Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process—Shamrock Development v. Smith

Jessica Klander

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol36/iss1/4

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.fellofer@mitchellhamline.edu.
© Mitchell Hamline School of Law
CIVIL PROCEDURE: FACEBOOK FRIEND OR FOE?: THE IMPACT OF MODERN COMMUNICATION ON HISTORICAL STANDARDS FOR SERVICE OF PROCESS—SHAMROCK DEVELOPMENT V. SMITH

Jessica Klander†

I. INTRODUCTION .............................................................................................. 241
II. HISTORY ........................................................................................................... 243
III. THE SHAMROCK DEVELOPMENT DECISION ............................................. 247
IV. ANALYSIS ....................................................................................................... 250
   A. Shamrock Decision .................................................................................... 250
   B. Shamrock Decision: Unconstitutional? ..................................................... 251
   C. Changing Patterns of Communication: The Facebook Phenomenon ........ 254
   D. The Trend: Case Law and Rule Changes ................................................. 260
   E. Shamrock Decision: Call for Statutory Change ....................................... 263
V. CONCLUSION ................................................................................................. 265

It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the court.¹

I. INTRODUCTION

Service of process is a critical aspect of litigation.² In an

† Jessica Klander grew up in Saint Cloud, Minnesota. She earned her Bachelor of Arts degree in English Literature in 2004 from Macalester College in St. Paul, Minnesota. Before attending law school she worked as a sales account executive, an office manager, and most recently as a licensed independent insurance agent in Becker, Minnesota. Jessica is expected to receive her juris doctor from William Mitchell College of Law in May 2010.

² See Rachel Cantor, Internet Service of Process: A Constitutionally Adequate Alternative?, 66 U. Chi. L. Rev. 943, 945 (1999) (“A fundamental component of due process is the opportunity to be heard; that opportunity is worthless unless the
adversarial system, the rules safeguarding service of process ensure that the defendant is able to properly defend and be fairly heard. Yet, perhaps because it forms the bedrock of procedural due process, it is among the slowest rules to adapt to modern-day litigation. The standards for substituted service, specifically service by publication, are controlled by case law over a century old. Despite the amenability, speed, and efficiency of modern-day technology, service by publication has not been modified to reflect these advances. Recently, in Shamrock Development v. Smith, the Minnesota Supreme Court reaffirmed, and perhaps further tightened, the historic restrictions on service by publication. Critics and commentators have begun to challenge the efficacy of restrictions on service by publication, asserting that electronic publication may not only be constitutionally permissible, but a superior means of effecting service. As one commentator suggested, “[electronic publication] offers a potentially greater likelihood to effect notice than traditional methods of publication.”

defendant is aware that there is a matter pending against her.”); Aaron R. Chacker, Effectuating Notice: Rio Properties v. Rio International Interlink, 48 Vill. L. Rev. 597, 599 (2003) (“American jurisprudence regards notice as a fundamental procedural component of commencing litigation.”) (citation omitted).
3. See Cantor, supra note 2, at 945 (noting that notice protects defendants’ constitutionally protected right of due process); Chacker, supra note 2, at 602 (noting that due process requires defendants to be given notice of hearing against them and the opportunity to raise objections).
4. See Adriana L. Shultz, Comment, Superpoked and Served: Service of Process Via Social Networking Sites, 43 U. Rich. L. Rev. 1497, 1499, 1528 n.10 (2009) (“The requirement that plaintiffs give notice to defendants of claims against them has existed in some form for over 4,000 years . . . . One of the earliest known legal codes, the Code of Eshmunna, required plaintiffs to ‘shout’ or ‘speak’ their cause of action.”) (citing Revu'yan Yaron, The Laws of Eshmunna 118–19 (Magnes Press 1988)).
7. 754 N.W.2d 377 (Minn. 2008). See infra notes 70–77 and accompanying text.
8. See infra Part IV, notes and accompanying text.
This note first examines the history of service of process and the evolution of service by publication. It then details the Minnesota Supreme Court’s holding in Shamrock, followed by an analysis of that decision. The note then explores the constitutional sufficiency of electronic service and how it may actually be constitutionally required, given the wealth of evidence suggesting that electronic communication is an increasingly prevalent medium for social interaction. Furthermore, case precedent and recent amendments to the Minnesota Rules of Civil Procedure show a widespread trend towards further incorporation of electronic processes, indicating that a similar shift is likely for service of process. Finally, the note concludes that because the Shamrock court’s decision further restricts service by publication notwithstanding modern technology and constitutional notions of service of process, the ruling may be unconstitutional and in need of reevaluation.

II. HISTORY

The Fourteenth Amendment of the United States Constitution promises that no state shall “deprive any person of life, liberty, or property, without due process of law.” The cornerstone of due process is to guard against governmental abuse of power and to ensure the opportunity to be heard, which is enforced through jurisdictional limitations. Historically, a state’s jurisdictional power to confer a judgment on an individual was based on territorial boundaries and the individual sovereignty of the states. Thus, in order to establish personal jurisdiction, the defendant was to be personally served within the boundaries of the state. If this was impossible, there were only limited instances where substituted

10. See infra Part II.
11. See infra Part I.
12. See infra Part IV.A.
13. See infra Part IV.B.
14. See infra Part IV.C.
15. See infra Part IV.D.
16. See infra Part IV.D.
17. See infra Parts IV.E, V.
service was an appropriate means for providing adequate notice.  

Of the alternatives available for providing notice, service by publication has traditionally been viewed most harshly by the courts, because it is deemed to provide essentially no notice at all. The Court’s skepticism is evident in the 1878 case that laid the common law foundation for personal jurisdiction, Pennoyer v. Neff. In Pennoyer, the Court greatly restricted the use of service by publication by requiring that the defendant be personally served within the boundaries of the state in order for jurisdiction to exist. An exception allowing service by publication was made for actions concerning property within the state that had been seized from a nonresident owner. Conversely, the court explained that where the defendant was a nonresident and the cause of action did not involve property within the state, service by publication was always invalid.

This ruling was adopted into Minnesota law and reflected in a 1917 ruling involving an alimony judgment. In Roberts v. Roberts, the Minnesota Supreme Court affirmed the common law standard, holding that service by publication is void where the defendant is a resident of the state and can be found. But where the defendant resides in the state and intentionally evades service of process, service by publication is valid. As businesses expanded nationally and the complexity of multi-party litigation became more prominent, the physical presence standard set by Pennoyer became

22. See McDonald v. Mabee, 243 U.S. 90, 92 (1917) (holding that delivery of summons to a defendant’s last and usual place of abode is sufficient due process in some circumstances); see also Shultz, supra note 4, at 1503–05 (delineating the expansion of the law to include alternative forms of substitute service including: service by publication, mail, telefax, facsimile, and e-mail).

23. See Mullane, 339 U.S. at 315 (“Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper”); Yvonne A. Tamayo, Are you Being Served?: E-mail and (Due) Service of Process, 51 S.C. L. Rev. 227, 242 (2000) (“[S]ervice of process through posting or publication often provides less certainty that notice will reach the defendant than other methods of notification.”); Woods, supra note 9, at 444 (“[P]ublication cannot reasonably be argued to provide notice.”); id. at 444–45 (“Any defendant outside of that area is virtually assured of not being notified.”).

24. 95 U.S. at 724.
25. Id. at 727.
26. Id.
27. Id.
29. Id. at 400, 161 N.W. at 149.
30. Id.
increasingly scrutinized.\textsuperscript{31} \textit{International Shoe Co. v. State of Washington} answered these concerns by expanding the \textit{Pennoyer} physical presence rule to require an analysis of the defendant’s minimum contacts within the state, rather than domiciliary status alone.\textsuperscript{32} Interestingly, although the standards for personal jurisdiction were ultimately expanded by the Court, the requirements for affected substituted service were left relatively unchanged.\textsuperscript{33} Therefore, a defendant might meet the standards for minimum contacts within a state, but jurisdiction does not exist until the defendant has first been adequately served.\textsuperscript{34}

The standard for publication was challenged soon after the \textit{International Shoe} decision in \textit{Mullane v. Central Hanover Bank and Trust}.\textsuperscript{35} The Court recognized that although personal service is greatly preferred, when it is impracticable, substituted service may be necessary to ensure finality of the dispute.\textsuperscript{36} Although the Court determined service by publication to be adequate in \textit{Mullane}, it cautioned against the overuse of service by publication stating that “[service by publication] do[es] not sweep away the rule that within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties.”\textsuperscript{37}

“Reasonably calculated” became the formula for the constitutional standard of constructive notice.\textsuperscript{38} This formula was reflected in a 1967 Minnesota alimony suit, \textit{Gill v. Gill}.\textsuperscript{39} The court admitted that although publication is not a reliable means of notification, it is an appropriate substitute where it is “not reasonably possible or practicable to give more adequate

\begin{itemize}
  \item \textsuperscript{32} \textit{Int’l Shoe}, 326 U.S. at 316.\textsuperscript{32}
  \item \textsuperscript{33} Although the court did not directly determine the sufficiency of substitute forms of service of process, they did acknowledge the expansion of the law to include notice via registered mail when reasonably calculated to best notify the defendant. \textit{Id.} at 320.
  \item \textsuperscript{34} Shamrock Dev., Inc. v. Smith (\textit{Shamrock II}), 754 N.W.2d 377, 384 n.3 (Minn. 2008).
  \item \textsuperscript{35} \textit{Mullane v. Cent. Hanover Bank & Trust Co.}, 339 U.S 306 (1950).
  \item \textsuperscript{36} \textit{Id.} at 313.
  \item \textsuperscript{37} \textit{Id.} at 318.
  \item \textsuperscript{38} \textit{Id.} at 314.
  \item \textsuperscript{39} 277 Minn. 166, 171, 152 N.W.2d 309, 313 (1967).
\end{itemize}
The court held that notice by publication is limited to and dictated by extreme necessity.  

Minnesota law, as evidenced in the Minnesota Rules of Civil Procedure, continues to reflect the historical standard of service by publication by first requiring adequate service of process before personal jurisdiction can be established. The five circumstances where service by publication can be used are: (1) where the defendant domicile resident left the state with the intent to defraud creditors, avoid service, or remain concealed; (2) where the plaintiff has acquired a lien on property by attachment and the defendant is a resident and cannot be found, has left the state, or the defendant is a nonresident; (3) in marriage dissolution cases; (4) where the cause of action is regarding property within the state; or (5) in cases of foreclosure.

Despite the advent of the International Shoe minimum contacts standard and the constitutional formula for due process articulated in Mullane, the requisite standard for service by publication remains relatively unchanged, holding steadfastly to the historical underpinnings of personal jurisdiction and domiciliary residency. The stability of this doctrine reflects the intent to limit the expansion of service by publication and the judicial suspicion that it threatens the integrity of the due process clause of the Constitution. This is further exemplified by a recent Minnesota decision, where the courts were again asked to analyze the impact of modernity on the validity of common law standards of notice and due process. Again in Shamrock Development, Inc. v. Smith, the courts remained rigidly true to the common law restrictions of

---

40. Id. (citing Mullane, 339 U.S. at 317).
41. Id. In Gill, the resident defendant intentionally hid himself to evade service and avoid judgment against him. Id. This fact was undisputed in the case and justified the application of service by publication in order to bring finality to the dispute. The decision to implement service by publication was ultimately contingent upon the plaintiff’s success in meeting the conditions outlined in the statute. Id. So, although the Mullane formula of notice by reasonable calculation was adopted, meeting the conditions outlined by the statute remained precursory. Id.
42. See Shamrock Dev., Inc. v. Smith (Shamrock II), 754 N.W.2d 377, 384 n.3 (Minn. 2008).
43. MINN. R. CIV. P. 4.04(a).
44. See Shamrock II, 754 N.W.2d at 384 n.3; see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).
45. See Shamrock II, 754 N.W.2d at 384 n.3.
46. Id. at 378.
service by publication defined over 150 years ago. 47

III. THE SHAMROCK DEVELOPMENT DECISION

Shamrock Development, Inc. ("Shamrock") became involved in the dispute after Farm Credit Leasing Services Corporation ("Farm Credit") assigned them the right to judgment against Dakota Turkey Farms limited partnership ("partnership"). 48 The judgment came from a civil case in April 1996 in which Farm Credit prevailed against the partnership and certain individual partners, including Randall Smith ("Smith"). 49

In 2006, Shamrock decided to renew the judgment by commencing a new civil action against the debtors on the eve of the judgment’s expiration period. 50 On March 19, Shamrock attempted service of process to the partnership’s registered Medina, Minnesota address, but discovered it was now owned by a private resident unassociated with the partnership. 51 Shamrock then effected service of process on the partnership by serving the Secretary of State. 52

Subsequently, Shamrock attempted to locate Smith, an individual debtor, using an online database. 53 Despite addresses in the Farm Credit affidavit that specified Smith’s residence as in Washington, D.C. and his business in Virginia, Shamrock limited the online search to the Medina address. 54 The results indicated

47. Id. at 385.
48. Id. at 379–80.
49. Id. at 379.
50. Id. at 380. By law, all actions in Minnesota to enforce a judgment must be started within ten years of the entry of that judgment. Minn. Stat. § 541.04 (2006). Shamrock commenced the action against the past debtors just weeks before the statute of limitations expiration date. Shamrock II, 754 N.W.2d at 380.
51. Shamrock II, 754 N.W.2d at 380. The original action against the partnership included an affidavit filed by Farm Credit in which it indicated Smith’s residential address in Washington, D.C., and his business address in Arlington, Virginia. Id. at 379. Another similar affidavit identified an address in Medina, Minnesota, as both the residential and business address of one of the other partners, as well as the registered address for the partnership on file with the Secretary of State. Id. at 380. When the action by Shamrock was commenced the partnership was no longer located at the Medina address but was owned by a private resident unassociated with the suits. Id. at 379–80.
52. Id. at 380. By Minnesota law, when attempted service against an entity such as a partnership fails because the agent or partner cannot be located at the address on file with the secretary of state, the claimant can serve the secretary of state in lieu of the agent or partner. Minn. Stat. § 5.25 (2008).
53. See Shamrock II, 754 N.W.2d at 380.
54. Id.
that Smith was “associated” with the Medina address in “some manner,” but the results were largely unsuccessful.\textsuperscript{55} On March 22, Shamrock’s attorney filed a copy of the summons, complaint, and an affidavit initiating service by publication.\textsuperscript{56}

Smith moved to dismiss the claim through a limited appearance, claiming that service by publication was insufficient because he was not a domicile resident of Minnesota and the form of publication was not reasonably calculated to notify him, therefore violating his due process rights.\textsuperscript{57} The district court denied Smith’s motion to dismiss, holding that Minnesota law does not require the plaintiff to prove the factual elements necessary to exercise service by publication, but need only show a reasonable good faith belief that the elements do exist.\textsuperscript{58} The court of appeals affirmed this decision.\textsuperscript{59}

The Minnesota Supreme Court reversed the decision, interpreting the Minnesota Rules of Civil Procedure as limiting access to service by publication beyond a good faith belief in the information contained in the affidavit.\textsuperscript{60} The court held that a good faith belief was not sufficient to warrant service by publication but that the “existence of one of the enumerated circumstances is a necessary condition for service of process by publication to confer jurisdiction.”\textsuperscript{61} The holding exemplified the court’s narrow interpretation of the rule and their intent to limit the application

\textsuperscript{55}. Id. After the online database failed, Shamrock searched bankruptcy filings and hired a private investigator. Id. These efforts, albeit brief, were also unsuccessful. Id.

\textsuperscript{56}. Id. The affidavit stated: “Defendant Randall N. Smith is a resident individual domiciliary who has departed from the State of Minnesota with intent to defraud creditors, or to avoid service, or remains concealed within with the like intent.” Id. The summons was then published in Finance and Commerce, a Minneapolis business and legal newspaper, on March 24, 31, and April 7, 2006. Id. at 381.

\textsuperscript{57}. Id. at 381.

\textsuperscript{58}. Id. The district court interpreted Minnesota law as requiring only that the affidavit forming the basis for service by publication be made honestly and in good faith by the plaintiff based on information available. Id.

\textsuperscript{59}. Shamrock Dev., Inc. v. Smith (Shamrock I), 737 N.W.2d 372, 381 (Minn. Ct. App. 2007).

\textsuperscript{60}. Shamrock II, 754 N.W.2d at 383. The court commented that the language of the service by publication rule was “plain,” indicating that the rule “does not confer jurisdiction unless one of five specific circumstances actually exists.” Id. The court ultimately reversed the decision and remanded the case to the district court to determine if Smith was in fact a Minnesota resident and if he had intended to defraud investors or avoid service. Id. at 385.

\textsuperscript{61}. Id. at 383.
of service by publication. Shamrock stands to affirm the two requirements needed within the plaintiff’s affidavit to exercise service by publication: “(1) an affirmation of the essential jurisdictional facts of one of the enumerated cases . . . and (2) an affirmation of the affiant’s belief that the defendant is not a resident of the state or cannot be found in the state.”

The Shamrock ruling regarding service by publication is consistent with the historical foundation of the Pennoyer standard and state sovereignty, allowing the exercise of personal jurisdiction over residents of the state only when they are physically present. The decision is also consistent with previous holdings by the court regarding standards for service by publication. The consistency of this ruling with historical standards is fitting because the facts of this case are largely unremarkable and do not diverge from previous service by publication cases. According to the court, Shamrock overlooked the affidavit containing Smith’s contact information, and because of this oversight, service by publication was inadequate. However, the court did not only apply the traditional standard, but articulated a more restrictive rule. Despite the Mullane formula of reasonable calculation, the court’s decision suggests that the application of the service of process rule should be both hierarchical and conditional. One could infer,

---

62. Id.
64. See Gill v. Gill, 277 Minn. 166, 152 N.W.2d 309 (1967); Roberts v. Roberts, 135 Minn. 397, 161 N.W. 148 (Minn. 1917); see also supra note 41 and accompanying text.
65. The facts are largely unremarkable because, unlike numerous cases discussed in this note, the plaintiffs are not attempting service through technology but only through paper publication.
66. See supra note 51 and accompanying text. Interestingly, the court needed only to cite the prerequisite for service by publication in order to dismiss the case, rather than clarify the rule. According to Corpus Juris Secundum, “resorting to service by publication” requires the plaintiff to have first exercised due diligence in acquiring the information necessary to find the defendant. 72 C.J.S. Process § 85 (2005). Because the Minnesota Supreme Court believed the plaintiff had failed to exercise due diligence, the case could have been dismissed. Yet, the court instead took the opportunity to clarify the elements necessary to assert service by publication, and thereby further restricted the rule.
67. See discussion supra note 62 and accompanying text.
regardless of what type of service might actually be most reasonably calculated to reach the defendant, that the plaintiff must first attempt personal service, then, alternatively, leave a copy at the defendant’s usual place of abode with someone of suitable age and discretion, and only when those fail may service by substitute means be adequate. However, service by publication may only be exercised if the plaintiff believes and can actually prove that one of the five circumstances outlined by the rule exists.

IV. ANALYSIS

A. Shamrock Decision

In Shamrock, the Minnesota Supreme Court held that a plaintiff’s good faith belief and due diligence were not sufficient to warrant service by publication. The court clarified the language of the rule and in so doing, effectively restricted the use of service by publication by not only reiterating the Pennoyer standard but by also requiring the plaintiff to prove one of the conditions named. Shamrock became an opportunity for the court to reevaluate the elements of an archaic rule and perhaps broaden them to reflect modern communication. Yet instead of broadening the application of service by publication, the court articulated a stricter interpretation of the rule. Despite the court’s insistence that the ruling does not reform but only clarifies the existing standard for personal jurisdiction and service by publication, many commentators would disagree with this assessment. Where the

69. See supra note 43 and accompanying text.
60. Shamrock II, 754 N.W.2d at 383.
61. Id.
62. See supra note 62.
63. See Shamrock II, 754 N.W.2d at 383; see also supra Part III.
64. See Shamrock II, 754 N.W.2d at 383 (“This interpretation is consistent with the historical underpinnings of the rule.”).
65. See, e.g., Shultz, supra note 4, at 1511 (“[T]he Constitution does not require any particular means of service of process, but only that the method selected be reasonably calculated to afford notice and an opportunity to respond.”) (referring to the decision in Rio Props., Inc. v. Rio Int’l Interlink, 284 F.3d 1007 (9th Cir. 2002)); Tamayo, supra note 23, at 257 (“As methods of communication improve and individual mobility increases, mechanisms for serving process should evolve to allow for more convenient methods of serving process on a defendant while complying with constitutional due process and statutory requirements.”); Woods, supra note 9, at 444 (“Electronic publication, on the other hand, could actually offer a greater likelihood of providing notice than the traditional method of service by publication.”).
Mullane formula offers a flexible, ad-hoc approach to deciding the method most adequate for conferring notice. Shamrock effectively bars service by publication as a valid means for providing notice by articulating a bright-line, hierarchical standard. This is especially problematic where modern technology has influenced communication patterns so as to warrant electronic service as a compelling means for providing notice.

B. Shamrock Decision – Unconstitutional?

While the rules of civil procedure change over time, they are always bound by the principles encapsulated in constitutional notions of due process. The constitutional threshold for due process is that notice must be made by a method that is most “reasonably calculated” to reach the defendant. Personal service is the classic method for conferring notice and is the preferred method by both procedural and constitutional standards. However, where personal service is impractical, substitute service is allowed to bring finality to the action. The constitutional standard is deliberately broad so as to weigh the defendant’s right to due process against the State’s interest in bringing finality to the action. The broad constitutional interpretation also encourages state courts to shape the rules to the facts of the case, expanding upon the rules and often testing constitutional boundaries.

76. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14, 318 (1950); see also supra note 60.
77. See discussion infra Part IV.B.
78. See U.S. CONST. amend. XIV; see also supra notes 18, 19 and accompanying text.
80. See id. at 313 (“Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding.”).
81. Id. (“[T]he vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined.”); see also 72 C.J.S. Process § 70 (2009) (“Since ‘substituted service’ by its very designation indicates a form of service which may be used as a substitute for personal service, it is obviously . . . different and distinct from the latter . . . . It is within the power of the legislature to provide for substituted service in cases of necessity or if personal service is for any reason impracticable.”).
82. Mullane, 339 U.S. at 314 (“Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment.”).
83. See 72 C.J.S. Process § 71 (2009) (illustrating the validity of statutes authorizing substituted service as well as being liberally construed so long as they are guided by the principles of due process); see also ARIZ. R. CIV. P. 4.1 (allowing
Although courts are justified in expanding upon the alternatives available for substitute service, the constitutional sufficiency of the method must remain valid.  

Yet, while the constitutional standard may limit divergence, it can also be a catalyst for change when rules become outdated and antiquated. The constitutional standard of due process requires a plaintiff to use a method reasonably calculated to reach the defendant, which implies that courts must provide the methods appropriate for doing so. When the methods available are no longer reasonably calculated to reach the defendant, the courts must, in turn, make the changes necessary to comply with the standard. Because of the influence of modern technology on communication patterns, electronic service may be a significantly better means for reaching a defendant, making the exclusion of electronic service suspect. Due process requires that the method employed reflect an actual desire to inform the defendant, and when the defendant is best informed through electronic service, the exclusion of this method is in conflict with this underlying principle. Because the constitutional sufficiency for affording notice is factually specific, the plaintiff is required to conform to the actual behavior of the defendant. But when the methods for providing notice do not conform to actual behavior, due process becomes a loophole, rather than a safeguard, for defendants to evade service.

Currently, the Minnesota rule for substitute service is limited
to providing notice through face-to-face interaction.\footnote{MINN. R. CIV. P. 4.03; see supra notes 71–74 and infra notes 94–103 and accompanying text. Although Minnesota does offer the alternative of service by certified mail, this is considered constructive notice and only available where the defendant waives her right to service. Additionally, although service by publication is also an option, it can only be exercised once all other alternatives are exhausted as a last resort for achieving finality of the suit. See MINN. R. CIV. P. 4.03; see also Shamrock Dev., Inc. v. Smith (Shamrock II), 754 N.W.2d 377, 384 (Minn. 2008); see also discussion supra notes 41–45 and corresponding text.}

The rule states that service of the summons can be conferred upon an individual by “delivering a copy to the individual personally or by leaving a copy at the individual’s usual place of abode with some person of suitable age and discretion.”\footnote{MINN. R. CIV. P. 4.03(a).} The rule’s construction and the recent Shamrock decision require the plaintiff to physically find the defendant or else prove she is intentionally evading service in order to justify the use of service by publication.\footnote{See Shamrock II, 754 N.W.2d at 383; see also MINN. R. CIV. P. 4.05. As discussed earlier, it has become increasingly apparent that courts do not consider service by publication a valid means for conveying notice, other than as a last resort. See discussion supra note 22 and accompanying text; discussion infra Part IV.A.} Other than notice by physical delivery or service by publication in rare occasions, the only other option is through constructive notice by certified mail.\footnote{MINN. R. CIV. P. 4.04, 4.05. Although the rules allow for service by mail, in accepting such notice, the defendant is considered to have waived his right to service of process. See FED. R. CIV. P. 4(d). The courts strongly encourage service by mail as it is an efficient and cost effective means for delivering notice. See Shultz, supra note 4, at 1503. However, at its foundation, notice by mail still depends on physical interaction, with the postman and roommates as intermediaries. MINN. R. CIV. P. 4.05. As discussed earlier, it has become increasingly apparent that courts do not consider service by publication a valid means for conveying notice, other than as a last resort. See discussion supra note 22 and accompanying text; see also discussion infra Part IV.A.} The rule remains greatly restricted, suggesting a preference for service through face-to-face interactions and a strong skepticism towards substitute service.\footnote{MINN. R. CIV. P. 4.04; see also Shamrock II, 754 N.W.2d at 382.} This preference is acceptable as long as physical notice continues to be the most reasonably calculated to reach the defendant.\footnote{See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).} The fundamental assumption of the rule is that other than personal service, the most reliable means for affording notice is by leaving a copy of the summons at the defendant’s home with a person of suitable age and discretion.\footnote{MINN. R. CIV. P. 4.05; see also Shamrock II, 754 N.W.2d at 384.} Meaning, people are most likely to receive
information through face-to-face interactions, such as from a roommate, than by any other means.\textsuperscript{98} If, however, notice through an internet posting, for example, were a significantly more suitable means for affording notice than through a roommate, its exclusion could be deemed unconstitutional. In an age where face-to-face communication is becoming eclipsed by electronic and online communication, it is logical that electronic service would be a significantly more suitable means for reaching the defendant.\textsuperscript{99} The rigid construction of the current rule seeks to protect the defendant’s right to due process, but as modern society changes, it does so at the cost of fairness and judicial efficiency.\textsuperscript{100}

C. Changing Patterns of Communication: The Facebook Phenomenon

The internet has quickly become a natural background to everyday life. In 2002, more than 600 million people worldwide had access to the internet and the numbers continue to rise.\textsuperscript{101} Yet with great popularity comes even greater scrutiny and as one commentator described it:

It has been vilified as a powerful new tool for the devil, awash in pornography, causing users to be addicted for hours each day “surfing”—hours during which they are away from their family and friends, resulting in depression

\textsuperscript{98} Due to modern technology and the rise of electronic communication, the assertion that people have more face-to-face interactions than any other kind is likely a false assertion. If someone were to have dozens more interactions with Facebook friends, for instance, than their roommate or spouse, would the denial of affecting notice through Facebook be unconstitutional? See discussion infra Part IV.C.

\textsuperscript{99} See discussion infra Part IV.C.

\textsuperscript{100} The Fourteenth Amendment and the rule for service of process are meant to protect the defendant’s right to be heard. See U.S. Const. amend. XIV, § 1 (due process and defendant’s rights); 16C C.J.S. Constitutional Law § 1444 (2009) (noting that “[p]rocedural due process means that persons whose rights may be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified.”). Yet the plaintiff ought to be protected from the undue burden of using ineffective methods for conferring notice where the defendant can be adequately put on notice electronically. Electronic service is both efficient and inexpensive, and likely constitutionally superior. See Cantor, supra note 2, at 966 (“Internet service is cheaper than either traditional mail or personal service . . . . [and] is nearly costless to the plaintiff . . . . Moreover, because an email user can reply to an email without costs, replying to the plaintiff’s service is ‘prepaid,’ therefore, a plaintiff can use email to send a waiver request to the defendant.”).

and loneliness for the individual user, and further weakening neighborhood and community ties.102

Whether or not the internet causes such extreme isolation is certainly debatable, but not within the contemplation of this note.103 Rather, this note asserts that the effects of the internet have so distinctly changed the face of modern society that the customary means for communication has shifted from face-to-face interactions to electronically-mediated interactions.104

Earlier technologies have effected change, but none in recent history has been as influential and extensive as the internet.105 The effects of the internet on business and the dissemination of information are significant, but the more interesting and perhaps more surprising impact is the effect it has had on interpersonal communication and relationships.106 Nowhere has the effect been more profound than on the most recent generation.107 Today, teenagers have never known life without computers or cell phones.108 Virgin Mobile USA reports that more than nine in ten teens with cell phones have text messaging capabilities; two-thirds use text messaging daily.109 The dependence on electronic communication, albeit ingrained upon the lives of teenagers, is widespread and becoming more common among older generations.110 The pervasive impact of electronic communication

102. Id. at 574.
103. See id. (suggesting that the traditional perception that the internet causes depression and loneliness is a largely exaggerated and unfounded fear).
104. See id.; see also discussion infra Part IV.C.
105. See Bargh, supra note 101, at 574.
106. Id.
109. See Subrahmanyam & Greenfield, supra note 107, at 122. The statistics show that more than half of Virgin’s customers aged fifteen to twenty send or receive at least eleven text messages a day, while nearly a fifth text twenty—one times a day or more. Id. From October through December 2006 Verizon Wireless hosted 17.7 billion text messages, more than double the total from the same period in 2005. Id. Recently a study found that teens use instant messaging in particular as a substitute for face-to-face talk with friends from their physical lives. Bonka S. Boneva, Teenage Communication in the Instant Messaging Era, in Information Technology at Home, 612–72 (Robert E. Kraut et al. eds., 2006).
110. See Subrahmanyam & Greenfield, supra note 107, at 124 (outlining a recent study showing that over 73% of American college students now use the
on modern society has indisputably changed how people commonly interact and communicate. With the advent of social networking sites such as Facebook, MySpace, and Twitter, the use of computer-related mediums for fostering and maintaining relationships has increased exponentially. To date, over 300 million people are members of the popular networking site Facebook, and 120 million of those members log on daily. The popularity of social networking websites has caused researchers to begin to study the relationship between patterns of communication and online interactions. Unsurprisingly, many studies show that

Internet more than their university library for researching term papers); see also Facebook, July 31, 2009, facebook.com/facebook (citing that the fastest growing demographic on Facebook is 35 and older); Peter Corbett, 2009 Facebook Demographics and Statistics Report (July 6, 2009), http://www.istateglabs.com/2009-facebook-demographics-and-statistics-report-513-growth-in-55-year-old-users-college-high-school-drop-20/ (“There has been a staggering increase in the number of 55+ users – with total growth of 513.7% in the last six month [sic] alone.”).


113. Facebook, Press Room–Statistics, http://www.facebook.com/press/info.php?statistics (last visited Oct. 12, 2009). Facebook users have a myriad of options for accessing information about their friends and the avid users total more than 6 billion minutes spent on Facebook each day. Id. Facebook users can upload photos and videos, update their statuses and browse web pages via mobile phone, link to journals and other news-related articles and blogs through the website, and send messages to friends, as well as have instant message conversations with friends currently online. Facebook users are online constantly, checking the status updates of their friends, and sending and receiving messages between fellow Facebookers online, often from the convenience of their mobile phones. See the Facebook website for more information on using Facebook features. Facebook, Getting Started Guide, http://www.facebook.com/help/new_user_guide.php (last visited Oct. 12, 2009).

greater use of electronic communication and computer-mediated interactions correspondingly decreases face-to-face communication. In fact, one commentator noted that although much is yet to be learned about electronic communication and social relationships, one thing is certain: “teens now conduct a higher proportion of their communication through writing in an electronic medium rather than face-to-face or voice-to-voice.” Another study found that teenagers spend a week or more online without ever logging off, as one surveyor in the study indicated, “I’m always signed on, I always have an awake message up and that way people can let me know if something major is happening in my life. I even have an awake message on when I’m asleep or when I’m away at school.”

With the recent studies pointing to an exponential increase in the use of electronic communication, it could reasonably be argued that people currently, or soon will, have a more consistent online address than they do a physical address. With this in mind, the assumption that an average person is at home or checks their

115. See Subrahmanyam & Greenfield, supra note 107, at 135 (An intense four-year video study of thirty families with children showed the role of technology in modern family life. When the working spouse came home the other spouse and the children were often so absorbed in electronic media they only greeted him about one-third of the time. “Electronic multitasking has become pervasive, sometimes at the expense of face-to-face family interaction, among siblings as well as with parents.”); Bagozzi, supra note 114, at 105 (finding that users of “high-interactivity” web communication, such as Facebook or instant messaging, show a decreased level of face-to-face interactions with family as compared to before engaging in online social interactions); Gross, supra note 114, at 646 (“Of particular note is the extent to which boys . . . resembled girls in their heavy use of the Internet for social communication . . . . Most participants reported using the Internet for both social and nonsocial purposes—often simultaneously.”).

116. Subrahmanyam & Greenfield, supra note 107, at 136.

117. Generation Speed: Today’s Teens, GOOD MORNING AM. (Sept. 30, 2005), available at http://abcnews.go.com/GMA/ AmericanFamily/Story?id=1172574) (“The survey included 180 Chicago junior and senior high school students and an online version completed by 641 teens in eleven states. 62% said they could not live comfortably without their cell phone, IM or e-mail for more than a few days, and 31% said life is moving too fast.”).

118. This is certainly already the case with many businesses, and the courts have already begun to deal with its effects. In Rio Properties, Inc., v. Rio International Interlink, a casino brought a trademark infringement action against a foreign internet business. Because the defendant had no physical address, the court allowed service by e-mail stating, “RII listed no easily discoverable street address . . . RII had neither an office nor a door; it had only a computer terminal.” 284 F.3d 1007, 1018 (9th Cir. 2002).
mailbox more than they are online is highly unlikely.  

Notions of due process demand that the court provide the means necessary for the plaintiff to best afford notice reasonably calculated to reach the defendant; if this is through electronic service, the court ought to allow it.  

Therefore, when it is significantly more likely that a defendant would receive notice through a posting on her Facebook page, or through a friend on Facebook, than by leaving a copy with a roommate, it may be unconstitutional to disallow this form of notification.  

Electronic service may not only be constitutionally required, but may also prove to be a more reliable and effective means for reaching an evasive defendant. A defendant may easily avoid service at a physical address by moving or claiming ignorance, but may find it more difficult to elude service where internet sites and computer hard drives track specific usage and make information difficult to delete.  

The importance of using electronic service would be especially relevant when dealing with companies that conduct business primarily online. Online-only businesses are  

119. See id.  

120. In fact, there have been recent cases suggesting a trend towards the use of electronic service, especially where there is a foreign defendant. See id. at 1017 (holding that the facts of the case find service by email appropriate form of notice and, “[i]n proper circumstances, this broad constitutional principle [notice reasonably calculated to provide notice] unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance”); New Eng. Merch. v. Iran Power, 495 F. Supp. 73, 81 n.4 (S.D.N.Y. 1980) (holding that where notice upon a foreign defendant is made impracticable, service by telex is acceptable: “Thus, as it stands now, telecommunication remains a sound method by which to insure that defendants are notified of the instant actions.”); In re Int’l Telemedia Assoc’s., Inc., 245 B.R. 713, 721 (Bankr. N.D. Ga. 2000) (holding that service upon a foreign defendant via email was sufficient to comport with notions of due process: “Moreover, communication by facsimile transmission and electronic mail have now become commonplace in our increasingly global society.”); Shultz, supra note 4, at 1497–98 (citing Nick Abrahams, Australian Court Serves Documents via Facebook, SYDNEY MORNING HERALD, Dec. 12, 2008, available at http://www.smh.com.au/news/technology/biztech/lawyers-to-serve-notices-on-facebook/2008/12/16/1229189579001.html).  

121. See discussion infra Part IV.B.  

122. See Cantor, supra note 2, at 965 (“Internet service has the potential to be more secure, and thus more reliable, than any form of service employed in the past. Digital signatures . . . are harder to forge than traditional signatures . . . . [U]nlike traditional mail, where one mail box or mail room may serve a number of people, one internet account usually serves one person.”).  

123. See Cantor, supra note 2.  

124. See Rio Prop., Inc. v. Rio Int’l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002).
increasingly prevalent, and in *Rio Properties Inc. v. Rio International Interlink*, the court acknowledged service by email as the most appropriate means for notice because such companies have “neither an office nor a door; [they] only [have] a computer terminal.”

The use of electronic service provides other judicial and public policy benefits as well. The increased allowance of electronic document submissions has already helped to alleviate the crippling effect of filing and paperwork in courthouses. The use of electronic filing also significantly improves the overall efficiency of court dockets, and the allowance of electronic service would likely continue to foster goals of judicial expediency. Justice and integrity may be fundamental judicial goals, but the cost and time of litigation, as a practical matter, is a crucial aspect in every step of the judicial process. The Advisory Committee of the Federal Rules of Civil Procedure has indicated that one of its primary goals is decreasing the costs of litigation, and that service of process is an area in desperate need of such reform. Furthermore, constitutional due process preserves the plaintiff’s right to provide notice, free of overly burdensome requirements, and by a means that is both feasible and cost efficient.

---

125. *Id.*
126. *See discussion infra Part IV.D.*
129. *See supra* note 128 and corresponding text.
130. Cantor, *supra* note 2, at 966 (noting the Advisory Committee’s desire to mitigate the cost of litigation through technology.); Conley, *supra* note 128, at 411 (“Rule 4 places a strong emphasis on the need to save costs. The rule states that the defendant ‘has a duty to avoid unnecessary costs of serving the summons.’”).
131. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317–18 (1950) (“We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries . . . and we have no doubt that such impracticable and extended searches are not required in the name of due process.”). *See also* Cantor, *supra* note 2, at 966 (suggesting service via the internet may be constitutionally required in some circumstances because “internet service is cheaper than either traditional mail or personal service; thus internet service promotes the Advisory Committee’s desire to limit the overall costs of service.”).
commonality of electronic communication and the fact that electronic service is virtually costless, the logical and constitutionally reasonable progression would be for such an allowance.\textsuperscript{132} As the amount of mail delivered decreases and the prevalence of email increases, the continued denial of electronic service indicates a preference for the defendant, and may become an easy loophole for the evasive defendant to avoid service of process.\textsuperscript{133} Electronic communication has caused the foundation of Minnesota Rule 4.03 to become archaic, and the evidence of the numerous judicial and public policy benefits indicates the need for statutory reform. In fact, the lack of electronic alternatives to service of process may very well be an unconstitutional oversight.

\textbf{D. The Trend: Case Law and Rule Changes}

However unchanged the standard for service by publication, or slow the progression towards electronic service may be, cases calling for the increased allowance of electronic service have inundated the courts.\textsuperscript{134} \textit{New England Merchants National Bank v. Iran Power Generation and Transmission} became one of the first cases

\begin{quote}
\textsuperscript{132} Cantor writes, \\
The constitutionality of internet service of process will become increasingly clear as the number of Americans who rely on the internet as their principal means of communication increases. If it is obvious that one’s chosen medium for communication is the internet, then it is also obvious that the form of notice most ‘reasonably calculated’ to reach the defendant is also the internet. Cantor, supra note 2, at 966.
\end{quote}

\begin{quote}
\textsuperscript{133} See id. at 961 (arguing that internet service would be more difficult to avoid because “the defendant would be unable to make changes to the web site, he would be unable to ‘lose’ the service.”). See also Chacker, supra note 2, at 597 (“But what systematically exists as a rightful protection for litigants has developed into a procedural loophole through which wily defendants can avoid litigation. More specifically, in certain instances, effectuating notice has become a game of ‘hide and seek.’”); Murphy, supra note 127, at 107–08 (“Indeed ‘service of process is not a game of hide and seek’ but defendants can often be surprisingly evasive when it comes to avoiding courts . . . . [A]s technology grows, courts should not be afraid to use this technology where defendants are hiding from service.”).
\end{quote}

\begin{quote}
\end{quote}
to allow electronic service of process through the use of telex.\(^{135}\) The court recognized the lack of case precedent in such a decision, but justified the validity of incorporating modern technology into service of process, stating that “[courts] cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships.”\(^{136}\) In *In re International Telemedia Associates, Inc.*, the United States Bankruptcy Court further expanded the use of electronic service by allowing the use of email to serve an evasive defendant.\(^{137}\) Similar to *New England Merchants*, the *Telemedia Associates* court defended its decision despite a lack of corresponding case precedent stating that, “any unspecified form of alternative service usually has its genesis in untried or formerly unapproved methodology . . . . It would be akin to hiding one’s head in the sand to ignore such realities and the positives of such advancements.”\(^{138}\) The court, in both *Telemedia Associates* and *New England Merchants*, recognized that it would not only be imprudent to ignore technological advances where it would increase a plaintiff’s ability to effect notice, but that it would simply be illogical.\(^{139}\) Although electronic service is still an exception to the rule, courts have become more inclined to allow electronic service where there is an evasive foreign defendant.\(^{140}\) Courts have justified this more liberal application of the rule, because where there is a foreign defendant and service is impracticable, the Federal Rules of Civil Procedure allow for court directed service under special circumstances.\(^{141}\) In order for courts to allow electronic service on a domestic defendant, however, there would need to be a statutorily defined rule designating its allowance.\(^{142}\) Although there are no states that specifically allow for electronic service on a


\(^{136}\) *Id.*

\(^{137}\) *Int’l Telemedia Assoc.*, 245 B.R. at 720–21.

\(^{138}\) *Id.* at 719.


\(^{140}\) *Rio Props. Inc.*, v. *Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (holding service by email appropriate where foreign defendant is evasive); *Ryan v. Brunswick Corp.*, 2002 WL 1628933, No. 02-CV-0133E(F) at *3 (W.D.N.Y. 2002) (holding service by email adequate even where evasiveness is not extreme); *Int’l Telemedia Assoc.*, 245 B.R. at 722 (holding service by facsimile or email was sufficient to provide notice to evasive foreign defendant).

\(^{141}\) *Fed. R. Civ. P. 4(f)(3)* (service allowed “by other means not prohibited by international agreement, as the court orders.”).

\(^{142}\) *See supra* note 81 and accompanying text.
domestic defendant, some permit alternative service as “directed by the court.” However, there has yet to be a case in the United States where this could be construed so as to include an internet posting via a Facebook page, for instance.

Despite the lack of electronic service in the United States, it cannot be long before such case law will begin to surface, because as noted by the court in *Rio Properties*, “[t]o be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond.” As the internet fast becomes a necessity, and not a choice, statutory reform to include electronic service has become an imminent issue beckoning immediate attention. Allowing electronic service has begun to become more prevalent in other countries. For example, in a groundbreaking service-of-process case, an Australian defendant suffered a default judgment obtained through the exercise of service by publication via Facebook. However unique, the Australian case denotes positive signs that the judiciary worldwide is beginning to recognize and incorporate electronic methods of communication into the processes of civil procedure.

Although the United States has not yet incorporated electronic service into service of process, there are signs that the trend is moving in that direction. Recent changes to the Federal Rules of Civil Procedure suggest that there is a general trend toward allowing electronic service. There have been parallel developments in the service of documents electronically in the federal and state judiciary system. In 1996, the Federal Rules of Civil Procedure were amended to make “clear the equality of filing

---

143. See supra note 81 and accompanying text.
144. *Rio Props.*, 284 F.3d at 1017.
145. Conley, supra note 128, at 426 (“According to Bill Gates, Chairman of Microsoft, the internet is at the center of the action. ‘Microsoft, among others, is already programming to a future that can’t exist without the Web.’ . . . The move toward electronic communication is a serious one . . . .”).
147. Shultz, supra note 4, at 1497 (citing Nick Abrahams, *Australian Court Serves Documents via Facebook*, SYDNEY MORNING HERALD, Dec. 12, 2008.)
148. Shultz, supra note 4, at 1498.
149. See discussion infra Part IV.D.
150. Murphy, supra note 127, at 94–95.
151. Id. at 92.
by electronic means with written filings.” 152 Similarly, rules 5(a) and 5(b)(2)(E) work together to allow the electronic delivery of all pleadings and papers as long as the parties consent to it in writing. 153 Furthermore, under the rules of discovery, parties are required to provide any electronically stored documents unless unduly burdensome. 154 But perhaps the closest analogous change is in the use of electronic postings for class action lawsuits. “Even absent judicial decree, parties to class actions are employing internet technologies, usually websites, to help meet notice requirements.” 155 These changes underscore the importance of electronic communication in modern litigation. Because notice forms the foundation for litigation, electronic service ought to be allowed.

E. Shamrock Decision: Call for Statutory Change

The Mullane court articulates the tension between protecting notions of due process and the allowance of service by publication: “Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper . . . .” 156 While this may have been true in the past, the potential for service by publication to be a valid form of notification has increased with the advancement of modern technology. 157 Electronic communication through social networking sites and internet postings offer a far more directed and intentional method for affording notice than an advertisement in a local newspaper.

The constitutional standard articulated in Mullane does not bar publication as a means for affording notice. It may even encourage its use when it is the means most reasonably calculated to reach the defendant. 158 The Court struck a balance between the competing tension of due process and judicial finality by articulating a variable standard where sufficiency of service is determined by reasonableness rather than a bright-line rule. 159

153. Id. 5(a), 5(b)(2)(E).
154. Id. 26(a)(ii), 26(b)(2)(B).
155. Cantor, supra note 2, at 958.
157. See discussion supra Part IV.C.
158. See discussion supra Part IV.C.
159. Mullane, 339 U.S. at 314.
160. Id. at 315 (“The means employed must be such as one desirous of actually
Yet, despite the Court’s clear articulation of the standard, the judicial system has been slow to adopt this formula when it comes to modern technology and service by publication. Increasingly complex business models and the transformation of communication modes have impacted nearly every aspect of civil procedure and modern litigation, but have yet to influence the standards for service by publication. Several commentators have addressed the need for the judicial system to more accurately reflect the present status of modern-day communication, in terms of best informing notice and the standards for service of process. Fortunately, as aforementioned, a recent Australian case has confronted the use of service by publication through electronic means when it permitted a default judgment via a posting on Facebook. One commentator optimistically adds, “[n]ecessity, the mother of invention, has frequently been the catalyst for adapting the law to implement new technologies, and if a situation arises in which a message sent via Facebook is the only means to serve an elusive defendant abroad, the law might, in due time, adapt accordingly.” In a world where business and social networking is accomplished via the internet, and where service of process is the most fundamental aspect of the operation of law, it is logical to reduce constraints on service and permit a variety of electronic means. The fundamental purpose of due process is to afford the defendant adequate notice and the opportunity to be heard. Mullane articulated the policy rationale behind due process: the right to be heard and the corresponding need for flexibility. Accordingly, it is only necessary to begin to allow the incorporation of electronic notification.

Nevertheless, the Shamrock decision, although purporting to informing the absentee and that one might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . ”.

161. See discussion supra Part II.
162. See discussion supra Part IV.D.
163. See sources cited supra note 75.
164. See supra notes 146–47 and accompanying text.
165. Shultz, supra note 4, at 1528.
166. See Id. at 1527.
167. Cantor, supra note 2, at 945 (“The notice function of service protects the defendant’s Fifth and Fourteenth Amendment rights not to be deprived of life, liberty, or property without due process of law. A fundamental component of due process is the opportunity to be heard . . . .”) (footnote omitted).
maintain the status quo, effectively built an additional barrier to electronic publication as a permissible means for service of process. The hierarchical approach approved of in Shamrock requires the plaintiff to first exhaust all other alternatives before exercising service by publication. Although the Court’s concerns regarding adequate due process are certainly justified, given the efficacy of modern-day technology, due process may be better served through a more liberal application of the rule. Because service of process is so fundamental to the administration of the law, it ought to be more amenable to change and adapt according to modern advancements in electronic communication.

V. CONCLUSION

Although Shamrock did not call for a modern adaptation for service by publication, the court’s hierarchical interpretation of the rule not only reiterated the status quo, but further restricted it. This court reflects the majority sentiment that service by publication is an inadequate means for giving notice, but perhaps this is misguided. As society trends toward public electronic means of communication, the means for affording adequate notice must necessarily change as well. With the advent of web communication such as Facebook, Twitter, and blogging, electronically-mediated communication has quickly become the norm. Where service by publication was once an inferior means for providing notice, it may now be a viable, if not a constitutionally required method of service.

---

168. In fact, as one commentator suggests, “Electronic publication . . . could actually offer a greater likelihood of providing notice than the traditional method of service by publication.” Woods, supra note 9, at 444.
169. Conley, supra note 127, at 417 (“The inevitable result of human progress is that courts are, and always will be, faced with the question of how to apply existing laws to new human behaviors to ensure that the judicial process continues reliably and preserves the parties’ legal rights. . . . [C]ertain processes are so fundamental to the operation of law that historically they have been more open to adaptability and change.”).
170. See discussion infra Part IV.A.
171. See discussion infra Part IV.C.
172. See discussion infra Part IV.B.