

SET THE DEFAULT TO OPEN: *PLESSY*'S MEANING IN
THE TWENTY-FIRST CENTURY AND HOW TECHNOLOGY
PUTS THE INDIVIDUAL BACK AT THE CENTER OF LIFE,
LIBERTY, AND GOVERNMENT

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I. INTRODUCTION

Rugged individualism and religious and economic freedom are among the most important factors that have contributed to the growth of U.S. global power and prestige and the welfare of its citizens since the founding of the original colonies. The trajectory of freedom has not always been smooth; however, the United States has remained a powerful example of the benefits and resilience of constitutional democracy. It has weathered a civil war and two world wars, grown from the shores of the Atlantic to the northern reaches of the Pacific, become a global economic and technological powerhouse, and even treated the great wound of slavery.

In the midst of this success the underlying tension in constitutional democracy—the force behind U.S. power and prestige—has the capacity to muddle the national vision. Tension between individual rights and the state is not new. It stretches from antiquity to the Renaissance to the modern world. The U.S. Constitution represents an attempt to codify the social contract between the government and its citizens in an enduring document that supports a functioning government and society.¹

During the 220 years since its ratification, we have repeatedly revisited the fundamental elements of this social contract. Since the initial Bill of Rights, we have added seventeen amendments to the Constitution, and our constitutional jurisprudence has advanced far beyond the common law we inherited from Great Britain. One case in particular, *Plessy v. Ferguson*,² highlighted

1. Richard Primus, *An Introduction to the Nature of American Rights*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 15, 17–18 (Barry Alan Shain ed., 2007). See also, "The meaning of open," Jonathan Rosenberg, Senior Vice President, Product Management, Google, <http://googleblog.blogspot.com/2009/12/meaning-of-open.html>, last visited Jan. 7, 2010. ("As Google product managers, you are building something that will outlast all of us, and none of us can imagine all the ways Google will grow and touch people's lives. In that way, we are like our colleague Vint Cerf, who didn't know exactly how many networks would want to be part of this "Internet" so he set the default to open. Vint certainly got it right. I believe we will too.") We assert that the blessings of liberty will best be secured when the Internet is fully open both to "networks" and to individuals, empowering individuals to use the Internet to fully participate in commerce and government as each sees fit – socially, economically, politically, administratively, and otherwise.

2. 163 U.S. 537 (1896).

the tension between the government and the individual more than any other case in its time. Before *Plessy*, the Civil War Amendments sought not only to end the slavery that was countenanced in the original Constitution,³ but also to protect the individual rights of all citizens at the State level.⁴ *Plessy* eviscerated that goal with its abhorrent doctrine of “separate but equal.”⁵ Although the Supreme Court later overturned the “separate but equal” doctrine in *Brown v. Board of Education*,⁶ the tension between group rights and individual rights remained. This tension continues today due to the recent extraordinary growth in the size and power of the federal government in areas as personal as retirement, education, and health care.

The expansion of federal power has been accompanied by accelerating development and use of technology. From curing disease and increasing food quality and supply, to the space shuttle and the iPhone, technology has revolutionized how individuals live and communicate. The Internet, one of the most significant advances in technology, has the capacity to change how the social contract is executed. By enabling speedy and robust communication, it can fundamentally alter the individual’s relationship with the state. Ultimately, the Internet has the capability to perform the traditional governmental function of aggregating individual power. Thus, the Internet holds the potential to facilitate the casteless and classless society described in Justice John Marshall Harlan’s dissent in *Plessy*.⁷

II. SUMMARY

Contemplating the future requires understanding our nation’s trajectory. This Article will briefly review the history of individual rights and their expression in civil society. This

3. U.S. CONST. amend. XIII § 1.

4. U.S. CONST. amend. XIV § 1.

5. *Plessy v. Ferguson*, 163 U.S. 537, 537 (1896).

6. 347 U.S. 483 (1954).

7. *Id.* at 559:

[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

(Harlan, J., dissenting).

overview will demonstrate how *Plessy* was a significant detour from the path of social, commercial, and constitutional history, laying a foundation for the Article's discussion of technology's potential to facilitate Harlan's vision. The Article's second section will advance a variety of retrospective and prospective examples of how information technology enhances individual rights and the rule of law, and how government and government services can be reoriented around the individual.

III. THE SHIFTING BALANCE BETWEEN THE INDIVIDUAL AND THE STATE

The many ways power has been used, abused, centralized, decentralized, aggregated, disaggregated, usurped, and dispersed is the stuff of history, a story that is still unfolding. From Chairman Mao's dictum that "power comes from the barrel of a gun,"⁸ to the United States' founding premise of a government designed by "We the People,"⁹ wherein "all men are created equal,"¹⁰ the discussion of power and governance remains vital.

Americans have always had an uneasy relationship with the state. The first wave of immigrants from Europe was comprised of religious minorities fleeing monarchies.¹¹ Pioneers seeking economic freedom and success followed in their wake.¹² Under British rule, the relationship between the colonists and their home government was uneasy.¹³ To maintain the sanctity of their unalienable rights, representatives of the colonies formally declared their independence in July 1776,¹⁴ an act that was formally recognized by Great Britain in 1783 with the Treaty of Paris.¹⁵ Four years later, the Constitution was formally ratified,¹⁶ but some of the tension between the state and the individual remained.

8. DALAI LAMA, FREEDOM IN EXILE 263 (1990).

9. U.S. CONST. pmbi.

10. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. WAYNE A CORNELIUS, CONTROLLING IMMIGRATION 62 (2004).

12. *Id.*

13. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see generally James H. Hutson, *The Emergence of the Modern Concept of a Right in America*, in THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 25 (Barry Alan Shain ed., 2007).

15. Paris Peace Treaty, U.S.-U.K., Sep. 3, 1783, 1 U.S.T. 586.

16. U.S. CONST.

IV. INDIVIDUAL RIGHTS

The relationship between the individual and the state has shifted dramatically since the founding of the United States. Some causes of that shift are pragmatic, while others are technological or legal. The Framers designed the Constitution to protect liberty by limiting the government's power. They crafted a set of mechanisms to balance the edifices of power—legislative, executive, and judicial; State and federal—against one another, in order to prevent the government from being turned against the very individual rights it was meant to protect.¹⁷ They did not simply write a list of positive rights and entitlements for citizens. Instead, they drafted a list of negative injunctions against the government,¹⁸ thereby limiting its power.

The Framers' limited enumeration of federal powers—which includes the regulation of interstate commerce, coinage, and declaration of war—did not contemplate disaster relief, price controls, education, housing, or substantive corporate activity as federal functions.¹⁹ At the time, federal involvement in such areas would have been seen as an infringement upon liberty.²⁰ The American Constitution treated government as a mechanism to secure individual rights, not a tool to redistribute the fruits from exercising those rights to others. The Constitution focuses on individual rights from different perspectives. From the Privileges and Immunities clause,²¹ to free speech,²² freedom of the press,²³ the right of assembly,²⁴ and the Takings Clause;²⁵ the Framers had the foresight to put a number of mechanisms in place to protect the individual. The branches of government

17. THE FEDERALIST NO. 47, at 239–240 (James Madison) (Lawrence Goldman ed., 2008).

18. U.S. CONST. amend. I–X (Most of the guarantees in the Bill of Rights are prohibitions on government actions. Only the Sixth and Seventh Amendments have positive guarantees: the right to a speedy trial and the right to a jury).

19. See MICHAEL CONANT, THE CONSTITUTION AND ECONOMIC REGULATION 1 (Transaction Publishers, 2008) (1991) (“A national constitution is primarily a political document whose main function is to create a structure of government and a set of limitations on government to protect individual rights.”).

20. See 2 WILLIAM BLACKSTONE, COMMENTARIES *134 (“[P]ersonal liberty consists in the power or locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.”).

21. U.S. CONST. art. IV, § 2, cl. 1.

22. U.S. CONST. amend. I.

23. *Id.*

24. *Id.*

25. U.S. CONST. amend. V.

created by the Constitution were vital to the organs of power; however, the Framers did far more than create institutions. They sought to ensure the unalienable individual rights endowed by the Creator and to protect the property rights associated with individuals:

Indeed, it is crucial to appreciate the connection between rights and property, to think of all rights as “property,” broadly understood, as goods “owned” by the individual and by no one else. For that is the key to distinguishing true from false “entitlements”—things to which one holds title—as Locke and the Founders clearly understood.²⁶

Understood this way, the Fifth Amendment Takings Clause protects a vital and permanent individual right. When drafted, taking of property was conceived of in the agrarian sense, as taking land from a private person for the public good. More recently, the Supreme Court’s decision in *Kelo v. City of New London*²⁷ led to legislative and constitutional actions in the States to prohibit takings for the greater *private* good.²⁸ The scope of property has broadened since Madison penned the Fifth Amendment and now includes identity and intellectual property. This puts “virtual rights” at the center of modern notions of property as society explores multi-dimensional connections that may themselves be considered property in the era of the Internet.

V. RECONSTRUCTION AMENDMENTS THROUGH *PLESSY*

The ideals of liberty and equality, for which the Civil War was fought to save the Union, were formalized in the Thirteenth, Fourteenth and Fifteenth Amendments.²⁹ Regretfully, the opportunity these amendments presented to rebalance individual and founding liberties were lost through a series of poorly decided Supreme Court cases. If the Court had

26. Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 13–14 (1998).

27. 545 U.S. 469 (2005) (ruling that private property could be taken as part of a private development plan for economic development).

28. For an introductory look at State action after *Kelo*, see 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO*, CASTLECOALITION.ORG (Dec. 2008), http://www.castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129.

29. U.S. CONST. amend. XIII–XV.

interpreted these amendments to restore the rights of *all* individuals, then the civil rights laws of the mid-twentieth century might never have been necessary.

Franklin Delano Roosevelt and the New Deal Era decisively shifted the balance toward an overarching and overweening federal government and against individual rights.³⁰ However, the trend had already started with the *Slaughter-House Cases*³¹ and *Plessy*,³² which all but rendered the Reconstruction Amendments dead upon their arrival.³³ In these and other cases, the federal government's guarantees of individual rights were ruled either to be wholly redundant, like the Privileges and Immunities Clause,³⁴ or so watered down that they could not effectively check government power, like the rational-basis review of the Due Process Clause.³⁵

The text of the Fourteenth Amendment seems to broaden dramatically the scope of individual rights and to safeguard them against the power of the government.³⁶ The Fourteenth Amendment has four basic rights-granting provisions: (1) it grants citizenship to all people "born or naturalized in the United States,"³⁷ (2) it prohibits the States from abridging the "privileges or immunities of citizens of the United States,"³⁸ (3) it creates a Due Process Clause applicable to the States,³⁹ and (4) it mandates equal protection of the laws.⁴⁰ Wholly devoid of any race-specific language, "the focus of the [Fourteenth] amendment was not the abolition of racial discrimination per se, but rather the protection of fundamental rights generally."⁴¹ As drafted, it was designed to grant citizenship to all persons born

30. See, e.g., Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (elaborating on the growth of the Commerce Clause in the New Deal era); Richard Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5 (Winter 1988) (discussing post-1937 legislation).

31. 83 U.S. 36 (1873).

32. *Plessy*, 163 U.S. 537.

33. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1224 (2009).

34. *Id.* at 1226.

35. See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (applying the rational-basis review of the Due Process clause).

36. U.S. CONST. amend. XIV.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 71 (2003).

or naturalized in the United States and to protect the rights of those citizens from the power of their government.⁴²

A. *The Slaughter-House Cases*

After ratification, the exact scope and operation of the Fourteenth Amendment was left to the courts' interpretation. In a pivotal decision, the Supreme Court in *Slaughter-House*⁴³ effectively wrote the Privileges or Immunities Clause out of the Fourteenth Amendment.⁴⁴ The Court came to its conclusion through a three-step process. First, it interpreted the Fourteenth Amendment as primarily focused on protecting the rights of newly freed slaves, as *opposed* to broadly protecting of individual rights.⁴⁵ Second, it interpreted the Citizenship or Naturalization Clause⁴⁶ to create a bifurcated system of citizenship, not to grant citizenship to newly freed slaves.⁴⁷ Thus, all the citizens of the United States had both federal citizenship and State citizenship,⁴⁸ each of which granted different rights.⁴⁹ Third, the Court ruled that the Privileges or Immunities Clause only protected the rights granted by federal citizenship,⁵⁰ which only conveyed a handful of relatively minor rights like access to navigable waterways and running for federal office.⁵¹ Because of the Court's holding, the Fourteenth Amendment's Privileges or Immunities Clause only granted a circumscribed set of rights. According to Justice Field's dissent, these legal gymnastics reduced the Fourteenth Amendment to "a vain and idle enactment which accomplished nothing."⁵²

42. *Id.* at 58–61.

43. 83 U.S. 36 (1873).

44. HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION 134 (1968) ("Justice Miller's *Slaughter-House* opinion . . . moved majestically, almost irresistibly, from the Trumbull-Carpenter premises [of bifurcated citizenship] to the practical absurdity that the Fourteenth Amendment effected no fundamental change either in the content of the national citizenship or in the scope of Congressional power.").

45. *The Slaughter-House Cases*, 83 U.S. 36, 37 (1873).

46. U.S. CONST. amend. XIV, § 1.

47. *Slaughter-House*, 83 U.S. at 53.

48. *Id.*

49. *Id.* at 53–54.

50. *Id.* at 53.

51. *Id.* at 79–80.

52. *Id.* at 96 (Field, J., dissenting).

B. *Plessy v. Ferguson*

What *Slaughter-House* did in interpreting the Privileges or Immunities Clause, *Plessy* echoed for the Equal Protection Clause.⁵³ *Plessy* upheld the constitutionality of government-imposed segregation, finding that segregation was constitutional as long as the separate facilities were equal.⁵⁴ Only Justice Harlan dissented from the Court's decision, making a strong argument for equal individual rights in his dissent:⁵⁵

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.⁵⁶

If the dissent in *Plessy* had been the majority opinion, our Constitution would not only be legally color-blind, but the goals of individual liberty would also have been reaffirmed at the turn of the century. The Framers sought to embed those individual protections in the original Constitution, and the Civil War Amendments could have reaffirmed them in *Plessy*.

The implications of this missed opportunity are beginning to accelerate as government institutions seek to take over more and more of the decisions best left in the hands of individuals. Although *Brown v. The Board of Education* rid us of the notion of "separate but equal,"⁵⁷ it did not rebalance the relationship between government and individuals. Restoring the rights of the individual is vital to a continued success as a fully functioning civil society. Several centuries ago, people escaped the monarchies of Europe by fleeing to another continent. Today, it is possible to escape virtually rather than physically, and mechanisms like the Internet are potentially a new foundation for the revived social contract of the twenty-first century.

53. *Plessy*, 163 U.S. 537.

54. *Id.* at 548-49.

55. *Id.* at 552-64 (Harlan, J., dissenting).

56. *Id.* at 559 (Harlan, J., dissenting).

57. 347 U.S. at 495 (internal quotations omitted).

VI. GROWTH AND EXPANSION OF GOVERNMENT

The Reconstruction Amendments and their jurisprudence are only part of the story. As the courts were interpreting the legal scope of individual rights, there was a parallel development in the field of federalism. First, the federal government's powers were expanded dramatically by the enforcement provisions of the Reconstruction Amendments.⁵⁸ Later, direct election of senators reduced State legislatures' control over the federal government.⁵⁹ Finally, with the help of a pliable court and a national crisis, Franklin Delano Roosevelt dramatically expanded the federal government with his New Deal.⁶⁰ This section examines the growth of the federal government and how the changes of the twentieth century—both legal and societal—enabled that growth.

National defense and international diplomacy are appropriate functions of a strong, unified national government. The Departments of State and War were original members of the first cabinet.⁶¹ The addition of the Department of Commerce in 1903, then called the Department of Commerce and Labor, was also arguably appropriate for the increasing complexity of interstate commerce in the midst of the industrial revolution.⁶² However, the argument for federal involvement becomes more tenuous when the growth of federal legislation extends to roads, schools, and health care. As the number of agencies increases and the scope of their authority intensifies, the government is no longer just regulating commerce among the States, it is increasingly *becoming* commerce and thus supplanting its original limited constitutional role.

As noted above, the Founders did not design the Constitution to grant a series of positive individual rights. Rather, they

58. See U.S. CONST. amend. XIII § 2, XIV § 5, XV § 2 (granting Congress power to enforce the provisions of these amendments).

59. See U.S. CONST. art. I, § 3, cl. 1, amended by U.S. CONST. amend. XVII § 1; see also John W. Dean, *FindLaw Forum: Should the 17th Amendment Be Repealed?*, CNN.COM, LAWCENTER, <http://archives.cnn.com/2002/LAW/09/17/fl.dean.17th.amendment> (last visited Dec. 19, 2009).

60. See Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending, 1933–1939*, 34 J. L. & ECON. 161 (1991) (discussing the growth of the federal government and changing spending patterns during the Great Depression).

61. M. HINSDALE, *A HISTORY OF THE PRESIDENT'S CABINET*, 1–16 (1991).

62. FREDERIC AUSTIN OGG, *THE AMERICAN NATION: A HISTORY, VOLUME 27, NATIONAL PROGRESS, 1907–1917* 132 (1918) (“By the close of the century the growing complexity of the industrial situation called for better facilities of investigation and control. . . . Congress created a Department of Commerce and Labor.”).

designed it to limit the power of the government.⁶³ The rights that are granted are, for the most part, negative rights—freedoms from government.⁶⁴ The Framers created a system of checks and balances in order to prevent any one branch from becoming too powerful.⁶⁵ They also created a tension of power between the States and federal government.⁶⁶ The premise was that government was a threat to liberty; therefore by limiting its power liberty would be preserved.⁶⁷ It is important to keep this conflict between government and liberty in mind when studying the explosion of government in the past century.

A. *The Death of the Tenth Amendment and the Growth of the Administrative State*

The shift in the balance of power between the state and the individual that began with *Slaughter-House*⁶⁸ and *Plessy*⁶⁹ was dramatically accelerated with the jurisprudence of the New Deal Era.⁷⁰ The last bulwark against an overweening federal government—the Tenth Amendment—was all but interpreted out of the Constitution.⁷¹ In expansively interpreting the Commerce Clause, the courts gave the federal government an almost unlimited power.⁷² Though it has recently begun to reign in federal power under the Commerce Clause,⁷³ the Court

63. Conant, *supra* note 19, at 22 (“The second general objective of the federal Constitution is to guarantee the civil rights of persons within the United States through specified limitations on the powers of governments.”).

64. *E.g.*, U.S. CONST. amend. I–X.

65. THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) (examining separation-of-powers).

66. *See* U.S. CONST. amend. 10 (explicitly observing that the federal government is one of limited powers).

67. *See* THE FEDERALIST NO. 51, at 56 (James Madison) (explaining the necessity and structure of separation-of-powers).

68. *Slaughter-House*, 83 U.S. 36.

69. *Plessy*, 163 U.S. 537.

70. Epstein, *supra* note 30.

71. *See* United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941) (holding that Congress has the power under the Commerce Clause to regulate employment conditions and finding the Tenth Amendment was “but a truism”).

72. *See id.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding Congress has the power to regulate production of crops for self-consumption).

73. *See* United States v. Lopez, 514 U.S. 549 (1995) (ruling the Commerce Clause does not justify regulating guns in school zones), United States v. Morrison, 529 U.S. 598 (2000) (ruling the Commerce Clause does not justify providing civil remedies to victims of gender-motivated crimes), Seminole Tribe v. Florida, 517 U.S. 44 (1996) (ruling the Indian commerce clause did not grant Congress authority to abrogate the states’ sovereign immunity).

does not seem prepared to roll back completely the post-New Deal jurisprudence.⁷⁴

These legal shifts, combined with dramatically increased federal revenues following World War II,⁷⁵ have allowed an explosion in the size and power of the federal government⁷⁶ at the expense of States.⁷⁷ Paralleling the growth of the federal government, society's attitude towards government has changed dramatically since the founding. Historically, Americans viewed the federal government with distrust.⁷⁸ The size and power of the federal government proposed in 1787—tame by today's standards—was a subject of heated debate.⁷⁹ The level of comfort Americans have with the size and scope of their government today suggests that the growth of the federal government is not merely a legal development, but also a societal development.

B. Shifting Roles of Government

In media, shopping, travel, entertainment and music we have huge choice and control, from many organisations that offer us incredible service and value. But when it comes to the things we ask from politics, government and the state—there is a sense of power and control draining away; having to take what you're given, with someone else pulling the strings.⁸⁰

This distinction between individuals and institutions is an important one. Like any institution, government is an aggregation of individuals. In our early days as a country, we

74. *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding the federal government's power to regulate intrastate use of marijuana under the Commerce Clause).

75. WILLIAM D. ANDREWS & PETER J. WIEDENBECK, *BASIC FEDERAL INCOME TAXATION* 5–7 (6th ed. 2009) (giving a brief history of the federal income tax).

76. See generally J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L. J. 757 (2003) (discussing how regulatory law has exponentially grown); Robert C. Ellickson, *Taming the Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101 (discussing the explosion of the length and complexity of statutes and regulations over the twentieth century).

77. Pete Du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J. L. & PUB. POL'Y 137, 137 (1993).

78. THE FEDERALIST NO. 17, at 84 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

79. THE FEDERALIST NO. 45, at 228 (James Madison) (Lawrence Goldman ed., 2008).

80. David Cameron, U.K. Leader of the Conservative Party, *Fixing Broken Politics* (May 26, 2009) available at <http://www.epolitix.com/latestnews/article-detail/newsarticle/david-cameron-fixing-broken-politics-speech-in-full/>.

were first aggregated as colonies,⁸¹ then as a Confederation,⁸² and finally as a Union through the Constitution.⁸³ The citizens were paramount to the governments they established. The Framers decided how their government would function and laid a specific framework to achieve their noble goals. They decided how they wanted to balance their individual rights with the necessity of aggregation. The Framers wanted individuals to come first and the institution they were creating to come second. Thus, they designed a government with individual rights in mind—even before the adoption of the Bill of Rights:

The contention that the classical theory of rights stood behind the Constitution from the start, even before the Bill of Rights was added “for extra caution,” is only buttressed by the realization that the Privileges and Immunities Clause was already there in the original, unamended Constitution, ready to limit the federal government as its authors surely meant it to, prior to the addition of the Bill of Rights.⁸⁴

The American Constitution, with its various rights, checks, balances, and enumerated powers was designed in light of our human flaws and the implications of unchecked power. However, the Constitution was not designed to handle the challenges that would occur if government itself became imbued with an animus of its own, separate from the will of the people. Webster’s dictionary defines statism as: the “concentration of economic controls and planning in the hands of a highly centralized government.”⁸⁵ With TARP⁸⁶ and government-ownership of General Motors, Chrysler, and other interventions into private enterprise, we observe statism in various aspects of the American economic landscape.⁸⁷

Rather than step back from intervention, it appears that state control is becoming fundamental. Recent actions by the “Pay

81. Lance Banning, *From Confederation to Constitution: the Revolutionary Context of the Great Convention* in *THE CONSTITUTION: OUR ENDURING LEGACY* 23, 27 (James MacGregor Burns et al. eds., 1986).

82. *Id.* at 29.

83. W. CLEONSKOUSEN, *THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION* 162 (National Center for Constitutional Studies, 1955).

84. Shankman & Pilon, *supra* note 26 at 20.

85. WEBSTER’S NEW COLLEGIATE DICTIONARY 1152 (9th ed. 1983).

86. Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, 5211–5241, 5251–5253, 5261 (2008).

87. David Boaz, *This Slippery Slope Isn’t Steep, It’s Nearly Vertical*, *MODESTO BEE*, Nov. 15, 2009, available at 2009 WLNR 22970019.

Czar” to dictate the pay of executives in companies receiving federal financial support⁸⁸ and current health care legislation⁸⁹ indicate increasing state control. Notwithstanding its form or the industry to which it is applied, statism destroys personal sovereignty and therefore contradicts founding constitutional principles. While federal intrusion into interstate commerce, beyond mere regulation of, is one example of a threat to personal sovereignty,⁹⁰ the use of the government to deliver services directly poses a more significant threat to liberty and commerce.⁹¹ Overreaching regulation of national and global commerce interferes with market clearing mechanisms, typically resulting in shortages and surpluses;⁹² the transformation of economic activity, from commercial activity to governmental activity, doesn’t distort market mechanisms – it destroys them.

As government grows, people are more likely to see government as a service provider, not an administrator of the social contract or protector of individual rights.⁹³ The idea that there is a “government” existing independently of its citizens threatens to become firmly embedded in our consciousness as a society. The government is frequently invoked as the solution to any number of societal concerns, commercial crises, or natural catastrophes. “The government” should have done more in the wake of Hurricane Katrina,⁹⁴ “the government” needs to lower the price of prescription drugs,⁹⁵ “the government” needs to improve our schools, “the government” needs to make housing

88. Stephen Gandel, *Pay Czar*, TIME, Nov. 9, 2009, at 30.

89. See Janet Adamy & Naftali Bendavid, *House Passes Health-Care Reform Bill in Historic Vote*, WALL ST. J., Nov. 8, 2009, available at

<http://online.wsj.com/article/SB125757198373535753.html> and Associated Press, *Senate Dems eye finish line for health bill: Obama, American Medical Association praise legislation after crucial vote*, MSNBC.COM, Dec. 21, 2009, <http://www.msnbc.msn.com/id/34498942>.

90. For a historical overview of the development of the Commerce Clause, see Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605 (2001).

91. See 514 U.S. 549 (1995).

92. A classic example of shortages occurred under natural gas price controls in the 1970s. A more recent example of surpluses is housing, which was overbuilt because of excess demand caused by a variety of policies, including preferential tax treatment for home mortgage interest, capital gains preferences for real estate gains and federal sponsorship of entities created to securitize mortgages.

93. See generally DAVID KELLEY, *A LIFE OF ONE’S OWN* (1998) (explaining the historical evolution of the Welfare State).

94. See Michael Ignatieff, *The Broken Contract*, N.Y. TIMES, Sept. 25, 2005 § 6.

95. See Robert Pear, *A.M.A. Says Government Should Negotiate on Drugs*, N.Y. TIMES, Oct. 17, 2004, § 1 at 18.

more affordable,⁹⁶ or “the government” needs to facilitate company acquisitions to prevent a financial Armageddon.⁹⁷

In the absence of technological solutions to address government’s perception of people’s daily needs, federal powers have usurped what were traditionally personal or local powers.⁹⁸ Because individualized solutions are administratively difficult and costly, federal solutions typically use classification schemes to administer government assistance programs. For example, unemployment benefits are allocated based on job loss rather than actual need or specific entitlement.⁹⁹ Medicare reimbursements are based on standard procedure costs, not on actual costs for particular patients.¹⁰⁰ The effect of such policies is that individuals are treated unequally. Government—particularly a massive national government—is a blunt instrument. It must distribute entitlement benefits based on large group classifications. It cannot manage the administrative burden of subjectivity and must therefore choose putatively objective standards, which necessarily discriminate among beneficiaries and all citizens. This creates inequalities among beneficiaries, and more broadly, among all citizens. Some contribute large amounts of money toward the public good by voluntarily creating value for society and then paying taxes on that value. Others may contribute little value while deriving significant benefit. Notwithstanding Justice Harlan’s eloquent argument that “in the eye of the law, there is in this country no

96. See C. Theodore Koebel & Cara L. Bailey, *State Policies and Programs to Preserve Federally Assisted Low-Income Housing*, 3 HOUSING POLICY DEBATE 995 (1992).

97. See Stephen Labaton, *Trying to Rein in ‘Too Big to Fail’ Institutions*, N.Y. TIMES, Oct. 25, 2009, at A1.

98. For example, as of November 2009, Congress was considering expanding federally provided health care from retirees to working Americans, potentially resulting in unequal medical treatment for people based on their work status. Editorial, *ObamaCare’s Tax on Work*, WALL ST. J., Oct. 18, 2009, available at <http://online.wsj.com/article/SB10001424052748704322004574477401457898882.html>. The Social Security Act of 1935 provided for a major federal role in retirement savings. Social Security Act, 42 U.S.C. § 401 (2006). The Department of Education Act provided for a major federal role in education. 20 U.S.C. § 3401 (2006). The Economic Opportunity Act of 1964 provided for a major federal role in efforts to reduce poverty. Pub. L. No. 88–452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C. § 2701 (2006)). The Federal Unemployment Insurance Act provided federal funding to subsidize state unemployment insurance. 26 U.S.C. § 3301 (2008).

99. State Unemployment Insurance Benefits (Dec. 2, 2008), <http://www.ows.doleta.gov/unemploy/uifactsheet.asp>.

100. Overview Prospective Payment System—General Information (Nov. 13, 2009), <http://www.cms.hhs.gov/prospmedicarefeesvcptgen>.

superior, dominant, ruling class of citizens,”¹⁰¹ the federal government since *Plessy* has become a vehicle to authorize certain citizens employed by the government to grant benefits and sponsor particular transactions subject to the discretion of a “ruling class.”¹⁰²

These developments, particularly mandatory income redistribution, have contributed to the “sense of power and control draining away; having to take what you’re given, with someone else pulling the strings.”¹⁰³ Ideally, working to restore a personal sense of power and control should also include effective means to accomplish collective ends, like poverty reduction and universal health care, in a *voluntary* manner that empowers all economic participants. It should transcend the “social dilemma” problem presented by the public goods game¹⁰⁴ that arises when people decline to participate as individuals because they are unable to see that their personal efforts make significant differences in people’s lives.¹⁰⁵

VII. RESTORING INDIVIDUAL RIGHTS

Rethinking the question of aggregation from the individual’s point of view makes the dissent in *Plessy* a powerful opinion as one considers the growing role of the state.¹⁰⁶ This dissent from the end of the nineteenth century remains compelling at the threshold of the twenty-first because even now the challenge presented by the state making economic decisions is that these decisions must result in the creation of both classes and castes.

Freedom from interference by the government is a necessary predicate for people to be able to mobilize themselves as

101. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

102. Deepak Chopra, *The Discreet Charm of the Ruling Class*, HUFFINGTON POST (Oct. 23, 2007) available at http://www.huffingtonpost.com/deepak-chopra/the-discreet-charm-of-the_b_69404.html.

103. Cameron, *supra* note 80.

104. See generally Urs Fischbacher, Simon Gächter & Ernst Fehr, *Are People Conditionally Cooperative? Evidence from a Public Goods Experiment*, (Institute for Empirical Research in Economics, University of Zurich, Working Paper No. 16, July 2000) available at <http://www.iew.uzh.ch/wp/iewwp016.pdf> (examining conditional cooperation in a public goods game).

105. Technologies that have attempted to bridge this divide include “peer-to-peer” lending and “donors choose” projects. While these are in their technological infancies, technology that enables more robust handling of personal information would presumably contribute to adoption of these and other new business models to help address public welfare concerns.

106. *Plessy*, 163 U.S. at 552–564 (1896) (Harlan, J., dissenting).

responsible and active citizens. No amount of civic involvement and awareness will be sufficient to mobilize citizens when a government stands athwart. Thus, it is helpful to examine the ways in which technology has been used to spread information and organize individuals, even in the face of hostile government policies.

A. Historical Overview of Information Technology and Political Change

Historically, information technology has played a significant role in political thought and action,¹⁰⁷ especially in the United States. New forms of technology have produced new political developments.

The Founders used technology to great avail in the run-up to the American Revolution.¹⁰⁸ Their task was first to aggregate the people into a large insurrection, then later to aggregate the people to agree to a form of government. The authors of the Declaration of Independence explained their preference for personal and local power and control over remote royal power.¹⁰⁹ They emphasized equality and “the consent of the governed”¹¹⁰ and objected to delays in royal approval of local colonial lawmaking,¹¹¹ demands to forego political representation,¹¹² bureaucratic travel requirements in connection with local governance,¹¹³ dangerous security policies,¹¹⁴ ineffective immigration policies,¹¹⁵ and the growth of British bureaucracy in the colonies.¹¹⁶ The information technology of choice to facilitate the debate about the case for independence was the printing press.¹¹⁷

107. See generally A NATION TRANSFORMED BY INFORMATION (Alfred D. Chandler, Jr. & James W. Cortada eds., 2000) (discussing how information technology has transformed national history); BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER (2003).

108. RICHARD D. BROWN, *Early American Origins of the Information Age*, in A NATION TRANSFORMED BY INFORMATION 39 (Alfred D. Chandler Jr. & James W. Cortada eds., Oxford 2000).

109. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

110. *Id.*

111. *Id.*, para. 3–4.

112. *Id.*, para. 5.

113. *Id.*, para. 6.

114. *Id.*, para. 25.

115. *Id.*, para. 9.

116. *Id.*, para. 12.

117. THOMAS R. ADAMS, AMERICAN INDEPENDENCE: THE GROWTH OF AN IDEA xi (Jenkins and Reese 1980) (1965).

Several years after the Revolutionary War, communication technologies of the era brought together many of the same activists to frame the Constitution.¹¹⁸ The power to regulate interstate commerce in the Constitution¹¹⁹ was among the most powerful positive federal authorities¹²⁰ proposed by the Framers. Again, the printing press was the information technology of choice, publishing both the Federalist and Anti-Federalist Papers.¹²¹

Subsequent constitutional law developments, particularly the majority opinion in the *Plessy* case, neglected the plain language of equality in the Declaration when they interpreted the Constitution's expansive Civil War Amendments.¹²² While some telecommunication technology was available at the time of *Plessy*, the primary communications tool remained the printing press.¹²³

Motion pictures and radio broadcasts were pervasive by the middle of the twentieth century. As more Americans saw stark pictures of southern injustice and victims began to be known as real people via the media instead of printed names in newspapers, and as civil rights leaders personally appealed to growing audiences, the Court remedied its primary *Plessy* error in *Brown v. Board of Education*.¹²⁴ However, other private and government classifications, such as income distinctions, affirmative action, and targeted public assistance based on socio-

118. See MICHAEL WARNER, THE LETTERS OF THE REPUBLIC (1990) (describing the framing of the Constitution).

119. U.S. CONST. art I, § 8. The powers to tax and coin money, while important, lack equivalent universal application. Neither every person nor even every U.S. citizen engages in taxable activity or uses U.S. money. On the other hand, anyone who engages in any activity that "so affect[s] commerce . . . as to make [federal] regulation of them appropriate" is subject to explicitly broad powers granted to Congress. *United States v. Darby Lumber Co.*, 312 U.S. 100, 118 (1941).

120. Powerful negative authorities include bans on abridging free speech and religion and on the federal government exercising authorities not explicitly granted to it by the Constitution.

121. See Warner, *supra* note 118.

122. Abraham Lincoln did not mistakenly neglect to consider the Constitution in context of the Declaration like the *Plessy* Court. Regarding the author of the Declaration, Lincoln said,

All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times.

Letter from Abraham Lincoln to Henry L. Pierce and Others (April 6, 1859), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, at 19 (Don E. Fehrenbacher ed., 1989).

123. Warner, *supra* note 118.

124. 349 U.S. 294, 298 (1955).

economic data, belied Justice Harlan's view that "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."¹²⁵

Commentators credit the successful passage of the Civil Rights Act of 1964 in part to President Kennedy's effective use of television before his assassination.¹²⁶ Visual representations of the chaos at the 1968 Democratic National Convention created a fear of disorder which contributed to the election of President Nixon.¹²⁷ Broadcasts of the Vietnam War were credited for the public pressure that resulted in the U.S. withdrawal.¹²⁸ In each case, technology's delivery of increasingly vivid pictures of leadership, disorder, and violence may have caused results, or at least timing of results, that were different than they may have been in the absence of such technology.

After World War II, highly progressive marginal tax rates—up to 95%¹²⁹—along with federal expansion of retirement, health care, energy, and education policies, caused the formation of conservative, libertarian, and objectivist movements in opposition.¹³⁰ The development of airmail, high-speed rail service, and the technology to support multiple printing locations for national publications facilitated the development of these various movements.¹³¹ Both the economic "malaise" of the late 1970's¹³² and the election of President Reagan, who, like President Kennedy, made extraordinarily effective use of

125. 163 U.S. 537, 559.

126. John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) *available at* <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm>.

127. John Schultz, "The Substance of the Crime was a State of Mind"—How a Mainstream, Middle Class Jury Came to War with Itself, 68 UMKC L. REV. 637, 639 (2000).

128. Glen Sulmary & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1840 (2007). *But see* Michael Linfield, *Hear No Evil, See No Evil, Speak No Evil: The Press and the Persian Gulf War*, 25 BEVERLY HILLS B. ASS'N J. 142, 145 (1991).

129. TAX POLICY CENTER, HISTORICAL HIGHEST MARGINAL INCOME TAX RATES, *available at* http://www.taxpolicycenter.org/taxfacts/content/PDF/toprate_historical.pdf.

130. LEE EDWARDS, *THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA* (1999).

131. *E.g.*, Edward A. Keogh, *A Brief History of the Air Mail Service of the U.S. Post Office Department* (May 15 1918–August 31, 1927),

<http://www.airmailpioneers.org/history/Sagahistory.htm> (last visited Dec. 19, 2009);

Randy James, *High Speed Rail*, (Apr. 20, 2009),

<http://www.time.com/time/nation/article/0,8599,1892463,00.html>.

132. Edwards, *supra* note 130.

broadcast technology to accomplish his goals, was attributed to the economic consequences of these technological developments. President Reagan utilized his communication skills—honed in radio, film, and television—to become one of the greatest political communicators of modern times.¹³³ While he was able to use his communication skills to reduce marginal tax rates, those skills and the communications technology of the time proved incapable of permanently reducing the growth of government-mandated social benefits. If President Reagan had access to today’s significantly more robust interactive communications technology, the impact of his Presidency may have been more effective on the spending side as well.

Using technology to shape fundamental constitutional issues continued with the publication of the House Republican “Contract with America” in TV Guide in 1994. This, combined with the use of talk radio, resulted in the first change of party control of the U.S. House of Representatives in forty years.¹³⁴ In a similar use of technology, President Obama’s highly Internet-based 2008 campaign promised dramatic “change”; while the subsequent realities of governing, without the tightly choreographed script of a campaign was attributed to information published by “new” media, like the Fox News Channel.¹³⁵ The development of information technology during the late nineteenth and twentieth centuries accelerated at increasing rates,¹³⁶ as did the development of legal policy.¹³⁷

It is true that some developments in technologies contributed to a range of catastrophes: the Civil War, World War I,¹³⁸

133. See generally FREDERICK J., JR. et al., RONALD REAGAN: THE GREAT COMMUNICATOR (2003) (analyzing Reagan’s skill with communication technology).

134. JOHN B. BADER, TAKING THE INITIATIVE: LEADERSHIP AGENDAS IN CONGRESS AND THE “CONTRACT WITH AMERICA” 172 (Georgetown University Press 2007) (1996).

135. Ann Samer, *Obama Advisers Say Fox News Isn’t News*, AOL NEWS, Oct. 18, 2009, <http://news.aol.com/article/white-house-advisers-say-fox-news-is-not/722055>.

136. See Harro van Lente & Arie Rip, *Expectations in Technological Developments: An Example of Prospective Structures to be Filled in by Agency*, in GETTING NEW TECHNOLOGIES TOGETHER: STUDIES IN MAKING SOCIOTECHNICAL ORDER 206 (Cornelius Disco & Barend van der Meulin, eds., 1998) (Moore’s Law predicts the “regular, periodic doubling of the number of ‘gates’ (a measure of complexity)” in computer processor technology).

137. See Ruhl & Salzman, *supra* note 76 and accompanying text; Ellickson *supra* note 76 and accompanying text.

138. Maree Cullen, *World War One and its Aftermath: 1914-1921*, (Nov. 27, 2002), http://www.faculty.edfac.usyd.edu.au/projects/NSWhistory/arp_resources/world_war_one_and_its_afte.htm.

political disasters in Germany, the Soviet Union, and China,¹³⁹ the capability of a relatively small group of terrorists to leverage construction and aircraft technology to accomplish the September 11th attacks, and the creation of an unsustainable market in asset-backed securities leading to the 2008 economic crisis.¹⁴⁰ The technologies that facilitated so much destruction are also those that improved the ability of individuals to control mass opinion or to imprison and kill large numbers of individuals. These are unlike other technologies which facilitate person-to-person communications, disperse risk, and empower a well-informed citizenry to defeat violence, aggression, and deceit. The technology that facilitated television pictures of violence from Vietnam was credited with ending the war in Indochina. The surveillance technology that kept al Qaeda on the run was credited with disrupting subsequent terrorist attacks. And the technology that makes public company financial statements available to the market—first on paper, then microfilm, microfiche,¹⁴¹ EDGAR, and now via eXtensible Business Reporting Language (XBRL)¹⁴²—has made public company investing safer than asset-backed security investing to which no equivalent disclosure mechanism was applied. This technology of disclosure has at its heart a concern for the

139. *See, e.g.*, STEPHANIE COURTOIS ET AL., *THE BLACKBOOK OF COMMUNISM* 175–76 (Jonathan Murphy trans., Mark Kramer ed., 1999) (explaining how the “passportization” of 27 million people in 1933 facilitated mass deportations from various cities and the deaths of many deportees).

140. *See* Hitachi Data Interactive, *XBRL: An Interview with Paul Wilkinson* (Part 1), <http://hitachidatainteractive.com/2009/10/29/xbrl-an-interview-with-paul-wilkinson-part-1> (last visited Dec. 19, 2009) (“As we’ve seen with ABS, keeping disclosure regulation up-to-date with financial innovation is critical. Over the past decade, one reason capital flowed disproportionately to ABS relative to public companies is because regulators used proven manual systems to keep GAAP (Generally Accepted Accounting Principles required to be applied to public company finances) up to date. SOX (the Sarbanes Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745) was expensive. It helped prevent more Enrons and WorldComs, but at the same time, it drove capital toward non-GAAP investments. Despite Reg. AB (Regulation AB, 70 Fed. Reg. 1506, 1508 (Jan. 7, 2005)) (to be codified at 17 C.F.R. 210, 228–229, 232, 239, 240, 242, 245, and 249), which was generally a codification of many years of asset-backed securitization legal practice, ABS financial practices continued to evolve, contributing to both the housing bubble and to the growth of multi-layered complex securities on top of basic ABS.”).

141. SEC Commissioner Richard B. Smith, *Cleveland Regional Group of the American Society of Corporate Secretaries*, *available at* <http://www.sec.gov/news/speech/1970/041670smith.pdf>. (“Well, the first difficulty I mentioned, dissemination of the periodic reports outside the Commission, has been substantially improved by the microfiche system inaugurated more than a year ago. Copies of any periodic report filed with the Commission are quickly available to any member of the public who chooses to pay for them.”).

142. *See infra*, note 199.

individual rights of the “common man”¹⁴³ to allocate capital to industry as he saw fit. Keeping today’s capital markets open to the “common man” mitigates the chance of excessive power being given to or taken by the government and is therefore important to individual rights.

B. *Modern Developments for Information Technology and Dissent*

In June 2009, the U.S. State Department sought the assistance of the social networking service Twitter to empower Iranians to communicate with each other about a disputed election.¹⁴⁴ While the number of Iranians who used Twitter to communicate during the election crisis is uncertain,¹⁴⁵ the phenomena attracted global attention because of efforts by the Iranian Government to limit communications. YouTube videos have also been used to document actions by the government of Iran to limit protests.¹⁴⁶

In November 2009, Chinese citizens worked to overcome the “Great Firewall of China,” a state-run barrier to any information that could foment discord against the Communist dictatorship.¹⁴⁷ Chinese who were eager to celebrate the twentieth anniversary of the Berlin Wall’s collapse set up a “Berlin Twitter Wall” to share memories and to discuss other barriers to freedom that should be removed.¹⁴⁸ Earlier in 2009, the People’s Republic of China (PRC) government had mandated software on all personal computers in China, ostensibly for the purpose of protecting children from

143. SEC Commissioner A. A. Sommer, Jr., “Differential Disclosure: To Each His Own,” available at <http://www.sec.gov/news/speech/1974/031974sommer.pdf> (“This ‘common man’ concept has been expressed repeatedly in Commission rules and determinations and court decisions relating to standards of materiality.”).

144. Sue Fleming, *U.S. State Department Speaks to Twitter Over Iran*, REUTERS, June 16, 2009, available at <http://www.reuters.com/article/rbssTechMediaTelecomNews/idUSWBT01137420090616>.

145. Ravi Somaiya, *The Revolution Will Not Be Tweeted Because Only 0.027% of Iranians Are on Twitter*, GAWKER, Nov. 9, 2009, available at <http://gawker.com/5400268/the-revolution-will-not-be-tweeted-because-only-0027-of-iranians-are-on-twitter>.

146. Matthew Weaver & Saeed Kamli Dehghan, *New Protests in Iran*, GUARDIAN, Nov. 4, 2009, available at <http://www.guardian.co.uk/world/blog/2009/nov/04/iran-student-day-protests>.

147. Aileen McCabe, *Chinese Netizens Leap Great Firewall of China to Mark Berlin Wall’s 20th*, VANCOUVER SUN, Nov. 6, 2009, available at <http://www.vancouversun.com/technology/Chinese+netizens+leap+Great+Firewall+China+mark+Berlin+Wall+20th/2193355/story.html>.

148. *Id.*

inappropriate content, but then dropped its plan after concerns about the use of the software to limit political speech spread around the world on the Internet.¹⁴⁹ The Internet appears to have generated disagreement within the PRC government itself. While Minister for Public Security, Meng Jianzhu, was concerned about “weak links in social regulation,” the PRC’s Ministry of Culture accused the PRC’s General Administration of Press and Publication of acting without authority in attempting to ban a new version of the online game World of Warcraft.¹⁵⁰

The government of Russia, understanding how difficult it is to win a race against communications technology, appears to prefer intimidation to control Internet conduct and content. The founder of a human-rights Web site was reportedly shot in the head by police in what officials suggested was an “accident,” and bloggers have been charged with inciting hatred for criticizing law enforcement.¹⁵¹ By one account, seventeen journalists have been assassinated in Russia since 2000.¹⁵²

In order to make the Internet a more powerful tool to promote freedom abroad, the U.S. Congress repeatedly considered legislation entitled the Global Internet Freedom Act.¹⁵³ The 2009 version of the bill would provide authority to sanction U.S. companies for failing to protect the identity of people using the Internet to promote freedom abroad and would create a U.S. State Department Office of Global Internet Freedom. Previous versions of the bill called for the development and deployment of U.S. technology to defeat Internet jamming and censorship by oppressive foreign governments.

149. See *China Bureaucratic War Over Online Warcraft Heats Up*, Reuters, Nov. 4, 2009, available at <http://www.reuters.com/article/technologyNews/idUSTRE5A32Ge20091104>.

150. *Id.*

151. Alastair Gee, *Russia’s Dissident Bloggers Fear for Their Lives*, U.S. NEWS, Sept. 30, 2008, available at <http://www.usnews.com/articles/news/world/2008/09/30/russias-dissident-bloggers-fear-for-their-lives.html>.

152. David Satter, *Journalism of Intimidation*, FORBES, July 2, 2009, available at <http://www.forbes.com/2009/07/07/paul-klebnikov-murder-opinions-david-satter.html>.

153. H.R. 2271, 111th Cong.; H.R. 275, 110th Cong.; H.R. 4780, 109th Cong.; H.R. 48, 108th Cong.; H.R. 5524, 107th Cong.

C. President Obama's Administration, Mass Organization and the Future

Political professionals—a class of campaign consultants and cable television “talking heads” the framers would have found abhorrent to their values—express increasing frustration with the “tone” of political discourse.¹⁵⁴ Internet-induced changes in the news media market structure cause national and global news content providers to experiment with more subjective professional journalism.¹⁵⁵ Tangible democratic results embody dynamism and disruptive technology.¹⁵⁶ The premise of representative democracy—that while public passions can flutter about at undesirable speed, institutional constraints can effectively moderate excessive wavering¹⁵⁷—is particularly relevant in light of the development of real time tools that exponentially increase the ability millions of individuals to collaborate.¹⁵⁸ Elections to offices of constitutional responsibility are far more important than selecting a winner on American Idol, but as decision-making technologies converge and advance,¹⁵⁹ those responsible for implementing the technology must be concerned that the medium of decision-making supports appropriate contemplation by the message senders.

Among the questions that arise as communications economics evolve is whether money will become more or less important in politics. While websites and e-mail campaigns are much less expensive than national television campaigns, the movement of

154. *E.g.*, *Glen Beck: Obama Is a Racist*, ASSOCIATED PRESS, July 29, 2009, <http://www.cbsnews.com/stories/2009/07/29/politics/main5195604.shtml>, Scott Whitlock, *MSNBC's Chris Matthews Visibly Frustrated After Being Taunted for Leg Tingle*, NEWSBUSTERS, Nov. 4, 2009, <http://newsbusters.org/blogs/scott-whitlock/2009/11/04/msnbc-s-chris-matthews-visibly-frustrated-after-being-taunted-leg-ti>.

155. *E.g.*, MSNBC.com, Countdown with Keith Obermann, <http://www.msnbc.msn.com/id/3036677> (last visited Dec. 19, 2009); FOX News, Sean Hannity, <http://www.foxnews.com/bios/talent/sean-hannity/> (last visited Dec. 19, 2009).

156. *See*, Organizing for America, <http://my.barackobama.com> (last visited Dec. 19, 2009) (an online community of organizers behind Barack Obama).

157. THE FEDERALIST NO. 10 (James Madison) (Lawrence Goldman ed., 2008).

158. *Cf.* Google Wave, <http://wave.google.com> (last visited Dec. 19, 2009) (allowing visitors to communicate and collaborate in real time), American Idol FAQs, <http://www.americanidol.com/faq> (last visited Dec. 19, 2009) (explaining the game show's interactive voting component).

159. *See* Mike Godwin, *Superhuman Imagination: Vernor Vinge on Science Fiction, the Singularity, and the State*, REASON, May 2007, <http://reason.com/archives/2007/05/04/superhuman-imagination> (speculating about Benjamin Franklin's interest in “the Singularity”).

voter eyeballs from prime time to Facebook and other Internet platforms has changed communication-economics in yet-to-be understood ways.¹⁶⁰ Will money become more important as political professionals seek positive attention for their chosen candidates? Or will political campaigns go the way of music promotion, where the returns on investments in marketing super bands and mega acts have evaporated when faced with competition from the “long tail” of content and talent that is now easily available to music consumers?¹⁶¹ Or are the economics of film promotion more applicable, where low-budget productions can now use Internet word-of-mouth to compete with studio-produced entertainment which costs hundreds of millions of dollars to produce?¹⁶² With an ever-increasing amount of content on the Internet available for free,¹⁶³ will political decision-making continue to generate sufficient revenue to employ the professional political class? Or might new leaders emerge who understand how to balance republicanism and democracy, so that the long-term health of national governance is not compromised by short-term fancy for particular ideas that sound good when they are tweeted?

VIII. RESTORING THE BALANCE BETWEEN CITIZENS AND GOVERNMENT

A well-functioning republic requires not only that its citizens have the opportunity to think, organize, speak, and act for themselves, but also that its citizens capitalize on those opportunities. In examining how to restore a healthier balance between citizens and their government, it is important to realize that this is the balance of distinct entities. Restoring a healthier balance can best be accomplished by strengthening the citizens or by limiting the government. Changing technology creates opportunities for citizens to speak and mobilize, even in the face of governmental opposition.

160. J.P. Freire, *The Caucus*, *Facebook Pitches Its Political Benefits*, N.Y. TIMES, Oct. 10, 2007, <http://thecaucus.blogs.nytimes.com/2007/10/10/facebook-trains-campaigns-to-use-the-web/>.

161. See Zeb G. Schorr, Note, *The Future of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA. SPORTS & ENT. L. J. 67 (Fall 2003) (discussing developments in the music industry in a digital age).

162. Mark Steven Bosko, *Cybermarketing: Using the Internet to Promote Your Video*, VIDEOMAKER, Feb. 1998, <http://www.videomaker.com/article/3241>.

163. See CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* (2009) (discussing shifting business models and overall price declines of Internet content).

Dramatic technology changes over the past few centuries affect the tension the Framers built into our system. There has always been a functional limit on democratic government because it is difficult to muster the resources for a full referendum whenever an issue needs to be decided. However, the Internet provides a unique opportunity to aggregate many more voices at a scale that was never before imaginable. The Internet presents new ways for pure democracy to challenge Hobbes' Leviathan. The only certain outcome is that the future will be different from the past.

Concepts like crowdsourcing¹⁶⁴ are part of the new vernacular highlighting the impact of the Internet on mainstream thinking and discussion. Is it possible for the Internet to also create a new mechanism for crowdsourcing and "meGovernment?"¹⁶⁵ Can the same ideals that led to the ratification of the Constitution be reinvigorated at the start of the twenty-first century? Can we restore the core principles of individual rights that were at the heart of our Founders' vision 220 years ago?

Although there is a glimmer of hope for a revival of federalism,¹⁶⁶ a set of concurrent developments facilitated by technology and the Internet force us to revisit many decisions to grow government over the past two centuries. While many of these legislative and executive actions may have been wise at the time, when looked at anew, in light of contemporary capabilities and technologies, better approaches to the old problems become apparent. This opportunity to rethink old decisions is both functional and fundamental.

Technology is not a solution in and of itself but is a set of tools to achieve particular goals. The aim is not to sidestep government with technology, but rather to make government's size and physical scope more consistent with principles of liberty while using technology to achieve societal goals – old and new alike – more effectively.

Since the mid-1990's, the Internet has proven to be an unprecedented and remarkably powerful mechanism of

164. Taking tasks traditionally performed by employees or contractors and outsourcing them to a group (crowd) or community in the form of an open call. JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 1–6 (2008).

165. meGovernment is the application of technology to deliver government services in a highly customized, personal, unique, and individual-oriented way.

166. See *supra* note 73 and accompanying text.

communication and aggregation. If government is a mechanism to aggregate the activities and protect the rights of individuals, then the power of sites like Facebook, MySpace, LinkedIn, and other tools should help us think anew about government mechanisms and their future roles as aggregators of individuals.

A. Changing Delivery Methods

The States and the national government alike jumped into the Internet and eCommerce revolution, seeking to harness the same tools and technologies to deliver government services via the Internet. The authors of this Article have served in different capacities to advance technological approaches at the state and federal levels.

Our particular experiences with eGovernment¹⁶⁷ inform our perspective on the ability of the Internet to deliver government services and to create a more symmetric information flow for investing. Moreover, our experiences inform a perspective on how these technologies can go further to transform both the delivery of services and the more efficient and transparent regulation of market participants. If they are tapped more aggressively, these tools can facilitate more innovative approaches to eGovernment in the twenty-first century and perhaps lead to a meGovernment.

To fully understand the implications of technology on government and government services, it is useful to examine retrospective and prospective examples of eGovernment. The capability of technology to improve commerce is already clear in the private sector. As technology continues its rapid advance, the public sector has the opportunity to learn from these examples and simultaneously advance the rights of individuals, decreasing the burden of government and more efficiently aggregating services appropriate for a civil society.

When the eGovernment Task Force in Texas was first formed in late 1999, the legislative mandate required that the Governor's appointees achieve two fairly basic goals: (1) initiate

167. Gary Thompson served on both an eGovernment Task Force authorized by the Seventy-Sixth Legislature of the State of Texas and the ensuing Texas Online Authority, created by the Seventy-Seventh Legislature. Paul Wilkinson was Senior Advisor to U.S. Securities and Exchange Commission Chairman Christopher Cox, 2005–2009, and oversaw the adoption of XBRL.

several pilot projects¹⁶⁸ and (2) make recommendations on necessary legislation to further advance eGovernment in Texas.¹⁶⁹ Initially, the idea that you could go online instead of stand in a line to renew your driver's license was novel. However, that service and others, like renewing your vehicle registration, were advanced.¹⁷⁰ Over time, additional legislation put all professional licenses online¹⁷¹ and several initiatives tied in city and county governments. Harris County, for example, used the Texas Online platform for the payment of traffic tickets in its jurisdiction.¹⁷²

Over time, Texas Online became more ambitious, seeking to harness technology to streamline even more functions of government, including courts. Working with judicial agencies and partnering with the private sector, Texas Online laid the foundation for filing court documents electronically.¹⁷³ This would not only lower the costs of filing incurred by parties to litigation, but it would also strengthen the courts' ability to handle increasingly complex cases with multiple filings. However, a few members, including one of the authors, became concerned that Texas Online was simply putting digital wrappers on existing processes, instead of digging deeper into the processes and reinventing them based on the power of technology. This was a result of putting the government before the "e," rather than the "e" before the government. Texas Online was built on the 1999–2003 period's understanding of the Internet and technology. A few years later, the U.S. Securities and Exchange Commission (SEC) was able to harness technologies from the 2005–2009 period.¹⁷⁴ While these experiences were separated by only a few years, the pace of technology development during that brief time contributed to significant implementation differences.

168. Texas SB 974, 76th Leg. Reg. Sess. § 2054.062(b) (1999).

169. Texas SB 974, 76th Leg. Reg. Sess. § 2054.062(e) (1999).

170. *Texas Government Goes Online*, VICTORIA ADVOCATE, Sept. 30, 2000, at A11.

171. *See, e.g.*, Texas State Board of Plumbing Examiners, Online Services, <http://www.tsbpe.state.tx.us/online-renewal.html> (last visited Dec. 19, 2009) (listing the full suite of services for online plumbing licensing).

172. Ticket/Pay, Online Ticket Payment System, City of Houston, <http://www.texasonline.state.tx.us/NASApp/rap/apps/chotpa/jsp/eng/welcome.jsp> (last visited Dec. 19, 2009).

173. Texas Online, eFiling for Courts: eFiling Main Information, <http://www.texasonline.com/portal/tol/en/info> (last visited Dec. 19, 2009).

174. *See* U.S. Securities and Exchange Commission, Office of Interactive Disclosure, <http://www.sec.gov/spotlight/xbrl/what-is-idata.shtml> (last visited Dec. 19, 2009).

These examples are an illustrative snapshot of approaches to eGovernment. However, with rapidly increasing capabilities and greater adoption of both the wired and wireless Internet, the opportunities ahead are exciting because of the innovative ways in which new services can be delivered and the ability to reorient the way in which we “aggregate” to solve problems in the private and public sectors. In the past decade, the power of technology has advanced, and those advances inform the potential for more dramatic meGovernment initiatives for the twenty-first century.

If there is no government independent of its people, there can be no services independent of the people for whom the services are designed. Practically speaking, this means that rather than routing tax dollars through one government agency, the IRS, to be allocated by a legislative body, the U.S. Congress, and then spent by another agency, the Internet and e-commerce can support more innovative and efficient models to achieve similar results at lower costs and with fewer restrictions on personal freedom.

Through the power of technology and the interconnectedness afforded to us by the Internet, the aggregation power of the government is no longer unique. The following prospective examples highlight areas of government that were originally designed in light of limitations that no longer exist. Each example looks at the delivery of the associated services from the perspective of the individual rather than the institution. By putting the “e” before government, meGovernment can be achieved in both cases.

The Department of Veterans Affairs (VA) example looks at the prospect of meGovernment from a delivery perspective. The Commerce, Education and Labor example shows how regulation can be delivered virtually rather than through institutions that are focused more on bureaucratic sustainability than on the goals agencies were created to achieve. Each example looks at meGovernment from an outward-facing perspective.

As the health care debate unfolds,¹⁷⁵ the VA duplicates functions performed elsewhere in the public and private sectors that could be improved by the more elegant use of technology as an aggregator of services.

175. *Supra* note 91.

In order to deliver health care to veterans, the VA has developed a large system of staff, hospitals and other facilities.¹⁷⁶ In light of the defense of freedom by soldiers and veterans, this commitment of health care resources to veterans is fitting. Yet these services do not require replicating health care systems that already exist. Technology and meGovernment can remove the federal government from this delivery paradigm and improve the focus of public and private resources on better and broader support of our veterans.

Certain health care assets are required to treat the unique injuries and circumstances that occur on the battlefield. Front line doctors in the theater of war reflect that reality; ongoing care once the battle is won must reflect it too. Burn centers like those in San Antonio, Texas reflect this excellence in veterans' care.¹⁷⁷ Beyond using the Internet to provide maps to these facilities and contact information, however, advances in technology could reorient the entire paradigm of care and payment, reducing the cost and friction in the system while expanding the delivery and quality of care. The intersection of two technology-enabled tools makes a meGovernment approach to veteran health care possible. The first tool is tagging. To understand tagging, we can look at Flickr.¹⁷⁸ Flickr is an Internet service that lets users upload photos to share with friends and tag those photos with names or descriptions.¹⁷⁹ The second technology tool, the electronic benefit card, has also become common. Many States use the functionality of credit and debit cards to electronically distribute benefits and funds directly to recipients.¹⁸⁰ Combining these tools can unshackle VA health care from its physical infrastructure.

A robust mechanism that would tag a veteran's personal information and health needs with the appropriate privacy and

176. *See generally*, United States Department of Veteran's Affairs, Fact Sheet: Facts about the Department of Veterans Affairs (2009), <http://www1.va.gov/opa/fact/vafacts.asp> (last visited Dec. 19, 2009) (stating that the VA health care system includes 153 medical centers and more than 1,400 sites of care).

177. The Brook Army Medical Center in San Antonio, TX, has a Burn Center verified within the DoD. SAMMC: San Antonio Military Medical Center, <http://www.sammc.amedd.army.mil> (last visited Dec. 19, 2009).

178. Flickr, <http://www.flickr.com> (last visited Dec. 19, 2009).

179. *Id.*

180. Electronic Benefit Transfer has been used in all 50 states since June of 2004. Electronic Benefit Transfer (EBT), <http://www.fns.usda.gov/snap/ebt> (last visited Dec. 19, 2009).

control over that information at the veteran's command. This could support the transformation of the physical silos of the VA health care system into a virtual delivery system. This reduction in the duplication of effort would increase personal control for the veteran while freeing resources for better care and enabling government employees to return to the private sector where their talent would be available to veterans – along with the talents of millions of other health professionals.

These tags in the aggregate would create a virtual cloud of information that could be dynamically rearranged based on the unique needs of any individual. The physical structure of the current VA, or any government department, can never be this dynamic. Rather than federal labyrinths of asset maps and distribution mechanisms, individuals could reveal the best choices through their own actions. Services would be expanded and moved from the government back into the hands of the sovereign, “We the People,” acting in concert.

B. Changing Regulatory Methods

As the federal government expanded to regulate an increasingly technological nation in the twentieth century, it borrowed practices from the private sector and modified those practices to accomplish its objectives. The following examples show how technology can improve regulation to empower individuals.

Following the stock market crash of 1929 and the subsequent economic crisis, Congress and Franklin Delano Roosevelt's administration assigned the disclosure of important financial information by public companies offering their securities to investors to the Securities and Exchange Commission.¹⁸¹ Instead of enacting legislation to prohibit individuals from investing in companies that failed to meet certain financial standards, Congress chose to let individuals decide their own investment strategies with the help of information disclosed pursuant to improved accounting standards.

Inadequate disclosure of information to investors in public companies in the 1920s contributed to a stock market bubble¹⁸²

181. JAMES S. OLSON, HISTORICAL DICTIONARY OF THE GREAT DEPRESSION, 1929–1940 252 (Greenwood Press 2001).

182. Howard I. Golden, *Corporate Governance*, in COVERING GLOBALIZATION: A HANDBOOK FOR REPORTERS 187–88 (Anya Schriffin & Amer Bisat eds., 2004).

which, when it burst, helped initiate the Depression. In response, Congress granted the Federal Trade Commission and, subsequently, the SEC the authority to require disclosure as a prerequisite to offer and resell securities.¹⁸³ While many aspects of the New Deal remain controversial, it is generally agreed that disclosure of material public company information contributed significantly to the world-leading growth of U.S. capital markets.¹⁸⁴

Disclosure of company information instead of substantive regulation of particular company behavior complied with the main principle of equality expressed in the *Plessy* dissent. Instead of dividing society into classes—some of which were allowed to participate in capital markets while others were deemed insufficiently sophisticated—the full potential of market power was brought to bear on the challenge. Anyone could buy or sell a stock or a bond as long as the company issuing it complied with open and transparent disclosure standards.¹⁸⁵ The sense of power and control among individuals was further enhanced by the repeal of fixed commissions on equity trading in 1975.¹⁸⁶ While the public Social Security system provided one leg of the retirement savings stool, lower cost private investment, including Individual Retirement Accounts and 401(k) plans, comprised a growing second leg.¹⁸⁷ As the system of company disclosure evolved, however, it became increasingly complex: participants deferred to third party analysts to help them make investment decisions. Unfortunately, many analysts turned out to be less than objective.¹⁸⁸ Claims about the potential of the Internet itself became more enticing and easier to believe than the results of standard financial analysis, resulting in another

183. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1223–27 (1999).

184. See FRANK B. CROSS & ROBERT A. PRENTICE, LAW AND CORPORATE FINANCE 133–38 (2007) (discussing the growth of the U.S. markets and corresponding impact on other markets).

185. See Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan*, 28 BROOK. J. INT'L L. 319, 326 n. 34 (2003) (outlining the subsequent statutes applicable to the disclosure requirement).

186. Adoption of Securities Exchange Act Rule 19b-3, Exchange Act Release No. 11, 203, 6 SEC Docket 147 (Jan. 23, 1975).

187. MICHAEL B. SNYDER, DESIGNING AN EFFECTIVE ERISA COMPLIANCE PROGRAM, §§ 1:4, 1:20 (Corporate Compliance Series Vol. 5 2009).

188. Louis E. Ebinger, Note, *Sarbanes-Oxley Section 501(a): No Implied Private Right of Action, and a Call to Congress for an Express Private Right of Action to Enhance Analyst Disclosure*, 93 IOWA L. REV. 1919, 1925–31 (2008).

asset bubble and the subsequent “dot-com crash.”¹⁸⁹ Congress then enacted the Sarbanes-Oxley Act¹⁹⁰ mandating additional controls over financial reporting, which proved expensive when performed manually.¹⁹¹

To create the original public company disclosure system, the SEC turned to the American Institute of Accountants, which supplied appropriate paper forms for companies to use in filing their financial reports.¹⁹² For nearly three quarters of a century, even though the extent of required disclosure gradually expanded, the format of public company disclosure to the SEC and the markets remained paper.¹⁹³ While the SEC’s EDGAR (Electronic Data Gathering Analysis and Retrieval) system provided for electronic representation of paper documents starting in the 1990s, it failed to bring the benefits of a database system either to companies or to investors.¹⁹⁴

In 1998, Charlie Hoffmann, a certified public accountant, developed a tool to represent Generally Accepted Accounting Principles in a version of eXtensible Markup Language (XML) called eXtensible Business Reporting Language (XBRL).¹⁹⁵ The American Institute of Accountants successor organization, the American Institute of Certified Public Accountants (AICPA),¹⁹⁶

189. Michael Geist, *Cyberlaw 2.0*, 44 B. C. L. REV. 323, 324 (2003).

190. Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2006) (the civil provision), Sarbanes-Oxley Act of 2002 § 906, 18 U.S.C. § 1350 (2006) (criminal provision).

191. The SEC further enhanced its disclosure requirements for public companies with the adoption of data-based disclosure in December 2008. Among the rationales for the adoption of data was more accurate information for investors and potential savings for companies working to mitigate the high costs of manual SOX compliance. Unfortunately, enhanced data disclosure was not applied to asset-backed securities before 2008, contributing to the 2008 financial crisis. Exchange Rule, 17 CFR 240.13a-14b; Exchange Rule 17 CFR 240.15d-14(b) (exempting asset-backed securities from complying with the Sarbanes-Oxley Act’s enhanced disclosure requirements).

192. U.S. Securities and Exchange Commission, SEC Approves Interactive Data for Financial Reporting by Public Companies, Mutual Funds, <http://www.sec.gov/news/press/2008/2008-300.htm> (last visited Dec. 19, 2009).

193. See generally JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (Aspen Pub. N.Y. 3d ed. 2003) (detailing the history of the SEC).

194. U.S. Securities and Exchange Commission, Important Information About EDGAR, <http://www.sec.gov/edgar/aboutedgar.htm> (last visited Dec. 19, 2009).

195. See *An Introduction to XBRL*, XBRL International, <http://www.xbrl.org/WhatIsXBRL> (last visited Dec. 19, 2009) (giving a brief overview of XBRL); See generally *Key Principles of an XBRL Framework*, CHARTERED FINANCIAL ANALYSTS INSTITUTE, June 23, 2008, available at

http://www.cfainstitute.org/centre/topics/reporting/pdf/principles_for_XBRL.pdf.

196. American Institute of Certified Public Accountants, <http://www.aicpa.org> (last visited Dec. 19, 2009).

helped develop the language and played a key role in advancing the federal government's interest in accurate and timely disclosure of material information from public companies.¹⁹⁷ To help its own business processes catch up with modern technology, the SEC began to explore adding XBRL data-based disclosure to its existing document-based disclosure system in 2004.¹⁹⁸

XBRL empowers individuals in several ways. First, as a nonproprietary, open standard, it is accessible to a large number of potential users at moderate cost.¹⁹⁹ This reduces the information advantages held by highly sophisticated investors who can more easily afford to convert paper format disclosure into data format disclosure.²⁰⁰ Second, because XBRL information is transmitted from companies to data intermediaries without the need for re-keying or potentially faulty computer parsing, error rates with respect to particular data are considerably lower.²⁰¹ Third, improved market access to financial information is likely to result in more competitive capital markets and therefore in a more efficient allocation of capital towards businesses that are able to use it to create the most value.²⁰²

A fourth advantage has yet to be fully realized because when it mandated the use of XBRL for financial reporting in December 2008, the SEC failed to lift its requirement for traditional document format financial statements.²⁰³ Therefore, direct

197. See Karen Kernan, *The Story of Our New Language*, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, 27–31 (2009) (detailing the adoption of XBRL by the SEC), available at http://www.aicpa.org/Professional+Resources/Accounting+and+Auditing/BRAAS/downloads/XBRL_09_web_final.pdf.

198. Securities and Exchange Commission, Press Release No. 2004–97 (July 22, 2004).

199. What Is XBRL?, XBRL International, <http://www.XBRL.org/WhatIsXBRL> (last visited Dec. 19, 2009).

200. How XBRL Web Services Impact Investors and Financial Analysts, PriceWaterhouseCoopers, <http://www.pwc.com/gx/en/xbrl/how-web-services-impact-investors-and-financial-analysts.jhtml> (last visited Dec. 19, 2009).

201. Mike Willis & Brad Saegesser, *XBRL: Streaming Credit Risk Management*, CREDIT & FINANCIAL MANAGEMENT REVIEW, (Second Quarter 2003), available at http://www.pwc.com/en_GX/gx/xbrl/pdf/pwc_xbrlcrm.pdf.

202. XBRL, The American Institute of Certified Public Accountants, <http://www.aicpa.org/Professional+Resources/Accounting+and+Auditing/BRAAS/XBRL.html> (last visited Dec. 19, 2009).

203. Interactive Data to Improve Financial Reporting, Securities Act Release No. 9001, Exchange Act Release No. 59,324, Investment Company Act Release No. 28,609, 74 Fed. Reg. 6776 (Jan. 30, 2009) at II(c)(5), available at

savings to investors in public companies will be limited to efficiencies created by public companies that reform their financial reporting process by using more efficient data-based systems to produce both their traditional and data statements. Until the dual filing requirement is lifted, investors and the companies in which they invest will not enjoy the full cost-savings potential of automated financial reporting.

The process of creating XBRL “data tags” for U.S. GAAP itself also showed the potential of technology to support more equal treatment of individuals in governance and policy making. While the process of creating accounting principles themselves is rigorous, formal, and controlled by a small group of accounting experts at the Financial Accounting Standards Board in Norwalk Connecticut,²⁰⁴ the process of creating data tags to represent those accounting principles was open and relatively informal and invited meaningful participation from anyone with potential expertise or judgment.²⁰⁵ The nonprofit organization formed to create the data tags, XBRL US,²⁰⁶ used crowdsourcing software called SpiderMonkey²⁰⁷ to empower anyone with an Internet connection to review draft data tags, comment on them, suggest new tags, and facilitate the integration of this public comment into the development process.²⁰⁸ While the tag creation process was probably not subject to the Administrative Procedures Act,²⁰⁹ technology nevertheless made it cost-effective to treat general public comment just as seriously as comment from Wall Street’s most elevated classes and castes.²¹⁰

<http://www.sec.gov/rules/final/2009/33-9002.pdf> (“The new rules will not eliminate or alter existing filing requirements that financial statements and financial statement schedules be filed in traditional format.”).

204. The Mission of the Financial Accounting Standards Board, Facts about the FASB, Financial Accounting Standards Board, <http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176154526495> (last visited Dec. 19, 2009).

205. *XBRL’s GAAP Data Tags Open for Review*, MARYLAND ASS’N OF CPAS, Nov. 25, 2008, available at <http://www.macpa.org/Content/24633.aspx>.

206. About Us, XBRL US, <http://xbrl.us/about/pages/default.aspx> (last visited Dec. 19, 2009).

207. *SpiderMonkey Captures the Business Reporting Zeitgeist: True Collaboration*, ALLBUSINESS.COM, Dec. 11, 2007, <http://www.allbusiness.com/company-activities-management/operations/5324810-1.html>.

208. *Id.*

209. 5 U.S.C. 701–706 (2008).

210. See Robert Bloom & Mark Myring, *Global Capital Markets and the Global Economy*, ENTREPRENEUR (July–Aug. 2007), available at <http://www.entrepreneur.com/tradejournals/article/169679338.html> (discussing XBRL’s potential for user-driven, real time business information).

Based in part on the success of the SEC program, on July 30, 2009, the U.S. House Committee on Oversight and Government Reform unanimously approved H.R. 2392, which requires the use of, and sets criteria for, a common data standard, such as XBRL, for the vast majority of information reported to and by the federal government.²¹¹ The potential benefits of H.R. 2392 include:

- Economies of scale for the creation and improvement of software and systems to process government and private data because multiple components of software to process a single open standard could be reused in multiple data domains;
- Interoperability with international data prepared and tagged according to the standard;²¹²
- Common means to validate that reported data fulfills regulatory requirements.

H.R. 2392 was originally promoted to bring transparency to the Troubled Asset Relief Program (TARP).²¹³ However, the legislation is much more sweeping, promising better regulation of the private and government sectors.²¹⁴ In particular, the availability of detailed information about the government's work in a format that can be easily understood and analyzed by its citizens holds the potential to revolutionize government

211. Government Information Transparency Act, H.R. 2392, 111th Cong. (2009).

212. This is particularly true if the standard selected is eXtensible Business Reporting Language, which has been widely adopted abroad. See XBRL INTERNATIONAL, WORLD WIDE XBRL PROJECTS LISTING (2009), <http://www.xbrl.org/BestPractices/WorldWideXBRLProjectsListing-2009-07-15.xls> (comparing the XBRL projects of multiple different nations).

213. Aliya Sternstein, *Lawmaker Calls for Bailout Formatting*, NEXTGOV, May 14, 2009, http://techinsider.nextgov.com/2009/05/lawmaker_calls_for_bailout_for.php.

214. See Data Interactive: News and Commentary from the Hitachi XBRL Business Unit, XBRL: An Interview with Amy Pawlicki of AICPA (Part 2), <http://hitachidatainteractive.com/2009/08/03/xbrl-an-interview-with-amy-pawlicki-of-the-aicpa-part-2> (last visited Dec. 19, 2009) ("XBRL can be used as a tool after the fact to help unravel the information (or in some cases lack thereof) that underlies the current credit crisis, but more importantly it should be proactively applied on a go-forward basis to enhance transparency and access to data, thereby helping prevent future crises."). See also Gary Greenberg, *Will the SEC Give the Buy Side What It Needs?*, SEEKING ALPHA, June 18, 2009, <http://seekingalpha.com/article/143915-will-the-sec-give-the-buy-side-what-it-needs>; XBRLSpy, XBRL US and NIEM to Explore Harmonization of Standards for Government Reporting and Technology, <http://www.xbrlspy.org/NIEM> (last visited Dec. 19, 2009).

oversight, a point not lost on the House Committee on Oversight and Government Reform.

Finally, as a global standard, XBRL's adoption in the United States makes it easier for individuals in the United States to participate in global capital markets.²¹⁵ The full benefits of capital market globalization will not be realized until substantive accounting and investment standards reach their full potential. Nevertheless, the computer language to empower individuals to practice borderless investment is in place in capital markets around the world.²¹⁶ That individual Americans should not face needless governmental limits on their freedom to choose from a world of opportunity is completely consistent with the spirit of human freedom that was expressed in the Declaration of Independence and in the Constitution.

Second and similar to XBRL, patent law has also enjoyed benefits from crowdsourcing in recent years.²¹⁷ The traditionally solitary activity of patent review has been crowdsourced via a system that empowers outside experts to review patent applications.²¹⁸ Considering the environment of invention in which the United States Patent and Trademark Office exists, perhaps it should not be surprising that it is at the cutting edge of leveling the playing field for all patent applicants through technology. It is worthwhile to contemplate the potential expansion of similar crowdsourcing to the public comment process from the Patent and Trademark Office to all agencies under the Administrative Procedures Act.²¹⁹ Such an expansion could drastically reverse the trend toward viewing the government as a separate entity from "We the People."

The new regulation of American citizens as part of the effort to combat terrorism provides a third example of technology's potential to either infringe on or protect individual rights.

215. See Hitachi Data Interactive, XBRL: An Interview with Paul Wilkinson (Part 2), <http://www.hitachidatainteractive.com/2009/11/05/xbrl-an-interview-with-Paul-Wilkinson-Part-2> (last visited Dec. 19, 2009) (discussing XBRL's potential to open and integrate world capital markets).

216. See Kernan, *supra* note 197 (discussing the global development and implementation of XBRL).

217. See generally Beth Simone Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful* (2009) (discussing potential and actual applications of crowdsourcing in the U.S. Patent Office).

218. See *id.* at 12–21 (giving a brief overview of the system developed largely in 2007–2008).

219. 5 U.S.C. 701–706 (2008).

While broad public dissemination of raw data about potential terrorist attacks may remain impracticable at the moment, the Department of Homeland Security (DHS) has attempted to create a proxy for such dissemination in the form of the five-color terrorist threat warning system.²²⁰ Depending upon the threat level, DHS can adjust the level of its interference with travel in the form of more or less stringent airport security screenings.²²¹ A more efficient system would rely on specific verifiable facts about each traveler whose identity would be absolutely confirmed. Such an approach, however, could raise significant privacy concerns.²²² Ideally, each traveler would be able to fully control the use of his or her own personal information without being able to distort the information in any way that would compromise the DHS mission. As any air traveler knows, technology that supports a convenient, fair, and efficient air travel security system has yet to be deployed, but thinking anew about the problem and thinking imaginatively about technology-based solutions offers some hope.

In the final example, we propose a combination of the Departments of Commerce, Education, and Labor. President Carter signed the Department of Education Organization Act into law on October 17, 1979.²²³ The Department began operating on May 4, 1980.²²⁴ The Bureau of Labor, on the other hand, was first established by Congress in 1884²²⁵ and became a cabinet level department in 1913 under President Taft.²²⁶ Regrettably, President Johnson's idea of reuniting Commerce and Labor was never followed. With the advance of technology, the opportunity to reunite them exists today, and such reunification should be understood from the perspective of the individual, not the institutions. Thus, its unification should not just include commerce and labor but also education if it is to maximize efficiency and minimize costs.

220. DEPARTMENT OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY SYSTEM (2002), available at http://www.dhs.gov/xabout/laws/gc_1214592333605.htm.

221. *Id.*

222. See generally Sara Kornblatt, *Are Emerging Technologies in Airport Passenger Screening Reasonable Under the Fourth Amendment*, 41 LOY. L.A. L. REV. 385 (2007) (discussing the Fourth Amendment implications of new airport screening technologies).

223. Pub. L. No. 96-88, 93 Stat. 673 (1979).

224. Overview, ED.gov, U.S. Department of Education <http://www.ed.gov/about/landing.jhtml> (last visited Dec. 19, 2009).

225. JOHN LOMBARDI, LABOR'S VOICE IN THE CABINET 35 (1942).

226. *Id.* at 15.

The lessons learned from Texas Online, XBRL, and other public and private sector digital transformation projects can inform this proposal. As Texas Online electronically enabled the issuance of licenses to professionals ranging from plumbers to cosmetologists,²²⁷ it quickly became clear that building online forms was trivial relative to electronically enabling the regulatory schema. Traditionally, the Texas Department of Licensing and Regulation (TDLR) managed the processes, staff and transformation of legislation and legislative intent into administrative mechanisms for the legislature's licensing goals.²²⁸ With technology and eGovernment, many of those regulatory functions can now be handled completely online,²²⁹ which means the entire department can now be rethought from the ground up.²³⁰ The Departments of Commerce, Education and Labor at the federal level are not dramatically different from TDLR and are ripe for improvement via meGovernment.

At the core of each departments' function is the regulation of talent—in the form of individuals—at some point in the value chain from education to labor to commerce. Some functions in these departments may be extraneous to talent, but as in the Texas Department of Licensing and Regulation, many functions could be streamlined and normalized with tools like XBRL. From the perspective of meGovernment, individuals should not have to go clicking through blue links on web pages to discern which government regulation covers their situation. With the proper tags around different rules, meGovernment can present a personalized portal into the regulatory schema that is relevant to the individual's business, invention or other commercial matter.

Because Commerce, Education and Labor were all established prior to the full flourishing of the Internet, each is architected in a way that contemplates physical structures and processes.

227. Official Portal of Texas, Online Services, <http://www.texasonline.com/portal/tol/en/gov/10> (last visited Dec. 19, 2009).

228. Texas Department of Licensing and Regulations, About the Texas Department of Licensing and Regulation, <http://www.license.state.tx.us/about.htm> (last visited Dec. 19, 2009).

229. Official Portal of Texas, Online Services, <http://www.texasonline.com/portal/tol/en/gov/10> (last visited Dec. 19, 2009).

230. *See generally* BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL (2009) (discussing proposals within the Obama administration to better integrate technology into government).

With the appropriate privacy tools in place, the footprint of each department can be reduced dramatically by putting individuals in charge of themselves. Currently, each department is simply developing, establishing, and enacting regulations and resources that are often related to the same individuals, resulting in a massive duplication of effort. Even worse, this duplication of effort does not only occur at the department level, but in many cases also occurs within the many agencies in each departments as well. Individuals, acting in concert, through the aggregation of the Internet, do not need government to perform these functions for them. Just like XBRL with business reporting, valid standards for talent could help government-enhanced standards in areas ranging from education to unemployment insurance. However, those standards need not result in large bureaucracies when they can be captured online through tagging of data and personal information.

C. Implications for Traditional Delivery of Services by Government

With the power of technology and the Internet, government and service delivery can be decoupled. As we consider new approaches to the delivery, regulation and transparency of the government, we must return to Rousseau's understanding of sovereign and government.²³¹ The sovereign is each of us as citizens of the United States, giving our consent to be governed. The sovereign gets larger or smaller based on population size. However, government, as an actor for the sovereign, can become smaller. As discussed in this section, smaller government does not need to translate into fewer services or less effective regulation. Technology offers another path forward that lets us rethink and rearchitect the assumptions underlying the creation of various mechanisms of government and yields the opportunity to achieve old goals in new ways. At the same time that we are reducing the physical size of government, lowering the number of government employees, and reducing the friction in the delivery of services, we can simultaneously increase the impact of our shared resources on very real

231. JEAN JACQUES ROUSSEAU, *The Social Contract, Or Principles of Political Right*, in THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 110 (Victory Gourevitch, ed. & trans., Cambridge University Press 1997) ("The Sovereign . . . acts only by means of the laws, and the laws being nothing but authentic acts of general will, the Sovereign can act only when the people is assembled.").

problems. We can create a new federalism by reconnecting individuals with each other, with the sovereign, and with our government. This new treatise of government builds on the vision of John Locke, enabled by twenty-first century technology.

IX. CONCLUSION

At the threshold of the second decade of the twenty-first century, America's grand constitutional experiment, while at risk from a growing imbalance between the state and individuals, remains a "shining city upon a hill."²³² We are no longer alone, however, in balancing the rights of individuals against the state, and the battles for individual rights will increasingly be fought on virtual shores with technology advancing the ability of individuals to assert themselves and to communicate and proving to be a battleground itself.

Technology gives us cause and opportunity to rethink our social contract and the mechanisms by which we make it real. In the past, we have looked to physical institutions as the methods by which to embody and aggregate government and the services it provides. Our increasing connections through the Internet not only represent new ways to communicate, but also present new opportunities to rebuild those institutions virtually. Thinking about aggregation in this new way also means that a system that works well today can be quickly and dynamically rebuilt as the needs of individuals and society change. Rather than waiting almost six decades as America did for the error of *Plessy* to be corrected, we can harness the power of individuals, to protect our rights *and* to strengthen the social contract from the inside out. For, in the end, individuals are the state.

232. Ronald Reagan, U.S. President, Farewell Address (Jan. 11, 1989), *available at* <http://www.americanrhetoric.com/speeches/ronaldreaganfarewelladdress.html> (quoting John Winthrop, Gov. Mass. Bay Colony, Model of Christian Charity (1630), *available at* <http://religiousfreedom.lib.virginia.edu/sacred/charity.html>).