward e-government has been uneven. Consider the experience of the U.S. federal government as seen through the Administration’s internal report card on the subject.

In the *President's Management Agenda Scorecard for the second quarter of FY 2008*, (a) more than half of all federal agencies have a worrisome status of yellow or red; and , (b) only 3 of 26 -- 12% -- of federal agencies had their act together and were still moving forward on a handful of priorities. Singling out the priority of most interest here, 20 agencies were making green-level progress on e-government but 17 are digging out of a hole (14 yellow, 3 red) on the status measure.<sup>7</sup> Ironically, the reddest of the red status belonged to the Department of Commerce -- an interesting spot to end up for a department the name of which shares a root word with "e-commerce."

The Economist provides a sobering albeit snippy assessment of e-government in the United Kingdom and here in the United States.<sup>8</sup> Interestingly, the British publication points to the American capitol as a rare find. It calls out the Washington, DC portal<sup>9</sup> and an allied suite of mashups and wikis as a hopeful example of how bureaucracies can be responsive to the public’s needs and simplify service delivery.

More on the use of such Web 2.0 entry points follows later in the paper but, first, it is worth unpacking The Economist’s main critique that e-government is a pale imitation of the dot-coms. Indeed, amazon.com (despite some bumps along the way) has maintained and even burnished its reputation as the gold standard for online transactions. The information and transactions behind them are reliably approachable, findable and actionable. The interface is appealing, intuitive and consistent each time a transaction occurs. Search and navigation are constantly

learning from users about how they look for what they want and return more relevant results (including recommendations about what you might also be interested in). Moreover, it is easy to act on what you find. In many cases, a single click will complete the transaction – whether the item is purchased directly from Amazon or its expansive network of independent agents or resellers.

That said, *The Economist* may give the private sector too much credit for delivering the same services and the same level or quality of service across channels. The magazine's argument that e-government is a pale imitation of the dot-coms would have greater resonance if the private sector actually delivered consistent, seamless online experiences. Many customers of large banks routinely encounter false starts and dead ends in managing their accounts online. Much of online banking stretches a thin veneer over dissimilar and previously discrete operating units, coming as it does with considerable variation by geography and lines of business. Through mergers and acquisitions, banks are now more of a federated environment than a unified enterprise. Banks and other corporations that have acquired, developed and even spun off business units face the challenge of presenting a common front end that masks the complexity, diversity and stubbornly separate systems and infrastructures at the back end. That gives them much in common with the federated environment that is government.

Public sector portals originated as equal parts veneer (to mask the complexity) and shared service (through which previously discrete agencies could present themselves through a common face and supported by shared infrastructures) while extending the value of data from legacy systems.

All of this is the work of the original Web (the one without a version number) and the iterative process of making incremental improvements over time en route to a transformation in the relationships between citizens and their government.

An earlier whitepaper, *This Old Portal*, to which this one is a companion, rehearses the basics of making sure the portal is sustainable from the start and captures some of the lessons learned from the first decade of public sector portals.

There are a number of public portal operators that have worked hard over the years to be an Amazon-dot-gov – approachable, findable and actionable – to the communities they serve. Among their number are state portals in Alabama, Arkansas, California, Maine, Utah and Washington and local counterparts as diverse as Las Vegas, NV, Killeen, TX, Louisville, KY, Oakland County, MI, San Diego County, CA and Wake County, NC. The list is not exhaustive but each portal has received positive notice, award or other recognition for changing the way the public's business gets done.

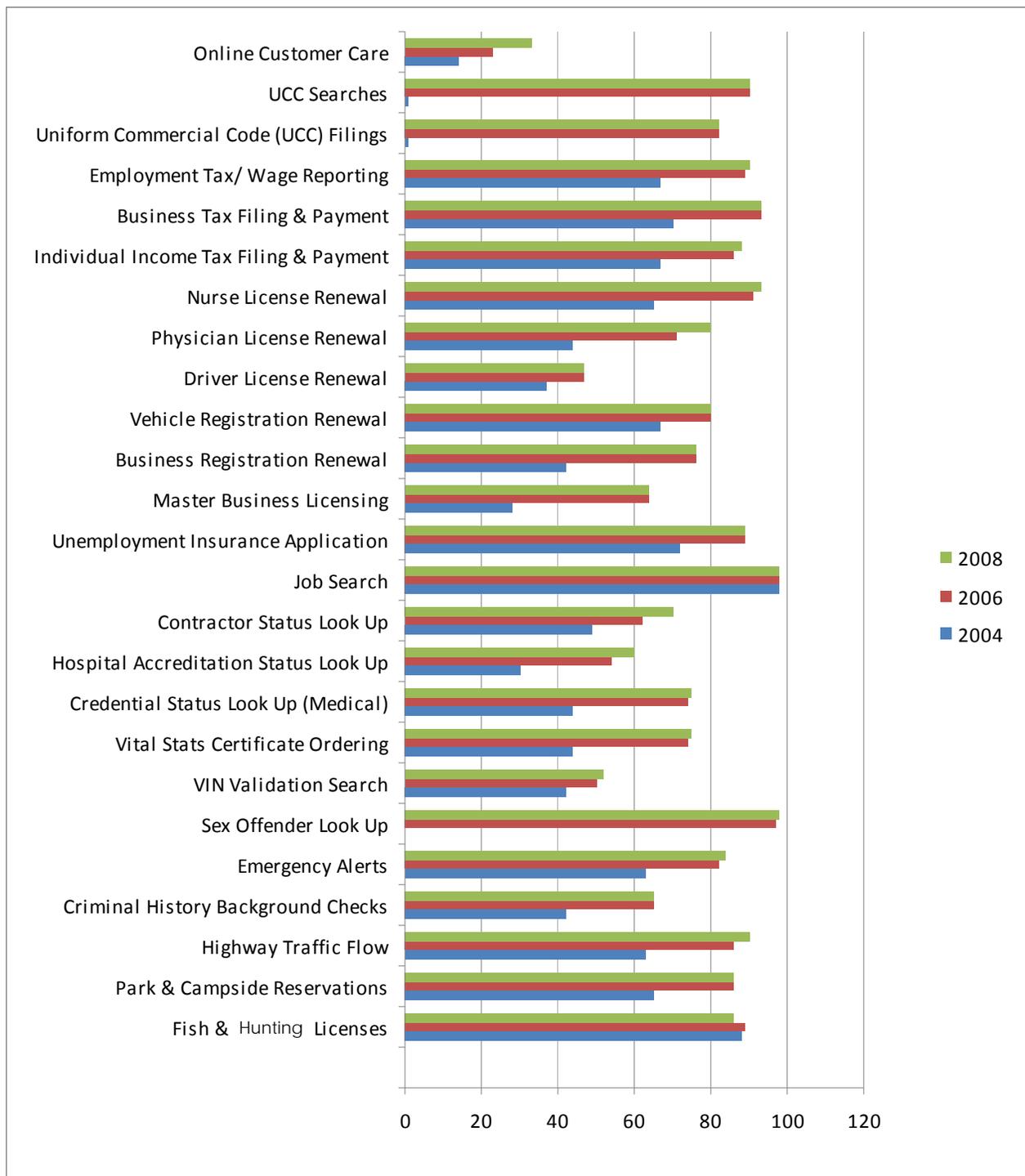
Portals have been helpfully subversive as a catalyst for making federated environments act more like an enterprise. The Massachusetts Common Intake portal integrates screening, intake and eligibility across a full range of health and human service offerings. In Virginia, TurboVet combines a Wizard-style question and answer interface to ensure veterans receive the benefits for which they are eligible while a social network creates a forum for soldier-to-soldier advice.

And in Hawaii, one-stop online services integrate the rules of multiple agencies to help entrepreneurs register new businesses and ensure that potential government contractors are compliant with the state's procurement regulations.

The story is much the same at the infrastructure or shared services level. Twenty-one states now rely on a single company to manage their portals and add transactions to their suite of online services. For its part, Newport News, VA, has been a driving force in the use and promulgation of an open source content management system. Still below the hood, Utah, South Carolina, Arkansas, Kansas and Idaho are among the states that provide common payment engines to process transactions from hundreds of online applications for both state and local government agencies. And in Washington state, King County's security portal puts a secure wrapper around its agencies' applications.

So, what do we have to show for approximately thirteen years of the portal? The action and much of the value has been realized through the hundreds of applications and transaction types that stand behind the portal.

The Center for Digital Government's *Digital States* survey provides a longitudinal view of the implementation of online services in 25 categories. As Figure 1 demonstrates, there has been: (a) significant growth in the last four years; and, (b) implementation rates have topped out in many of the categories.



[NOTE TO DESIGN: The X axis is a percentage. MSWord automatically inserted “120” which is confusing and unneeded. It should be labeled “Percentage of Responding States” and the scale should stop at 100.]

Significantly, those applications with the lowest implementation rates are those that require more sophisticated inputs to complete the transactions – VIN validations, vital records, credential lookups and drivers license renewal among them. These categories lag the others categories because they are tougher nuts to crack. The harder work requires rethinking the data sharing needed to complete the transaction. The data exists somewhere, and the Web 2.0/3.0 challenge and opportunity is to get the data from where they are to where they are needed. This involves machine-to-machine Web services – the type of Web service that we don’t think about because we don’t see or touch it. By definition, it does not involve human intervention or – the way the machines see it – human latency.

These web services are well-suited for what Nick Carr calls cheap, utility computing -- alternatively known as Cloud Computing or Software as a Service (SaaS). Carr, perhaps best known as author of *Does IT Matter?* and former executive editor of the Harvard Business Review, explores the rising relevance of utility computing in his most recent book, *The Big Switch*. These are variations on a theme that has been around for some time. They are heirs to the Application Service Provider (ASP) model and have much in common with the so-called self funded portal model, in which the infrastructure, application development and ongoing support are managed by the private sector at no upfront cost to government agencies or taxpayers. Carr correctly describes an approach that, while not new, has matured to the point where it can take its place in a mix of mission critical platforms. Carr condenses his argument for *The Big Switch*<sup>10</sup> to three irreducibly complex bumper stickers:

1. Harness the worldwide computer (an old term Carr resurrects to describe the cumulative effect of utility computing);
2. Rethink the interface (which necessarily includes man-to-machine and machine-to-machine Web services); and,
3. Reengineer the infrastructure (to make room for utility computing in the mix of platform choices).

The new platforms allow government to shift its focus from owning infrastructure to exercising it. It has been a long time coming.

In the dozen years since its introduction, e-government and its cornerstone – the portal – has matured from a project to a platform. The distinction is an important one. Marc Andreessen, the co-creator of the browser, observes, “A “platform” is a system that can be programmed and therefore customized by outside developers – users – and in that way, adapted to countless needs and niches that the platform’s original developers could not have possibly contemplated, much less had time to accommodate.”<sup>11</sup> In Andreessen’s experience, the browser became an accidental platform. In government, the portal was envisioned early on as a platform for organizing government service delivery in one place. It just took a while for them to realize the potential.

## II. Going Mobile and Going Social: *Government as Your BFFL*<sup>12</sup> -- Anytime, Anywhere

If e-government has been perfected, it has been perfected for the desktop or laptop experience — a 13 to 20 inch screen viewed from about two feet away. State portals in South Carolina, Indiana, Virginia, California, Nebraska and Colorado all demonstrate that design still matters when considering look, feel and functionality. Design is dynamic and a recent list from mashable ranks the ten most beautiful social networks (See Side Bar: Beauty in the Eye of the Beholder),<sup>13</sup> providing a stark contrast in look and feel to conventional web design. It points up the differences in tastes of those who came of age with the original Web and those who have come into their own with Web 2.0.

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### ***Beauty in the Eye of the (Millennial) Beholder***

Images from what [Mashable](#) considers the most beautiful social networks wash over the audience, followed by a question - do any of your sites look like any of these?

1. [Virb](http://www.virb.com) (<http://www.virb.com>)
2. [Trig](http://www.trig.com) (<http://www.trig.com>)
3. [PureVolume](http://purevolume.com) (<http://purevolume.com>)
4. [my9rules](http://9rules.com/my) (<http://9rules.com/my>)
5. [Pownce](http://www.pownce.com) (<http://www.pownce.com>)
6. [Flickr](http://flickr.com) (<http://flickr.com>)
7. [Threadless](http://www.threadless.com) (<http://www.threadless.com>)
8. [shelfari](http://www.shelfari.com) (<http://www.shelfari.com>)
9. [Beautiful Society](http://www.beautifulsociety.com) (<http://www.beautifulsociety.com>)
10. [Humble Voice](http://www.humblevoice.com) (<http://www.humblevoice.com>)

Do they? See for yourself. And consider that design does matter if public agencies are to serve (and be seen as relevant) by the demographic cohort that is native to the net.

Going social begins by tapping the MySpace and Facebook communities to attract “friends” and “fans” to the portal itself with a view to driving traffic back to important service offerings. It builds from there to include posting videos on YouTube (fundamentally reinventing the PSA and making government more transparent), using folksonomies to help curate archival photos through Flickr, publishing police blotters and hosting policy hearings on twitter, connecting information and services to their geography through mashups of online mapping and wikis, and tapping people with common concerns and needs to help each other through Ning, Nexo, Twango and other social networking sites.

States as diverse as Virginia, Utah, Rhode Island and South Carolina have embraced Web 2.0 entry points for their portals. On first blush, it might seem quaint or gimmicky for a portal to have “friends” on MySpace, Facebook, Ning, Nexo or any number of other social networks. But the genius of making friends is that it places government in the middle of social networks (which, by definition, are places where people like to congregate) rather than expecting people to find and come over to a government website without an introduction through a trusted social networking entry point is on the citizens’ turf and the en-

environment. The engagement is on the citizens’ terms. They will and they do link back to the portal, which has been effectively repositioned as a non-exclusive door to the suite of services and information that stands behind it. In other words, being a friend on social networks helps government act more like the public it serves.

There are other dimensions to the Web 2.0 reconsideration of the portal. Virginia.gov has introduced a number of Google gadgets, which add useful features and functions to the presentation of information and services. Interestingly, there is an open source dimension to

gadget making. Open Social is a standard way to build new features or widgets and plug them into social networks all over the web, including social networks such as Facebook, MySpace and Ning.<sup>14</sup>

Making information and transactions developed for the desktop browser useful and actionable from nomadic devices with postage stamp-sized screens becomes more important as growing numbers of users eschew land lines and PCs for mobile phones and other untethered devices. By mid-2008, a third of American households had abandoned conventional phone service in favor of mobile service. The number of cellular alone homes jumps to two-thirds in households headed by people under the age of thirty.<sup>15</sup>

There are now entire generations for whom the native environment is not radio and television but social operating systems, collective intelligence, data mashups, grassroots video, collaboration webs, and mobile broadband. They expect more of online communities than those who came of age somewhere between the TV and the PC. As the Internet returns to its social roots through Web 2.0 features such as blogs, wikis, social networks, mashups and viral video, the new features are rapidly adopted by a large and growing user base who expect nothing less.

With the digital majority, government and its agents have an opportunity to follow citizens home, or to work, or to their preferred 'third place' – but not in a creepy way – to monitor satisfaction with the services they receive. Of course, the third place may not just be the corner coffee shop but almost anywhere in an uncontrolled environment, which is exactly where timely access to actionable information and transactions are more valuable to the recipient than under more conventional circumstances.

Even as work continues to finish what states started in their transition to online service delivery, the 2008 Digital States survey results indicate there has been wide scale experimentation and significant adoption of collaborative Web 2.0 technologies among public agencies. Listservs, the long established Web 1.0 tool used by more than two-thirds of states (60%) of states, have been joined by wikis in a quarter (26%) for sharing information of common interest and concern. RSS Feeds – alternatively known as Really Simple Syndication, RDF Site Summary, or Rich Site Summary – are common (90%) for broadcasting information to interested users, and almost three-quarters of states (72%) are using podcasts somewhere within the executive branch. Just less than half of states are using Text Messaging (49%), mashups (46%), and blogs (44%).

Government is also beginning to tweet. That is tweet as in the verb form of Twitter, a micro-blogging service based on short messages or "tweets" that can be sent via PC, phone, instant message and numerous third party applications. The accompanying sidebar, Tweet Me, provides subscription links to a sampling of public twittering. A certain insider status is conferred on Twitter users who can follow developments on matters of shared interest through short messages from public officials and agencies. States as diverse as Vermont, Kentucky, Colorado, Utah and Rhode Island are early adopters of Twitter.

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***TWEET ME: The new water cooler chatter***

California Department of Vehicles:  
[http://twitter.com/CA\\_DMV](http://twitter.com/CA_DMV)  
Governor Arnold Schwarzenegger:  
<http://twitter.com/schwarzenegger>  
CALPERS: <http://twitter.com/CalPERS>  
Colorado: <http://twitter.com/coloradogov>  
Kentucky: <http://twitter.com/kygov>  
Louisville, Kentucky:  
<http://twitter.com/louisvillekygov>  
Louisville, Kentucky Metro Government  
Events Calendar: <http://twitter.com/loukyevent>  
Maine: [http://twitter.com/www\\_maine\\_gov](http://twitter.com/www_maine_gov)  
Michigan Governor Granholm:  
<http://twitter.com/govgranholm>  
Lieutenant Governor of Michigan:  
<http://twitter.com/johncherry>  
Nebraska: <http://twitter.com/nebraskagov>  
Rhode Island: <http://twitter.com/rigov>  
South Carolina: <http://twitter.com/SCGOV>  
Utah: <http://twitter.com/UtahGov>  
Vermont: <http://twitter.com/vermontgov><sup>16</sup>

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The social impulses of Web 2.0 are also evident in the penchant to share things online – views, music and photos. And it isn't just cell phone photos or pictures from your last vacation. The National Archives of the Library of Congress made a small portion of its 14 million photos available more widely by posting them online. Instead of building an online photo archive of its own, it opted to partner with the commercial photo sharing site, flickr. The Library's goals were threefold:

1. To share photographs from the Library's collections with people who enjoy images but might not visit the Library's own Web site.
2. To gain a better understanding of how social tagging and community input could benefit both the Library and users of the collections.
3. To gain experience participating in Web communities that are interested in the kinds of materials in the Library's collections.<sup>17</sup>

In short, the library's flickr experiment explored the wisdom of crowds and the use of folksonomies in helping to curate part of its collection. And here too, a venerable public institution is learning to act more like the public it serves.

The anytime, anywhere access also has the secondary benefit of saving trips to the library itself – an issue that has recently taken on added significance. Still, on first blush, Web 2.0 seems like uncharted territory to public officials and policy makers. There is a tendency in some jurisdictions to stay on the sidelines until the benefits of social media are proven somewhere else. It is important to remember that public agencies are not starting from scratch in this foray into Web 2.0 – the policy framework, support, and political will, that grew out of the original e-government movement provide a solid foundation on which to stand in experimenting with – and, ultimately, implementing – Web 2.0 features that encourage greater public engagement and deliver against public expectations in an increasingly social, mobile and hyper localized world.

### III. Going Green and Going Home: Sustainability by Saving Trips at Both Ends of the Transaction

The portal and online service delivery saves trips for the public and public employees alike. When large volumes of routine transactions move from conventional front counter delivery to the network, it takes people and cars off the road and contributes to jurisdictions' ability to meet their climate protection goals.

In a recent straw poll of state CIOs and their associates, 60 percent said the sustainability movement may finally provide telework with the traction it has long needed.<sup>18</sup> The rationale is that any shift in power usage by sending public employees home is more than offset by the fuel savings and other environmental benefits realized by taking cars off the road.

The Commonwealth of Virginia has taken a disciplined approach to telework. The state's scheme is anchored by legislative direction to meet telework goals by certain dates. The Governor has responded with a structure for ensuring both productivity and energy savings as public employees integrate telework into their work lives. The executive branch offsets only a modest list of telework essentials in terms of equipment, connectivity and supplies. The upfront restraint is a deliberate effort to ensure that going green saves green, rather than adding a new layer of cost to state operations.<sup>19</sup>

But how do you send public employees home without a degradation of the availability of public services? The long list of online self service transactions in Figure 1 above point to at least part of the answer. The good news is that the high implementation rates for most of the services suggest that they are ready to contribute to sustainability efforts. The bad news is that the tougher, more complex transactions are not yet available in all states, limiting the opportunity for quick and sustainable wins. The word *quick* deserves qualification. More properly, the ready availability of online self service is more accurately described as payment of a dividend for decisions and investments made years ago.

Such a green dividend from e-government is seen clearly in Utah where Governor Jon Huntsman implemented a four day work week for state employees in August 2008. The move promised to save trips but the Utah plan called for closing governments each Friday. Closed buildings can go dark and cold, netting energy and cost savings from reduced heating, air conditioning and lighting use.

But still, what about service delivery during a four day government work week? The governor was satisfied that the state portal, Utah.gov, and its suite of more than 600 online transactions were sufficiently broad and deep that the public would be able to conduct business with its government even when the buildings were dark and the employees were at home.<sup>20</sup>

With the green-inspired move, e-government has now proven its operational value in ways analogous to what the Automated Teller Machine (ATM) did to banking hours 25 years ago, or what online banking did for self service banking in the last decade. But Utah's move was more than that.

The governor was clear on this point – the state could not and would not have introduced a four day work week with all of its sustainability-related benefits without a mature e-government platform to keep services available. The single act in Utah is more than symbolic. It is the validation of a long held view that e-government could be – and is – transformational.

**Conclusion:** *Crisis, Complications and the Power of an Idea*

*Only a crisis, real or perceived, produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around.*

*-Milton Friedman*

The closing years of the first decade of the 21<sup>st</sup> century are likely to be remembered for their complexities and crisis. We would do well to remember Milton Friedman’s observation.

As with past crises, there will be “ideas that are lying around.” E-government is one such idea. As an idea, e-government, the portal and the larger campaign for government modernization are unique among ideas lying around in that they have a proven track record. It is lying around in the sense that it is taken for granted. It is lying around only in the sense of its still largely latent potential to change the cost structure and service delivery stance of government. If not e-gov, then what? If not now, when?

Real life has intruded on business as usual and government as usual. The historic analogies used to describe the current chapter of the country’s economic life are pretty bleak. Mistakes and misdeeds have shaken faith in the nation’s financial structures ... and, to a certain extent, its future. But Americans by their nature enjoy an enduring optimism. History also suggests that, buoyed by that unique national optimism, Americans have dusted themselves off and went on to make a better place of what their forbearers had made of this land.

Winston Churchill famously captured the sentiment less romantically when he concluded that Americans always do the right thing ... but only after exhausting all the other possibilities. Atom-based institutions are exhausted, crushed under the weight of paper-based processes and brick and mortar edifices that have atrophied into mausoleums to tired and discredited bureaucracies. Do you suppose there are any good ideas lying around?

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- 7 The archive of the executive management scorecards are available at <http://www.whitehouse.gov/results/agenda/scorecard.html>
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- 16 Twitter subscription list compiled by Joseph Morris of the Center for Digital Government, August 2008.
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- 19 Conversation with Peggy Ward, Chief Information Security Officer of the Commonwealth & VITA Internal Audit Officer, Commonwealth of Virginia, Milwaukee, WI: September 23, 2008.
- 20 Conversation with Steve Fletcher, Chief Information Officer, State of Utah, Milwaukee, WI: September 23, 2008.

## IRONY, INSANITY, AND CHAOS

*By David A. Rosenberg, Esq.*

**WARNING: All attorneys practicing in the Commonwealth of Virginia must maintain a working knowledge of repealed laws in Virginia, because they may not have been repealed, at least not some of them, for some people.**

This startling admonition stems from the holding in *City of Norfolk v. Kohler*, 362 S.E.2d 894 (Va. 1987), and its application in *Garraghty v. Commonwealth of Virginia*, 52 F2d. 1274 (4th Circ. 1995).<sup>1</sup> *Kohler*, relying on its interpretation of the former § 1-16 of the *Code of Virginia* (now § 1-239), holds that substantive rights under a former law cannot be repealed or in any way whatever affected by the enactment of a law. *Kohler* at 345.

Betty Kohler was hired as Deputy Director of the City of Norfolk Public Library on February 5, 1973. At that time, § 12 (7) of Norfolk's charter granted by the General Assembly, ch. 34, 1918 Va. Acts, provided that "no officer or employee in the classified service shall be...discharged except for cause and upon written charges, and after an opportunity to be heard in his own defense." *Kohler* at 343.

In 1977, the General Assembly amended the City of Norfolk's charter to exclude assistant heads of administrative departments (like Ms. Kohler) from the "classified service." Accordingly, in 1978, she was discharged without the notice or hearing required when discharging employees in the classified service.

The trial court ruled that "Kohler's 'right to continue gainful employment as a civil service employee, unless terminated for cause, was a right that had accrued at the time she was hired and could not be taken away involuntarily by the 1977 charter amendment.'" *Kohler* at 344.

On appeal, the Supreme Court of Virginia affirmed the trial court's decision. The Court recognized the general rule that employment rights conferred by the legislature on government employees can be modified or repealed lawfully by subsequent legislation. However, the Court held that its decision was controlled by § 1-16 of the *Code of Virginia*,<sup>2</sup> which states, as follows:

**§ 1-16. Repeal not to affect liabilities; mitigation of punishment.** -- No new law shall be constructed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter held shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of

the party affected, be applied to any judgment pronounced after the new law takes affect.

The Court held that Ms. Kohler's coverage under Norfolk's charter as it existed prior to the 1977 amendment, constituted a substantive right, "and in the language of Code § 1-16, a 'right accrued...under the former law' which could not be repealed or in any way whatever affected by the enactment of the new law." *Kohler* at 345.

In so holding, the Court erroneously elevated an ancient rule of statutory construction to an absolute restriction on legislative authority.

### **Rule of Statutory Construction**

Section 1-16 and its predecessors have been in effect for more than 100 years. This statute was part of Chapter 2 of Title 1 of the *Code of Virginia* which is entitled "Common Law, Statutes and Rules of Construction" (emphasis added). That this statute constitutes a rule of statutory construction is evident on the face of the statute: "No new law shall be construed..." (emphasis added). If § 1-16 were intended as an absolute restriction, then the words, "be construed," would have been omitted. See *Virginia & West Virginia Coal Co. v. Charles*, 251 F. 83 (W.D. Va. 1917) (Applying an identical predecessor to § 1-16 as a rule of construction).

As a rule of statutory construction, § 1-16 should be applied within the legal frame work for all such rules. In this regard, the province of construction lies wholly within the domain of ambiguity, and a court may resort to rules of statutory construction only when there is obvious ambiguity or uncertainty. See *Brown v. Lukhard*, 229 Va. 316, 330 S.E.2d 84 (1985); *Hampton Roads Sanitation District Commission v. City of Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978). Moreover, the cardinal rule of all rules of statutory construction is that the intention of the legislature always reigns supreme. See *Anglin v. Joyner*, 181 Va. 660, 26 S.E.2d 58 (1943).

The rules of interpretation 'are resorted to for the purpose of resolving ambiguity, not for the purpose of creating it. See *In re Boggs-Rice Co.*, 66 F.2d 855 (4th Cir. 1933). A statute which is clear and unambiguous must be applied and not construed. See *Vepco v. Board of County Supervisors*, 226 Va. 382, 309 S.E.2d 308 (1983). Finally, the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction. See *Thompson v. Chesapeake & Ohio Rail Co.*, 76 F.Supp. 394 (S.D. W.Va. 1948).

It is evident that the court in *Kohler* did not apply § 1-16 within this framework. First, without identifying any ambiguity, the Court baldly stated that its decision was "controlled by Code § 1-16." *Kohler* at 345. Then, in its holding, the Court described the affect of § 1-16 as an absolute restriction on legislative authority: "[I]n the language of Code § 1-16, a 'right accrued...under the former law' which could not be repealed or in any way whatever affected by the enactment of the new law ...." *Kohler* at 345 (emphasis added). The court's omission of the main predicate of the statute ("construed"), evidenced its misapprehension of the intent of the statute.

In short, the Court in *Kohler* did not even go through the motions of complying with the legal prerequisites for using a rule of statutory construction before invoking § 1-16. Moreover, it is

clear that any attempt to fulfill the prerequisites would have been futile, because the charter amendment in question was unambiguous.

The charter amendment simply stated that "assistant heads of administrative departments...shall not be included in...classified service." There was no ambiguity whatsoever in the scope of persons covered. The only normal, natural interpretation of the amendment is that it applied to any person occupying the position of assistant administrative department head anytime after the effective date of the amendment. Thus, there was no ambiguity in the intent of the legislature to cover current as well as future employees who are "assistant heads of administrative departments" after the effective date of the statute. In short, there simply was no uncertainty that the statute on its face applied to Ms. Kohler. In fact, the whole *Kohler* decision is based on the implicit assumption that, but for the invocation of § 1-16, the amendment clearly would apply to Ms. Kohler.

Likewise, *Garraghty* involved a similar situation regarding a state government employee. There, the employee (David Garraghty), as a warden in the Department of Corrections, initially was covered under the Virginia Personnel Act (§ 2.1 et seq. of the *Code of Virginia*), from which flowed to him certain conditions of employment similar to Ms. Kohler's.

However, the General Assembly then amended the Virginia Personnel Act, specifically removing wardens (and other high level state employees) from its coverage. Subsequent to the effective date of this amendment, certain personnel actions were taken against Mr. Garraghty in a manner which varied in certain substantial respects from what he would have received had he still been covered under the Virginia Personnel Act.

In the interlocutory appeal, the Fourth Circuit held, based on *Kohler*, that the new law was inapplicable to Mr. Garraghty. Accordingly, the District Court, on remand, ruled in the plaintiff's favor on the claims in the case related to this issue.

As in *Kohler*, it is clear that the "new law" in question in *Garraghty*, on its face, clearly applied to Mr. Garraghty, and to all other employees occupying certain positions after the effective date of the statute, regardless of the date they were originally hired into the position. It is inconceivable that the legislature would have intended the "interpretations" arrived at in the *Kohler* and *Garraghty* decisions. That is, one would have to believe that the legislature really wanted the new laws to apply only to employees who were hired into the positions in question after the effective dates of the new laws, but intentionally declined to include such limiting language, preferring (through some sort of perverted, legislative joke) to leave it to chance that a court might improperly invoke an ancient statute and thereby read into the statute the unspoken limiting language.

### **A Statutory Constitutional Amendment?**

But if it is so obvious that the legislature intended to cover the very employees who were before the courts in *Kohler* and *Garraghty*,<sup>3</sup> it is also obvious how flawed it is to thwart such intention by invoking § 1-16, which is nothing more than a prior legislative statement. That is, even if one

were to read § 1-16 incorrectly as a prohibition rather than as a rule of statutory construction, it could not be binding against the collective intent of a subsequent legislature. *See Stone v. Mississippi*, 101 U.S. 814 (1880). Each General Assembly is newly authorized to do whatever is not forbidden by the state or federal constitution. *See Quesinberry v. Hull*, 159 Va. 270, 165 S.E. 382 (1932). Unlike Congress, the state legislature has all powers except those that are specifically forbidden constitutionally. *See Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 77, 97 S.E. 362, 368 (1918).

To read § 1-16 as an absolute restriction on subsequent legislative authority, would be to elevate it to constitutional status. Under this rationale, Virginia's Constitution could be amended (or done away with) in any legislative session by a simple majority of the General Assembly. Of course, such attempts would be patently unconstitutional. *See Va. Const. art. XII, §§ 1-2* (prescribing sole means of amending constitution). It, of course, follows, that *Kohler's* elevation of § 1-16 to constitutional status is itself unconstitutional, because it either assumes an unconstitutional legislative intent in the creation of § 1-16, or worse, represents a judicial attempt to amend the Constitution.

### **Not Retroactive**

Both *Kohler* and *Garraghty* refer to § 1-16 as protecting against the "retroactive" application of statutes. *Kohler* at 345; *Garraghty* at 13. The specter of the retroactive bogeyman hovers over the cases, without any rational discussion of retroactivity. This talismanical waving of the retroactive wand does not work for two reasons.

First, in the civil arena, there is nothing inherently illegal or bad with statutes having retroactive affect. *See, e.g., United States v. Carlton*, 512 U.S. 26 (1994) (retroactive legislation permitted with mere showing of rational legislative purpose); *Etzler v. Dille*, 249 F. Supp. 1 (WD Va. 1965) (no express prohibition in Virginia Constitution against a statute operating retroactively). More importantly, in any event, there can be no doubt that neither the *Kohler* case nor the *Garraghty* case even presented a situation constituting the retroactive application of a statute. In both cases the "new" laws were applied prospectively, that is, applied to situations as they were found subsequent to the passage of the new laws. Ms. Kohler was fired after the effective date of the new law. There was no retroactivity involved.

True retroactivity in this situation would have required the City of Norfolk to have sought a termination date which preceded the enactment of the amendment to the charter. One can suppose that in such an unlikely situation the City might have sought outrageously to terminate Ms. Kohler retroactively to her first day of employment, and seek reimbursement for all salaries paid to her, and the value of all fringe benefits provided to her. Obviously, the case did not involve such a situation, and obviously, it did not involve the retroactive application of a new law. *See FHA v. The Darlington*, 358 U.S. 84 (1958) (new legislation not retroactive merely because impacts on previously acquired rights, because "appellee is not penalized for anything it did" before effective date of new law).

What probably is actually lurking behind the superficial sighting of retroactivity in *Kohler*, is a vague notion of "unfairness" because Ms. Kohler somehow "relied" on the prior law, her long-time livelihood was at stake, and she was in a category of persons who, more so than a random sampling of citizens, was more likely to be affected by the new law. But, if such a notion equates with retroactivity, then almost all laws are retroactive. Clearly, the likelihood of a person having to deal with a new law after it is enacted, has nothing to do with whether the law is being applied to the person retroactively. Further, as noted by the United States Supreme Court, the cry of "detrimental reliance" is as applicable to prospective legislation as it is to retrospective legislation, but neither one is thereby rendered unenforceable. *United States v. Carlton*, 512 U.S. 26 (1994).

Were we to apply *Kohler's* novel sense of "retroactivity" in the criminal law area, in a pure "ex post facto" context, we clearly see its folly. For example, imagine a criminal defendant claiming as follows:

My business and livelihood have been completely reliant on manufacturing and selling this drug which became statutorily illegal in Virginia on July 1. In fact, I chose Virginia as the site for my business because the drug had long been legal in Virginia, and my discussions with the political leaders in Virginia at the time assured me that the substance would remain legal to manufacture and distribute.

Clearly, these claims would constitute laughable attempts to establish an "ex post facto" defense if the defendant were charged with manufacturing and distributing the controlled substance after the effective date of the new law. But, if this is to clear in a case involving the loss of liberty and a constitutional protection, then surely no greater protection should be afforded in the civil arena. Put another way, if the above-described hypothetical criminal defendant relied on *Kohler* instead of the "ex post facto" doctrine, then, unfortunately, his defense suddenly may not be so laughable.

### **Broad Reach of Section 1-16**

Lest any lawyer or citizen not involved in the field of public employment be lulled into a feeling of false security, § 1-16 potentially refers to all new laws ("No new law shall..."), and therefore is not restricted to laws affecting public employment, or even employment. It could apply to all substantive areas of laws: domestic relations, tax, private employment, corporate law, estate and trusts--everything.

In this regard, which categories of people might be accorded the same status as Ms. Kohler? For the application of new divorce laws, would it be the people who held the status of marriage at least the day before and the day after the new law? For new tax laws, would it be the people whose business or personal financial situation put them in the scope of the new law prior to its effective date? For new employment laws, would it be all people who are employees or employers prior to the new law? Would a new law regulating certain utilities be "inapplicable" insofar as it negatively impacted current employees or stockholders of the utilities in question?

## Due Process-Garraghty, Son of Frankenstein

The *Kohler* Court, in dicta, spoke briefly about the plaintiff's claim based on due process grounds. The fallacy implicit in this dicta goes hand-in-hand with the Court's fallacious application of § 1-16. The due process issue unfortunately comes full circle in *Garraghty*, because *Garraghty* used *Kohler*'s fallacious holding regarding § 1-16 to uphold the plaintiff's due process claim.

The *Kohler* Court stated that "[m]uch of the argument on appeal focused upon the question whether the 1918 city charter had conferred upon *Kohler* a property interest in continued employment protected by the Fifth and Fourteenth Amendments of the United States Constitution..." *Kohler* at 344. The court then spoke approvingly of this argument in note 2:

While we need not decide the issue here, we note the logic of *Kohler*'s due process argument. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-41 (1985), the United States Supreme Court decided that two 'classified [state] civil service employees...who could not be dismissed [except for cause] possessed property rights in continued employment' and therefore, were entitled to the protection of the Fifth and Fourteenth Amendments.

The problem with this statement is that *Loudermill* has nothing to do with *Kohler*. In *Loudermill*, the Ohio statute in question was one which clearly prohibited the two employees in question from being discharged without just cause, and had not been repealed. *Loudermill* merely held that states cannot haphazardly ignore current laws providing public employees with certain employment rights, without running afoul of constitutional procedural due process requirements.

As stated in *Loudermill*, in these types of cases, property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules of understanding that stem from an independent source such as state law. The due process clause merely mandates adherence to certain procedural safeguards before depriving an individual of a property interest established under state law.

Accordingly, in these types of cases, it is nonsensical to contemplate a property interest grounded independently in the due process clause. Only the state law can create the property interest, and there is no constitutional obligation to create the property interest. Similarly, if a state law does create such an interest, there arises no obligation to refrain from repealing or modifying it through the appropriate legislative or rule-making process.<sup>4</sup> Otherwise, the legislative process would not remain flexible to respond to dynamic, ever-changing events; to be free to experiment with different solutions; and to repeal or modify legislation when experience points to better solutions.

Legislatures, of course, can and do, as a matter of policy, consider the impact on citizens of constantly changing the laws. In this regard, the open procedures involved in legislative law-making, as well as the ballot box, are sufficient safeguards against "unwise" or too frequent changes in the law.

Ironically, however, *Kohler's* flawed appraisal of the validity of the due process argument, becomes accurate in a post-*Kohler* environment. That is, the due process clause is triggered when state law creates an expectation of a "right." Without *Kohler*, there is no reasonable expectation under the laws of Virginia that the laws of Virginia would not change. Thus, in a bizarre twist, *Kohler* self-fulfilled its own incorrect dicta regarding due process, by becoming part of the law on which citizens like Mr. Garraghty, may be assumed to rely. In this respect, *Garraghty* is nothing more than the expected offspring of *Kohler*. Specifically, in *Garraghty*, the plaintiff's due process claim was based squarely on *Kohler's* interpretation of § 1-16. Without this link, there could not have been any valid due process claim, because, but for *Kohler*, there could have been no rational expectation that the new law (which converted the plaintiff to an "at will" employee) did not apply to the plaintiff.

### **Irony**

One irony of *Kohler* is that, in the long run, it could lead to a legislative reluctance to experiment with affording any new rights or privileges to public employees. That is, if a legislature thinks that if it provides new rights to public employees, then such rights can never be repealed except as to future employees, (regardless of the future unknown consequences), it may choose not to provide such new rights solely for that reason.

Another irony of *Kohler*, is that, in other circumstances, the same rationale could be used to render ineffective new legislation intended to help employees. By placing new restrictions or obligation on employers, a new law may be said to have taken away a substantive right of the employers. Such a law, under *Kohler*, supposedly then would not apply to any current employer's current employees.

In this regard, implicit in the *Kohler* decision, and some of the cases on which it relies, is the impression of § 1-16 preventing the legislature from "taking away" something from someone. The problem with this impression is that it presumes that laws are created with a bad motive, and that, insofar as they are applied to people already "impacted" by an existing law, that the new law will result in a net taking away from society.

The danger here is that it ignores the fact that, presumably, laws are enacted to redress a concern, to remedy a problem--in short, to give more than they take. But most laws cannot give if they cannot take. That is why there are usually proponents and opponents of most new, meaningful bills.

Thus, to proclaim *Kohler's* application of § 1-16 as some sort of appropriate check on legislative mischief, ignores that the courts must presume that all laws have been drafted rationally to produce a net benefit to society. Therefore, *Kohler's* interpretation actually delays, thwarts, or restricts such benefits.

This presumption of legislative rationality would apply equally to the particular situation found in *Kohler*. That is, it must be presumed that the city charter amendment would have produced a new benefit for the city. For example, it may have made it more likely that taxpayers in the city would have had their money more efficiently spent because, with upper management employees in city government in an "at will" status, they may have been less likely to be engaged in unproductive bickering or stalemates.

Judicially declaring that such an improvement must wait for a new generation of employees (particularly in this day when citizens are demanding that government operate more like private business right away), delays the legislative benefit to the taxpayers. The fact that Ms. Kohler or any other individual may microscopically view herself worse off under the new law is commonplace, but irrelevant to the legislative authority to have the law apply to her.

### **Insanity and Chaos**

The problem with "monkeying" around with rules of statutory construction is that, instead of resolving ambiguities, more ambiguities are created, and instead of simplifying the process of statutory creation and interpretation, it is made more complex and cumbersome.

To emphasize this point, suppose the amendment to the city charter in *Kohler* included the following "tag" line: "This amendment applies to all current and future employees, notwithstanding anything to the contrary in other laws, including § 1-16." Certainly, even the *Kohler* Court would concede that such language would nullify the rationale relied on in *Kohler*. More precisely, because the *Kohler* Court's rationale was illogical, the foregoing additional language would not nullify the court's rationale, but would so expose the initial sleight of hand which made § 1-16 appear out of thin air, that even the best judicial magicians would refrain from performing the trick in the first place.

Imagine further the chaos of a legal system which had a built-in (but ever-changing) segment of the population "grandfathered" against the operation of every new law. The only system which could be worse would be one in which this "grandfathering" might be taking place, but one cannot be sure until a court decides whether the law involved a "substantive" or "vested" right. That, however, is the system with which *Kohler* has left us.

### **What's The Real Story?**

It is not the intent of this article to impugn in any way the competence, integrity, or judicial ability of the members of the *Kohler* Courts.<sup>5</sup> I have appeared before that Court and know that the legal abilities of its members far surpass mine. It is always easy in hindsight to find areas of disagreement by microscopically examining one case at leisure out of the hordes which a court must decide.<sup>6</sup>

Why, then did the Court<sup>7</sup> rule so erroneously in a case with such devastating potential ramifications? I believe it was a classic case of "bad facts make bad law," and that the ramifications were not considered, and thus, were not expected.

The Court may have viewed it as a situation where the sovereign powers of city and state combined to go after alone, individual librarian who thought her employment should be for life. With such a view in mind, the Court may have seduced itself into unnaturally dragging § 1-16 out of the closet, throwing some make-up and a wig on it, and shoving it onto the stage to end the play pathetically on its own.

If such were the case, however, it would have been preferable for the Court to have relied on some type of implied contract theory. That is, the Court might have held in Ms. Kohler's particular situation, that at the time she was first hired, city officials gave her the impression that the conditions of her employment would never be changed (not even by the act of the state legislature). Under this rationale the general applicability of the new charter (and all other new laws), and the authority of the legislative branch of government would not have been implicated. Rather, the City merely would have been stopped from relying on the new law against Ms. Kohler.

But this scenario did not happen; leaving us awash in irony, and poised on the precipice of insanity and chaos.

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<sup>1</sup> The Garraghty opinion which is cited is from an interlocutory appeal from the District Court. On remand, the District Court then applied the portion of the appeals court's opinion discussed in this article.

<sup>2</sup> § 1-239, the successor to § 1-16, is identical to § 1-16.

<sup>3</sup> In fact, in *Garraghty*, the Court plainly stated that although Mr. Garraghty was covered under the Virginia Personnel Act when he was hired in 1985, the legislature enacted an amendment to the Virginia Personnel Act that specifically excluded wardens from its protection. *Garraghty* at 3. In addition, the Court even noted that "there was some evidence in the record that this amendment was known as the 'Garraghty Bill' and was passed in reaction to Garraghty's criticism of various correctional policies." *Garraghty* at 3.

<sup>4</sup> In fact, ironically, the Court in *Kohler* acknowledged the obvious lack of any constitutional restraint on amending or repealing laws by noting that the rule of general application is that "employment rights conferred by the legislature on government employees can be modified or repealed by subsequent legislation." *Kohler* at 344 -45.

<sup>5</sup> The Chief Justice and two other Just ices dissented in *Kohler*. Their three paragraph dissent concisely described their disagreement with the majority opinion:

The majority acknowledges the general rule that 'employment rights conferred by the legislature on government employees can be modified or repealed lawfully by subsequent legislation.' Nevertheless, the majority proceeds to find that a 'substantive' right was conferred upon Kohler under the fact s of this case and then determines that the decision if 'controlled' by Code § 1-16. I disagree.

<sup>6</sup>In this vein, one may ask why the thrust of this article appears to be aimed at judicial interpretation, rather than at legislative repeal of § 1-16. First, § 1-16, properly read as a rule of statutory construction is not a problem, and need not be repealed. Second, under the rationale of *Kohler*, repealing § 1-16 may do nothing to diminish the uncertainty of all laws repealed prior to the repeal of § 1-16. In this regard, ponder the conundrum created under the *Kohler* rationale, if a hypothetical law, which states, "No new law will be enacted," is purportedly repealed by a subsequently enacted law.

<sup>7</sup>The Garraghty decision is not dealt with here, because *Garraghty* was controlled by *Kohler*, as *Kohler* constituted the interpretation of a state statute (§ 1-16) by the Commonwealth's highest court.

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