Papers Written for CT554: Legal and Ethical Dimension in Technology Spring 2005

Human Fourishing.....2

References.....6

Censorship and the First Amendment.....7

Notes.....13

Bibliography.....13

Intellectual Property and Copyright Law: Society v The Individual.....16

Notes.....21

Bibliography.....21

Privacy as a Function of the Sense of Freedom.....23

Notes.....27

Bibliography.....28

An Examination of the Intended Purpose of the Progress Clause.....29

Bibliography.....40

How does the moral responsibility of conducing human flourishing relate to the creation of an ethic for the use of computer technology? To rationally consider the effects of a cyber ethic which would support and promote a moral responsibility of human flourishing (often referred to as "the good life"), we must first examine the *concept* of the good life in general and specifically, as well as the appropriateness of incorporating specific morality, or societal values, into a universal ethos. It seems intuitive that a value expressed by any particular societal rule in the form of its moral code, by virtue of the value being driven by the particular society within which it exists, does not belong in, and most probably should not be inserted into, a universal expectation of ethical behavior. However, we may be able to identify a series of basic principles derived from the concept of promoting human flourishing which offer a more generalizable interpretation, and consequently come to be accepted as a piece of a universal guide to the ethical use of technology by all.

Moor has defined human flourishing as a set of "core values" or the capacity of "life, happiness, and autonomy". Moor borrows the Aristotelian interpretation of happiness to define it as the equivalent of [the] "absence of pain", and further expands his use of the word autonomy to include "ability, security, knowledge, freedom, opportunity, and reason". This seems an easy definition which begs to be applied to the global community as it relates to the internet; it seems intuitive to the rational that one would always hope to augment access, pleasure, knowledge, etc. for any and all who might wish to participate; that the greater good of all can only benefit via this apparently beneficent moral code. Simply by virtue of Moor's particular terminology, one is forced to delve deeper into the implications, and the implicit meaning of applying an ethical rule which imposes the "value" of human flourishing at a global level.

Gert's focus on the public system seems to attempt to impose a more universal interpretation of morality by adding the premise that an ethic based in human flourishing is acceptable if all parties work with the same rules. However, in his list of justified moral rules, Gert includes, "obey the law", a rule which cannot be followed universally simply by virtue of the intrinsic variety of what different societies consider lawful. One can also argue against the universality of Gert's rule, "do your duty", syllogistically: if laws vary, then expectations of duty vary; ergo, neither can be considered factors in the incorporation of universal human flourishing.

Joseph Raz (1995) interprets the concept of human flourishing, or "Duties of Well-Being", as "…the (1) whole-hearted and (2) successful pursuit of (3) valuable (4) activities." While relevant to Moor's concept of autonomy, Raz goes further to say that the whole-hearted pursuit of happiness must presuppose an implied control and freedom to control one's own "agency" within one's particular moral system. Apparently contrary to both Gert's rule-based moral code and Moor's general description of human flourishing, Raz grants the capacity to fail and to feel displeasure; failure may include one's inability to "make another flourish", which, circularly, may in fact cause yet another to flourish. Raz seems to have inched slightly closer to a concept of acting for the greater good in the form of morals-based code of ethics. However, Raz does not successfully remove the confound of the value of particular material goods in a particular societal set of norms, nor does he discount the premise that it is much easier to inflict harm upon another (accidentally or intentionally) than it is to help that other. The implication of the potential of one to inflict harm on many must be a consideration with regard to global ethics; the virtual boundaries of the global society force a more stringent interpretation of what we intend by human flourishing.

We must question autonomy as an ideal built into the expectation of human flourishing. Autonomy, as defined by the Random House Dictionary, is: "…1. independence or freedom, as the will or one's actions… 2. self-government; independence… 3. self-governing community…". In reality, autonomy is tremendously context-specific depending not only on the larger environment within which one finds oneself, but also on where one sits inside the particular environment. For example, a manager in a large company may feel autonomous (able, secure, knowledgeable, free, independent, etc.) in his capacity to supervise those "below" him, yet if he is denied any one aspect of autonomy [as we have defined it thus far] by those who supervise him, he is not truly autonomous – whether he is aware of that condition or not. The manager is most likely "alive," and he may very probably be "happy" (or at least realizes an absence of pain), but we cannot presume that he is "autonomous", e.g, free to self-govern his behaviors, a seemingly necessary component of the concept of human flourishing.

Dewey (1922) defines freedom in the context of morals as "efficiency in action or ability to carry out plans," the "capacity to change plans," and the "opportunity to experience novel events". Dewey incorporates knowledge, opportunity, and reason into his premise of freedom with the argument that with this freedom, one is allowed the *opportunity* to pursue more *knowledge* toward the *ability* to *reason* more clearly (by virtue of having more information) toward a more *secure* state of being, and the eventuality of an higher ability to begin the process

again. Dewey's interpretation is a circular, self-perpetuating, and self-fulfilling expectation of a morals-based *ethic* of human flourishing. Dewey sees human flourishing as progressive, in-process, and positive in all realms including ethics and the use of technology. Dewey expands on his own thesis using the principle of moral judgment which essentially states that all morality is social in that regardless of what we *ought* to do, we will always behave according to the *response we receive from* society; no matter what seems to be the appropriate ethical behavior toward a greater good, we are dependent on the behavior(s) of those around us in the form of judgment(s). Morals and laws essentially come into being as patterns of judgment(s) become the normal reaction of the majority.

It can easily be reasoned that moral judgment is a manifestation of self-governing behavior, a key concept of autonomy. However, explanations of what it means to be autonomous often include specific rights and practices which force one to apply an ethnocentric (and often *ego*centric) judgment before considering the effects one's own autonomy may have on another's. An oft cited example is that of free speech: One wants to be autonomous in one's ability (or right) to utter any thought that may come to mind, yet (in our society) if the utterance of another is vulgar, one will argue that vulgar language infringes on the [autonomous] right of security, that is, the listener should feel secure in the right to not hear vulgarities.

Spinella's explanation of human flourishing, which includes "affection, cooperation, community, and help," seems to encourage an interpretation which implies that the onus of human flourishing occurs on a societal level, as compared to individuals' actions combining toward a result of everyone experiencing that good life. Durant (1926) interpreted Herbert Spencer's works similarly remarking that "…the highest conduct conduces to the greatest length, breadth, and completeness…" causing a societal morality that is based in the aim for all to "…unite [himself] in the widest variety, complexity, and completeness…" resulting in a civilized collection of universal morals which are worthy of "mutual imitation". According to Durant, Spencer believed that the greater good (human flourishing) occurs when the bigger society allows itself to evolve to a higher level of homogeneity.

It may seem that the preceding paragraphs were not all written to the same questions; it may even seem that an attempt has been made to set the reader up for a rampant editorial! One may question the relevancy of the comments to the discussion of how to regulate online communication with a morals-based concept such as human flourishing. It could be argued, for example, that the principles put forth by Dewey are too out-dated to be applied to the issue of human flourishing as it impacts the creation of a universal ethic for *computer* use; that the technology

available for Dewey to remark upon in 1922 is old hat, and could not possibly have presented the moral dilemmas that can be imagined in 2005; that his premises cannot be generalized to the educative and community values that are imposed by virtue of a "cyberspace". Dewey admitted that he could not predict specific or potential forms of technology, only that all technology must be welcomed and considered with regard to its use in advancing the ability to gather information toward a better and greater good. Dewey's intention was to find a universal and ethical perspective of proper and productive usefulness of technology.

Johnson echoes Dewey when she stresses the importance of not seeing "new *categories* of behavior" when we look at human computer use, that the computer networks simply offer new venues for exhibiting behavior. At the same time, social (moral) judgment can and does occur, immediately shaping negative behaviors out of the user-repertoire even as it reinforces positive behaviors.

The simple "belief in," or promoting of, the moral concept of human flourishing, as we identify a workable and ethical use of technology, is not a sufficient tool in the writing of a universal (or global) code of ethics. Applying a set of morals-based principles to the global society we call cyberspace seems to be inherently ethnocentric; because the concept of human flourishing is a function of our ethnocentric view of our particular environment, the application of any society's judgment of what is considered "the good life" [for all] cannot ethically be imposed on any other society. A cyber *ethic* must be *generalizable* across all societies, simply offering a starting point for the evolution of a variety of moral codes that can be specific to the particular societies.

"And then again, thinking is social; it occurs not only in specific situations, but in a given cultural *milieu.*" (Durant, 1926). It is conceivable that cyberspace is a new milieu, a complete and new society vulnerable to its own moral judgment, evolving to a higher level of homogeneity as it goes through the natural process of creating itself. The new cultural venue we call cyberspace is young enough that it has yet to exhibit all of its potential behavioral variations, and therefore cannot, perhaps, yet be held accountable to a defined set of morals. Perhaps this new society is still dependent upon simple etiquette toward the formulation of its own "golden rule".

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Can Censorship Be Reconciled with the First Amendment to the U. S.?

> Bill of Rights, Amendment I
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Censorship **1 a :** the institution, system, or practice of censoring **b :** the actions or practices of censors; *especially* **:** censorial control exercised repressively (Merriam-Webster On-line Dictionary)
>
> Censor **2 :** one who supervises conduct and morals: as **a :** an official who examines materials (as publications or films) for objectionable matter **b :** an official (as in time of war) who reads communications (as letters) and deletes material considered sensitive or harmful (Merriam-Webster On-line Dictionary)
>
> Freedom: (OED On-Line) **4. a.** The state of being able to act without hindrance or restraint, liberty of action.

Hamilton and Madison, by way of the *Federalists Papers,* clearly defined a primary purpose of the constitutional amendments as a formal means to prevent the formation of factions which could "..impos[e their] will against the public good" (Glick, 2004), while at the same time building in a sense and assurance of the inherent positive good that comes of and from diverse behavior, thought, and the speaking of one's own thoughts. Hamilton et al. (as members of the Congressional Delegation) were specifically considering the impact a particular *state* could have on the *entire nation* (ultimately affecting individual persons), rather than those of one *individual's* actions upon another *individual*. The original delegates made a conscious, valiant, and relatively successful attempt to create a document which could be applied philosophically across all levels of interaction and behavior. While Hamilton and his colleagues most likely could not in their wildest imagination come to an understanding of what we casually refer to as the 'net', it was the collective intent that the wording of the First Amendment would be meaningful (if not specific) enough to apply to any future question with regard to the perceived basic human right of an individual's autonomy.

Hamilton, Madison, and Jefferson were each men who were considered elite members of their collective society (as were the majority of the Congressional Delegation); all three were tremendously influenced by and immersed in the power of the elite; each of them *presumed* an inherent manifestation of censorship by virtue of the intellect of those empowered by election to create the rules of our democracy; that the elite, through intellectual conversation and rhetoric, are able to weed out inappropriate legislation et al. before it could ever get to the point of impacting "The People". Put simply, the Congressional Delegates of 1787 truly believed that only the wealthy elite

(who were wealthy because they were intellectuals) would ever come to be elected to a powerful position in society which required an interpretation of the rights spelled out in the Constitution; it simply doesn't seem to have occurred to these framers to include a "rule" about, or position of, censorship in the Constitution. It was accepted that common sense (the majority opinion) would control any untoward thought, amoral behavior, and or interpretation of behavior, and that that common sense would come of intellectual conversation and rhetoric – by the elite – at the congressional level. The "power" to determine specific applications of the Bill of Rights (and specific to this paper, the First Amendment) was left to the individual State leadership - which at the time of the writing of the Bill of Rights were the *same men who were doing the writing of the Bill of Rights.* Hence, the omission of a defined position resembling the Roman Censor written into the body of the Constitution of the United States, or included in the Bill of Rights.

Despite this assumption and acceptance that the members of the first Congressional Delegation belonged to the elite, they were still a relatively diverse collection of professionals, including farmers, attorneys, bankers, and business men. This diversity of membership contributed overtly to the construction of the Bill of Rights. The delegates were acutely aware that any one of the delegates could be wrongly impacted professionally by another if either were not allowed to speak freely in advance of any (or after the fact) [potential] act. As well, the delegates recognized the need for mutual respect and courtesy when discussing any issue which could ultimately affect another. We also must remember that this group of leaders had discovered the practical inadequacies missing in the original Constitution by virtue of having lived under the structure imposed by that Constitution; the purpose of constructing a bill of rights was driven by the need to address those inadequacies.

A quick review of the definition of censorship reminds us that if we were to interpret the First Amendment without the presumption that only the intellectually elite will find themselves in the position to write law and or impact the rights of others, we would suspect that it is entirely probable that the framers would have included such a position (of Censor) as a protection to those rights they so carefully (and esoterically) spelled out. As a matter of fact, we have, based on various interpretations of the original amendments, formally incorporated censors and the process of censorship into the security protocols of our democracy with the unambiguous intent to prevent enemies any serendipitous access to our "state secrets" and positions. Additionally, formal and informal censors have been employed to morally evaluate the content in films, books, etc with the intent to protect our children from those who

might intentionally (or unintentionally) do harm. And, while local school boards and academic institutions don't normally appoint an *official censor*, the *act of censorship* is relatively solidly engrained in the concept of educative leadership; a local school board represents the particular society, and determines policy based in their [collective] system of morals, presumably representing the same society. (For example, in the State of Maine, there is a mandate for "Citizenship Education" in place; that is, we have made it a state statutory requirement that our school children learn what it is to be a member of a democracy – as it would be taught and represented by each presumably autonomous school administration.) As a nation we seem to have allowed and accepted each of these examples as positive attempts to protect the greater good, a primary intent of those framers of the Bill of Rights. (Yet we Americans visibly balk at the very mention of censoring our private actions in (or via), and contributions to, the internet community!)

How does all this relate to the idea of censoring electronic communication? Can the First Amendment ever be reconciled with any form of censorship? What would Mr. Hamilton or Mr. Madison or Mr. Jefferson decide to do with this apparent paradox?

The first concern of those "old framers" might, understandably, be one of national security. (Remember that the "*original* original purpose" of the Constitution was to show a united front to other countries and republics toward a successful and profitable continuation of *this* country.) Another issue might be a question of the *quality* of interaction – that every man, woman, and child (good and "bad") can contribute to the content of internet interaction defies the "presumption of the elite" held by Hamilton et al. One has to suspect that the framers' next (and possibly most profound) consideration would be the premise that diversity of thought, and the contribution of that thought, is necessary for the success and continuation of any democracy, whether at the personal, municipal, state, or federal level. It is possible that the premise of mutual respect and courtesy, necessary for the running of a government, and recognized by the framers as such, would be brought into a conversation about the value of censorship with regard to the internet. Would they recognize the internet as a source of knowledge – or propaganda? Would the delegates be able to see the value in the diversity of quality – or remain mired in their collective elitism? What about the ability to disseminate information (on the part of the government) to intentionally "civically educate" The People?

It is reasonable to expect that the framers, like current Americans, would balk at the implementation of a formal censor; it seems equally reasonable to expect that they would insist on a form of monitoring (if not

censoring) all electronic communication with the purpose of preventing harm to individuals and the republic. However, it is not necessarily intuitive to expect that the framers would *amend the constitution* to do so. Without stating their intent in the body of the Constitution (although it is clearly spelled out in the *Federalists Papers*), the framers did not imagine that they were defining specific human rights or behaviors for *all*; the meaningfulness built into the Bill of Rights is in its *vagueness,* in combination with the explicit expectation of the autonomy of the states. The Bill of Rights is based in the presumption of diversity of state and individual values (systems of morals) which require, by virtue of their distinctiveness, guidelines only as specific as they can be applied to all. One suspects that the delegates would agree with Clare Booth Luce: "Censorship, like charity, should begin at home; but unlike charity, it should end there." (The delegates, of course, would substitute "home" with "State".) That the creators of our [federal] Constitution would evade the censorship issue by passing it off to the state legislatures does not address the ultimate question of whether or not censorship can be imposed simultaneous to the "fundamental right" expressed in the First Amendment.

Interestingly, the framers did not define the words used to write the First Amendment: *religion, speech, press, peaceable assembly, and petition*. In the world of 1780, each of these behaviors could only be overt, that is to say that one could not virtually practice a *religion* (although there is a presumed metaphysical component); *speech* could only be written to paper or said aloud; the *press* was a physical, mechanical, and financial "gadget" with physical journalists authorized to use it; *peaceable assembly* was the physical coming together of physical persons; and finally, there were formal and specific guidelines for *petition* preparation (vocal or written, individuals or communities). In today's world, we frequently belong to organizations *virtually*. It is possible to practice a religion online, never having to see another person or wonder about our influence of our physical presence on another. It is possible to "tell the world" our personal thoughts online – without ever having presented ourselves even as human. The production and propagation of literature is as inexpensive as the press (journalist) can afford to spend. We, as a society and as many societies, simultaneously and separately, peaceably assemble in chat-rooms and via LISTSERVs regularly – we often use those venues to draft petitions for personal and general application.

Reconciling (or rationalizing) the act of censorship with our constitutionally defined First Amendment is truly a conundrum. While the framers of the Constitution clearly expected a form of *self*-censorship via the natural discourse inherent in the running of a government, they clearly agreed and intended that the federal government

could not ethically impose a universal moral code – especially in the form of formal censorship - on the different "pieces" of the republic, that is the states and by extension, the individuals inhabiting the states. The "cop-out" evaluation in a discussion of censorship as it is applied to any opportunity to impose (or "activate") the First Amendment is to follow the original congressional delegation using the philosophy that each smaller community within any society has the inherent right to place greater restriction upon its members than that of the larger society, that any smaller group of people may determine it to be in their own best and greater interest to censor particular behaviors and thoughts. Paradoxically, we all have essentially been given, *via the First Amendment,* the right to censor – or not - anything (or anyone) that may occur within whatever we consider our community. A quick glance at the first lines of the State of Maine Constitution seems to offer us (as citizens of the State) the same opportunity to censor that we have as citizens of the United States by essentially stating the same fundamental rights that appear at the federal level:

> *As Amended and Revised by the Chief Justice, 1993*
> Article I.
> Declaration of Rights
> Section 1. Natural rights.
> Section 2. Power inherent in people.
> Section 3. Religious freedom; sects equal; religious tests prohibited; religious teachers.
> Section 4. Freedom of speech and publication; libel; truth given in evidence; jury determines law and fact.

Intuitively, if every member of the community we call the internet were to simultaneously invoke the First Amendment right in the form of the censorship of another, the community would quickly disintegrate; citing the First Amendment as the fundamental right to say "anything we want" would potentially prove just as destructive to the community, and even harmful to members of the community. Because the internet is not so easily or neatly subdivided into "smaller societies" (as is allowed by the constraints of the geographical world), creating (or mandating) a censoring mechanism that does not impose its own value system on others who are not members of the particular smaller community seems nearly impossible. The ability to navigate outside of a smaller community (via the internet) into a larger global community offers at once a wider and more fulfilling attempt at diversity of thought (crucial to the continuing success of a democracy), and more opportunity for harm (e.g. libel) to and by the visitor. Censorship, in its purest sense, is the act of suppressing behavior and or thought that is considered by a society as counter to the particular society's system of morals; the First Amendment assures us that our thoughts and personal behaviors are valuable and sanctioned. The presumption of the framers that inappropriate and or harmful behaviors

will be effectively self-censored by those participating in reasonable discourse reminds us that while the act of censorship and the rights imposed by the First Amendment may *seem* independent of each other, the reality is that one cannot be separated from the other. The fundamental rights included in the First Amendment are synergistically linked to the concept of censorship; the act of free thinking is based in the ability to self-censor, and to allow another to question (censor?) our thoughts, and to even expand on those thoughts. The intent of the framers was to ethically allow and encourage discourse and interaction with the goal that the ultimate result would be that of a society whose government represented the common sense of "The People"; the common sense having been derived through this process of autonomous adherence to the First Amendment of the U.S. Constitution.

Notes

It is interesting to note that, without exception, all of the sources used in the writing of this paper have been derived from and via the internet. Conscientious attention has been paid with regard to "checking one's sources", and often it has been necessary to cite more than two sources for the same material, as in the case of the *Federalists Paper,* which were obtained via an internet site in the Netherlands; both sources are listed in this bibliography. It is also worth mentioning the difficulty and cost of obtaining actual (hard) copies of the official documents as compared to the ease of access to official government and municipal internet sites – this seems to make a point about the capability of becoming a better informed (and diverse) member of the society.

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Intellectual Property and Copyright Law: Society v. The Individual

Any randomly chosen connotation of Intellectual Property (IP) seems immersed in the context with which a particular definition is concerned; depending on the source, IP has been defined as the *concept* of protection, the *act* of protection, and or as *assets* that can be protected. While the philosophy behind statutory protection of IP is based in the potential market-value of *in*tangible ideas, those protections are derived from copyright, patent, and trademark law, law specifically and originally designed for the financial investment protection of the right-holder of *tangible* items.

For the purpose of this paper, Intellectual Property is operationally defined as the *original product of the creative and derivative processes required in the formulation of an idea*; examples of this "original product" concept may range from something as simple as an emailed communication, to that of a professional, peer-reviewed paper explaining a scientific revelation which could be considered evolutionarily profound with regard to humankind. An inherent presumption in this operational definition is the fact that the intrinsic variety of original products (IP) warrants many different examinations of worth, marketability, and ownership as one challenges legal implications with regard to rights of ownership of specific cases. Additionally, because products such as computer programming code might eventually easily be considered as "items", qualifying them as "patentable" (as compared to the current copyrightable status), their inclusion is beyond the scope of this paper.

Accepting intellectual property as a creatively derived end-product removes a substantial amount of "fuzziness" from the concept of IP as one attempts to attribute ownership and rights of ownership to specific circumstances that might occur in the context of education, educating, and learning – a primary venue inferred using the concept of human flourish, that is to say, fulfilling the needs of the greater good. While IP is potentially "marketable" in the venue of education, it is more often a professional question of personal ownership and credibility. It is within the context of learning and educating that this paper will discuss the value of assigning IP ownership to the society, and the changes to statutory law which would have to occur if society were to take back that ownership.

The current U.S. Department of State definition of Intellectual Property is stated as:

> [The] Creative ideas and expressions of the human mind that possess commercial value and receive the legal protection of a property right. The major legal mechanisms for protecting

> intellectual property rights are copyrights, patents, and trademarks. Intellectual property rights enable owners to select who may access and use their property, and to protect it from unauthorized use.

The World Intellectual Property Organization (WIPO) defines the intellectual property rights as essential and necessary to the interest of competitive creativity in all venues, including science exploration and education (2004). While Maskus (1997) has discovered evidence that indicates a direct function of country per capita income (the poorer the country, the less incentive is derived via high regulation), he concedes a general positive correlation between high regulation of IP (at the individual and corporate level) and generally increased innovation. Copyright, trademark, and patent law in the United States specifically aims to protect the tangible end-product creator so that the innovator can recoup production cost; this ideology is designed to encourage monetary outflow for new ideas, products, and technology.

Essentially, the government (in its many forms) has deemed the value of thought and innovation as equal to the actuality of financial gain, seemingly determining IP regulation as a positive tactic with an eye to the constitutional responsibility of enhancing the "greater good". It can be argued that financial gain in formal education is couched in the tenure and promotion process; one can also surmise that the purpose of counting publications (in post-secondary institutions, for example) is based in the value assumption that the research is not enough, that one's thoughts must be published in order to "count" as scholarly. Similarly, the educator in the public school system is often rewarded with salary for the merit of having produced innovative materials. And, we don't want to forget a student who will most likely obtain greater financial stability as a direct result of having handed in an essay as he pursued his degree.

What happens when financial gain and the capability to recoup invested funds are removed from the formula before considering the value of intellectual property? A dramatic shift in the philosophy of education will most likely occur; we will move instantly away from the individual rights of the thinker, and into the realm of the collective societal right to access and build on the IP of another. How would this shift impact education and the pursuit of learning? Would this shift cause great thinkers to stop wanting to think? Would inventors of learning and teaching models refuse to be creative? How could we "protect" those thinkers – or would we want to?

When a student is asked to write an essay on a particular topic, the presumption is that the student has read a variety of ideas put forth by professional thinkers who must be given proper credit for those ideas. Is the student

paper an original product derived via the process of creative analysis of others' ideas, or do the ideas included by the student still "belong" to the original "thinkers"?

If an educator is required to teach a particular curriculum, and then, factoring his creative skills into the responsibility, he incorporates original concepts that result in a much different process of presentation (if not content), is that curriculum now a new original product derived from the process of creativity, or does the curriculum still belong to the original writer or designer? (One might wonder if a curriculum is a *marketable item* or an *original end-product* as the result of *creative derivation*; let's consider it simply an end-product for the moment.)

The webmaster at an academic institution has discovered the capability of deep-linking, and writes his pages incorporating persistent links in order to give students easy and immediate access to professional articles that normally would be available only via the [often] time intensive and costly Interlibrary Loan process. Has the webmaster used a creative strategy with an end-product result, or has he stolen from the professional authors?

The previous three scenarios are situations which occur regularly in the world of education; it is often difficult to determine the appropriate legal interpretation of each model's actions as current law is written. According to current copyright law interpretation, it is reasonable to state that none of the three actors has a right to claim ownership of his particular creative endeavor. The student was required to write something to give to his instructor; the educator essentially relinquished his right to claim "original thought" by staying within the defined curriculum; and the webmaster violated intellectual property rights by virtue of bypassing the permission-to-use owner of the articles (the journal publishers, or the actual authors). We can rationalize the gleaning of information on the part of the actors with the concept of fair use – all three, by virtue of educating and being educated have a right to access the documents used as they formulate their respective end-products. However, do they legally, in today's world, have the right to claim their respective end-products as their own personal intellectual property? The simple answer is "No.".

Examples from education are relatively easy to examine when assigning IP ownership and the rights associated with IP: there is traditionally no overt financial gain derived from educational materials creation; initial financial outlay is relatively small, primarily based in one's ability to access other information; educators and the educated presumably enjoy thinking anyway, removing the financial incentive.

The taking away of financial interest from the formula of IP ownership seems to also eliminate the need for copyright law. That is to say, if there is no reasoned need for the protection of another's thoughts, it becomes ethically (and legally) possible to pull information from any source toward the formulation of a new and original end-product [or thought]. When allowed to pull from any and all sources, without fear of having broken the law, it seems reasonable to expect increased innovation (or creativity) in and within the realm of education. Conversely, if copyright law were to be eliminated from the process of accumulating information for the purpose of educating and learning, one might predict an increase in the volume of creative production and educational pursuit. Making it "okay" for one to use previous thought and thought-processes, without fear of potentially breaking the law, very possibly would create an environment in which the accumulation of more varied information can be gathered at an increased rate, causing more frequent "spontaneous" insight, or creative end-products of thought. Additionally, the philosophy of contributing one's thoughts to the greater body of information simply for the sake of contributing can arguably be considered a societal responsibility *and* right in a democracy. It might also be conceded that these examples of "financial gain" can reasonably be protected by other means, such as the realignment and defining of value, or the enforcement of equal opportunity; these compared to the current requirement that intellectual property rights are essentially copyright law.

Incorporating the elimination of the potential for copyright infringement (that is, the removal of the application of copyright law to IP) into the combined context of the internet and education, one must agree with Lessig's interpretation of its impact on information gathering. If society is the rightful owner of all thought as intellectual property, the capability to democratically create and contribute to the greater good can only be strengthened, "…enable[ing] a broad range of citizens to use technology to express and criticize and contribute to the culture all around." (Lessig, 2004), potentially causing our educators and learners to collect information in the interest of the intrinsic value of wisdom. One can also borrow from Raymond's *Bazaar* example (1997) when defending the removal of current copyright torte from the ownership assignment of IP: in the closed, statutory bound, top-down process of creativity, one can only expect a reward-based level of competition and innovation; allowing participatory creativity naturally encourages greater input and growth of an idea.

When considering intellectual property as an asset to protect or requiring protection, it seems intuitive that the onus falls on society via education rather than the individual, that is to say, it is the responsibility of Society (and

Educators) to allow the free flow of the accumulation and dissemination of ideas with the purpose of enhancing and encouraging a greater body of thought. This responsibility can only be “enforced” by the removal of the legal constraints imposed by Copyright Law which is specifically written for the benefit of the individual.

Notes: additional definitions of intellectual property and intellectual property rights.

For a comprehensive variety of operational definitions, see:
http://www.google.com/search?hl=en&lr=&as_qdr=all&oi=defmore&q=define:Intellectual+Property

http://whyfiles.larc.nasa.gov/text/kids/Problem_Board/problems/invention/glossary.html
intellectual property (IP) - IP represents the property of your mind or intellect. Types of intellectual property include patents, trademarks, designs, confidential information/trade secrets, copyright, and so on.

In very general terms, an IP is the result of using one's intellect to create something new and different from whatever was known before. IP is also a legal concept, inasmuch, as like other property, it can be owned, sold, rented, given away, etc. lPs are protected by patents, copyrights, trade secrets, trademarks, and know-how (secrecy). By state law, VCU must retain title to any and all intellectual properties (patents, copyrights, trademarks) developed with significant use of general funds, except with prior approval from the Governor. However, the University or its VCU Intellectual Property Foundation can license IP. *www.research.vcu.edu/ospa_glossary.htm*

An intangible asset, considered to have value in a market, based on unique or original human knowledge and intellect. Intellectual property may or may not be associated with a patent or copyright.
www.bridgefieldgroup.com/glos4.htm

intangible property that is the result of creativity (such as patents or trademarks or copyrights)
www.cogsci.princeton.edu/cgi-bin/webwn

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WIPO Intellectual Property Handbook: Policy, Law and Use. WIPO Publication No.489 (E) (2004) Chapter 7: Technological and Legal Developments in Intellectual Property. Retrieved February 10, 2005, from http://www.wipo.int/about-ip/en/iprm/pdf/ch7.pdf.

Privacy as a Function of the Sense of Freedom

Privacy, as a *right*, has been manufactured by society as a function of the rights associated with personal and corporate security. Privacy is the manifestation of our determined constitutional right of security. One cannot pragmatically presume the security of personal property, personal "space", and personal intention without also assuming personal privacy. Freedom is the feeling of being secure in one's privacy as one goes about normal daily activities. B. F. Skinner suggests in *Beyond Freedom* (1971) that freedom is more reasonably considered a "state of mind", a *sense* of internal personal liberty, the *feeling* that one has avoided an aversive situation or controlling force. Skinner would argue that we *feel* free because the controls imposed on us (as human Americans) are covert, insidious while vague, and often apparently randomly assigned (as in the occasional speeding ticket). The level of privacy one *feels* determines the one's *sense* of security, and thence the inherent sense of freedom. A continued sense of Freedom and Security are rights granted to us by our Federal Constitution; it seems reasonable to expect that a certain level of privacy is built into those rights – even if privacy is not a human right in and of itself.

Implicit to the notion of privacy is the presumption of trust. Many of the "old moralists" – Plato, Aristotle, and Locke, to name a few – go so far as to work with the assumption of the human characteristic to trust when discussing privacy as it relates to all areas of personal, corporate, and governing expectations and processes; they might say that we are only able to maintain a sense of privacy because we are inherently trustful, and conversely, that we are only able to continue to trust others as long as we feel we can behave privately. This sense of privacy is manifest only when we are able to trust; the ability to trust is reinforced with the continued sense of privacy. The synergy of the *feelings* of trust, privacy, and security ultimately recombine to be the American Constitutional Responsibility and Right of Freedom.

The Privacy Act of 1974 assured Americans that any documents produced for the benefit of financial, personal, and property (etc.) transactions would be kept confidential with respect to reproducibility, covert information-collection, and any possible third-party financial gain. The Act was designed in and for a "paper" world, a world in which all formal documents were clearly either in print or not: mailing lists were paper lists; bank records were recorded and stored as paper; medical records consisted of hen-scratched notes on paper in one's own doctor's office. Confidentiality effectively guaranteed one's privacy via the Privacy Act. There were, of course, many legal processes for the government, and those working in the interest of the government, to get around the protections

defined in the Act; court orders could legally be obtained by organizations (police, etc.) if there seemed a reasonable need or cause for disclosure. With appropriate warrants, an effective "gag" could be placed on an individual who had provided information to authorities regarding a particular case; while this action required judicial review, it was still possible to keep covert activity classified. Essentially, the Privacy Act *covertly* gave the government permission to covertly access any records that may be considered necessary for the enhancement of the greater good.

An additional primary purpose of the Privacy Act was to protect the citizen-individual; an individual's right to know *who* had accused the individual of *what* crime ensured, via the Act, the considered Constitutional responsibility of security. Essentially, the Act permitted covert data-collection as long as the accused was eventually kept informed of the reasoning behind a search, and also of any possible repercussions resulting from a search.

In direct contrast to the Privacy Act, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act), has given *overt* permission to the government to covertly monitor and access any and all forms of communication and records that may be considered necessary for the enhancement of the greater good. The USA PATRIOT Act has also removed the "court order" requirement from the process of access by creating governmental agencies designed to act *as if* they are members of the judicial branch of government (e.g. Article III Court), effectively confounding the *sense* of secure privacy inferred from the Constitution. The Patriot Act simply eliminates the secrecy (privacy?) "guaranteed" by the Privacy Act. Additionally, the PATRIOT Act allows for deliberate covert activity in both the public and private domains by virtue of the application of compulsory "gag orders" which can be placed on any provider of "private" information; the most common example of this mandate is that of the opening of library records, after which the librarian is often "gagged" in order to prevent the patron from discovering the covert collection of his or her personal activity. The "gag-ability" and openly convert search mechanisms written into the USA PATRIOT Act has effectively removed the *sense* of privacy and freedom granted by the Privacy Act of 1974.

Not surprisingly, the enactment of the USA PATRIOT Act has caused Americans to question the moral and legal applications [of the Act] as the frequent occurrence of covert information-gathering may impact an apparent Constitutional right to privacy. It seems reasonable to respond to the overt-ness of this covert information collection with specific concerns regarding freedom-related behaviors (e.g., speech, religion, etc.). Interestingly, the Patriot Act has imposed few additional potential privacy-infringements beyond those of the Privacy Act. When we compare the

two Acts, we discover that both Acts allow(ed) for covert information-collection; the Acts include(d) intrinsic permissions for obtaining access to personal documents, etc.; both Acts define(d) tangible items as the key target in information gathering.

The USA PATRIOT Act does, however, include the expectation, via the interpretations and publications of the Department of Justice, that complete access to any information is essentially a Constitutional responsibility for which all Americans are expected to strive. The "Patriot" Act seems to have imposed a Hitler-esk quality of responsibility which results in the effective removal of not only *actual* privacy, but more importantly, the *sense* of privacy.

It may be more appropriate to ask how much of a *sense* of privacy is required for society to behave in ways that benefit and even enhance that same society, rather than to attempt to define a reasonable *level* of privacy necessary for the greater good. It may be that a *feeling* of having the ability to remain private is enough.

One can easily apply this hypothesis to the case of the access of library records. Adherence to the principle of confidentiality of patrons' records has traditionally been considered by Librarians to be a legal, professional, and ethical responsibility (Filgate, 2005). Prior to the enactment of the Patriot Act, the typical library patron could confidently borrow and read on any topic, secure in his *sense* that his reading activity was not being monitored any more intensely than the library staff required for basic "stack accounting". Since the enactment of the Patriot Act, that typical patron has come to be acutely aware of the fact that the government can, at any time, request a list of the books he has borrowed and or read [in the building of the library]; the Patriot Act has, for all intents and purposes, taken away the traditional expectation of confidentiality (privacy) which has been protected by the librarian. In September of 2001, his reading list was confidential; in October of 2001, that same reading list became effectively a public record. Beyond the actual privacy infringement, it most likely would also be the case that the librarian used to access the information would not be allowed to even inform the patron of the breech. Our library patron lost his *sense* of privacy specific to his reading preferences.

Interestingly, our library patron has not really *lost* any *actual* privacy. Working within the auspices of the Privacy Act, the government agent (police, FBI, etc.) could, via the process of judicial review, obtain a court order to search and or monitor a patron's reading records; an additional order could be obtained to "gag" the librarian through whom the access was gained. The Privacy Act allowed for this covert collection of information contingent

upon probable cause; that is, if the agent could convince a judge that the covert activity was warranted for a particular case, the agent could get permission to do so for a specific length of time, determined by the same judge. The patron could be investigated via his library records without any knowledge of the activity; the "right to know" clause in the Privacy Act could be effectively negated without legal loss of any of the presumed Constitutional Right to Privacy to the library patron. The Patriot Act, on the other hand, permits the covert collection of data overtly, and additionally, there is no initial requirement of judicial review in order to demand access to traditionally confidential records, and or to apply the gag order to the librarian. The Patriot Act has given agents the ability to initiate and carry out covert activities in the name of security with the assurance that if the normal process of judicial review disallows the acceptance of evidence into the review of a case based on the loss of any assumed right of privacy (for example), Article III of the Constitution can be invoked by identifying the evidence as cause for the suspicion of treason.

The notable difference between the two Acts with regard to personal privacy is that the Privacy Act imposed – and allowed for – a *sense* of privacy for our library patron, while the Patriot Act strips him of that secure *feeling* before he even enters the library. The *sense* of privacy, pre-October 2001, presumably encouraged a *sense* of reciprocal trust, which in turn created a *sense* of security. It is through this sense of security that an American is able to *feel* free to participate in his personal world; specific to this example, he feels free to peruse any topic that may seem interesting at the moment, despite the fact that, in reality, he had no more privacy before the enactment of the Patriot Act. We must also acknowledge that our library patron will most likely *not* be a target of covert information gathering every time he borrows a book from the library any more frequently since the enactment of the Patriot Act than he might have been under the Privacy Act; it is his *sense* of the possibility of being investigated that has changed.

The *sense* of the loss of personal privacy seems to undermine the Constitutional Right to Freedom and Security in an Orwellian way – the individual is never quite sure when his personal behavior is being covertly observed, although he is confident that he could be under investigation at any time. With the constant possibility of the activity of covert information gathering, the individual is not truly free to participate in his own intellectual pursuits, that is, to actively gather information about his world. It becomes as impossible for the individual to trust

that he is secure in his freedom, for example, to choose his representatives in government, as it is to believe that those representatives are trustworthy.

Mr. Skinner, in his search for the definition of Freedom, ceded the importance of the *sense* of privacy gained from covert schemes for covert activities when he states, "The literature of freedom has been designed to make men 'conscious' of aversive control…" The value of privacy, as it relates to freedom, is in its personal *sense* of liberty, and the *sense* of trust and trustworthiness in other individuals and the government. Actual privacy, liberty, and trust are not necessary to the advancement of the greater good as long as there is a *sense* or *feeling* of such built into the structure of a democratic society. Unfortunately, there are trade-offs to be made. Mr. Skinner also acknowledged the flaw in the value of the presumption of the necessity of a simple *sense* of privacy or freedom (as compared to actual privacy) when he finished his comment with, "…in its choice of methods it has failed to rescue the happy slave."

Notes:

I have given in to the convenience of using the Department of Justice (DOJ) notation "Patriot Act" in place of the full acronym, USA PATRIOT Act, despite the realization that the DOJ deliberately and quickly created the short-hand title in an attempt to soften the implications of the full title of the Act: *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (see Kranich). It is interesting to note that all ".gov" web-pages use the notation, "Patriot Act", while most legal web-pages use either "USA PATRIOT Act" or the short form "PATRIOT Act".

Robert Filgate, recently retired from the McArthur Library in Biddeford, Maine, offered me his perspective as a librarian on the implications of the USA PATRIOT Act at my specific request while preparing this paper. We corresponded via email on March 1, 2005.

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An Examination of the Intended Purpose of The Progress Clause

What is The Progress Clause? Did the members of the Second Continental Congress intend to grant an "inalienable right" of information gathering? Was it the intention of our founding fathers to promise all individual members of the society of the United States the opportunity to learn from and contribute to scientific knowledge via the Constitution? Does the concept – and its implications – of a Constitutional responsibility and right to access of information translate gracefully to the World Wide Web? What would the framers of our Constitution and Bill of Rights have to say about today's electronic "networkability" as it relates to freedom of speech and intellectual property protection? Could Thomas Jefferson, James Madison, or Alexander Hamilton ever have imagined a device such as the World Wide Web when they included the "Progress Clause" in the Constitution? Would they have tried to incorporate the notion of the WWW into their plans for our future – or would they even have wanted to do so?

The point of this paper is to attempt to force our current conceptualization of the so-called Progress Clause through the philosophies and goals of a few salient contributors to the construction of the US Constitution and its Bill of Rights specific to the application of The Progress Clause; this paper certainly does not represent the first attempt to do so, and will borrow from many previous theories through the process. It *is* possible to ask questions regarding intellectual property, censorship, and human flourish in the 21st century in the context of the times during which the framers were planning, however, one may discover that these questions cannot easily be philosophically (or even legally) considered within the context of the expectations put forth in the eighteenth century.

A common and accepted interpretation of some of the writings of the founding fathers is that we have been granted a Constitutional responsibility and right to offer and gather information with the intent to further our personal and collective knowledge of the human condition, as well as to discover how that human-ness can best be served by and for a democratic society. The so-called "Progress Clause" is understood based on the following two excerpts from the United States Constitution.

Article I: Section 8: Clause 8 in the Constitution states the constitutional responsibility:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

The First Amendment of the Bill of Rights adds weight to the presumed right:

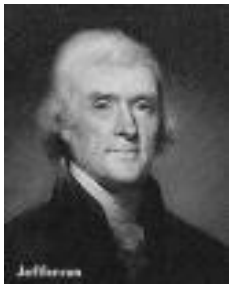
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment clearly grants us the right and responsibility to speak and think freely without fear of repercussion, while the Constitutional Article speaks to the governmental responsibility to both the assistance in the financial subsidizing of "thinking", and the right to expect that one's financial concerns will be protected. It is the combination of the previous statements from which we *infer* the Constitution Responsibility and Right to individually and collectively learn, educate, communicate, and debate toward the goal of increasing the value and effectiveness of our personal and national interests, that is, to enhance the greater good via the ideal of human flourish. The intention of the founding fathers seems to have been precisely as stated: the right to make money and to be protected, as well as the right to think creatively. It is reasonable for one to presume at this point that the framers would have protected (regulated) the 'net' and also allowed individual contributions to be made freely.

However, one cannot jump into an analysis of the web through a colonist's eyes without first examining the whence of those who were responsible for setting the ideology of our society to paper; that is to say that it is imprudent to try to make Mr. Jefferson, for example, "think" about current technology without first at least attempting to discover his intellectual context. This requires a short revisiting of the education of the late eighteenth century, along with a review of the environment during which Thomas Jefferson, James Madison, and Alexander Hamilton were learning. (I have chosen to focus on these three because they are considered the most influential contributors to the concept of the presumed Progress Clause based on both their respective personal writings and the *Federalist Papers* [collection].) Jefferson, Madison, and Hamilton each were considered scholars of their time. Each of the three was classically educated in the sense that they were required to read and understand the "great philosophers" before being allowed (by their mentors) to think or act; at the same time, each was expected to make a civic contribution to his respective environment. In fact, the three all were educated in this fashion specifically because they seemed, even as children, to exhibit the abilities necessary for accomplishing "great things".

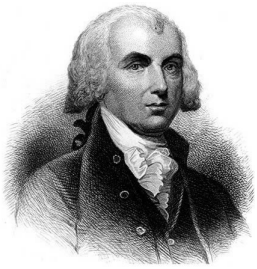
A primary component of the classical education was the reading of Aristotle's commentaries on the essence of being human, the responsibilities of the governed and those who govern, and, perhaps most important, Aristotle's thoughts regarding the ability to philosophize. We know that Jefferson was an avid reader of Aristotle; we can

presume that both Madison and Hamilton, too, were scholars of Aristotle as a function of their studies at King's College and the College of New Jersey, respectively. Indeed, each of the three has come to be considered an American Philosopher in his own right. As we presume to walk in the shoes of our three scholars, we will frequently hear echoes of the Aristotelian ethos.

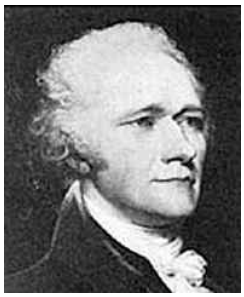


It is equally important to remember as we attempt to reduce the issues of today to points that can be interpreted through the intentions of the founding fathers, that there really were [at least] three styles of government championed at the Second Continental Congress; the framers of the Constitution and those who contributed over the first 12 years of its incorporation were not of one mind, to say the least. Mr. Jefferson was an eloquent advocate of pure Democracy; he supported complete autonomy at both the state and individual (landowner) point. Mr. Madison was a Republican, defining his plan as one in which each individual would have as much "say" as any other at a national level; his was not a plan of legislation, rather, he believed that men must be allowed to govern themselves (in the form of the election of representation) toward preventing the "evils of democracy" that are manifest as a monarchy or worse, anarchy. Mr. Hamilton was the Federalist in the group; he believed that the United States would best be served as a federation, a collection of states working within a set of federal laws as guidelines while supporting the greater good of one huge society. These statements are, of course, dramatic oversimplifications of the intentions of the three men.

While Mr. Jefferson believed in the autonomy of the state and the individual, he was acutely aware of the financial conflicts that could arise if there were no laws in place to protect each state's (and individual's) interest. Jefferson's view of the world included the individual's right to make decisions about oneself, the right to know about those others in one's environment, the right and responsibility for the individual to protect oneself, and the ability of the individual (given enough knowledge and information) to make rational and appropriate decisions regarding one's own interests and welfare; he extended this premise of autonomy to the state and its membership in the larger society of the nation. It is the influence of Aristotle that strengthens Jefferson's ideals with the premise that knowledge allows the individual and state to control positively, and that through that control, the individual retains autonomy in the form of freedom. Freedom through autonomy combined with contributory membership in the nation was Jefferson's goal.


James Madison

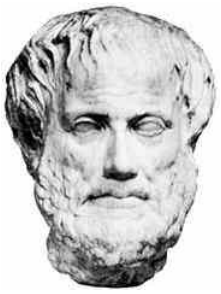
Mr. Madison, the Republican in our group, was truly an idealist. Studying with the Reverend Witherspoon at what is now Princeton, Mr. Madison genuinely believed in the good of man; he was confident that given the right to contribute to the running of the government (primarily via a vote) the common man would make the right decisions toward the good of the country and himself. Madison has often been called a "modern liberal" in that he trusted the people to self-regulate behaviors of both themselves and their shared government(s). While several of Madison's contemporaries considered him a "hopeless idealist", most agreed that he was the "guardian of morality" throughout the process of writing the constitution and its amendments.



Mr. Hamilton was (and still is) considered the Federalist of our three. Hamilton's background was very different in that, born under the veil of illegitimacy he had been required to work deliberately for every advantage we might see as his own, including the obtaining of his education and financial stability. Hamilton was a frugal advocate of the protection of the national debt in the form of one central government; it is through his impetus that the *Federalist Papers* came to shape the Constitution as we recognize it today. Hamilton was concerned less with liberty and freedom at the individual level; indeed his primary concern was to limit the extent to which the states as individuals could control or amend the intentions of the leaders at the national level.

Interestingly, all three of our framers were at one time or another referred to as a "Federalist"; depending on the historian of a particular era, references can be found to: Jeffersonian Federalism, Madisonian Federalism, and, of course, Hamiltonian Federalism. The retrospective implication and interpretation is that each of these men did support the notion of one nation, one confederation of states; they shared the ideology of a democracy as was defined by Aristotle.

> "… democracy is for and by the people… [and] …should be by those people with enough time on their hands to pursue virtue."

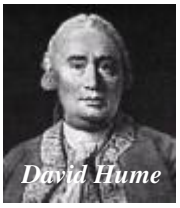


This broken quote is a deliberate bastardization of the original intent of Aristotle in [his] *Politics* (ca. 340 B.C.E.) to demonstrate the intentional political "flexibility" of the original

framers of the Constitution and its Amendments; the prevailing implied elitism seems cleanly rationalized here with the writings of Aristotle taken blatantly out of context.

Jeffersonian Federalism (also known as Libertarianism) espoused the autonomy of the states and the right and responsibility of each state to govern itself in the interest of its particular constituency. Jefferson apparently accepted the need for a central government (hence the reference to federalism), yet his primary concern was that of the state government. Jeffersonian Federalism included the premise that the rights of the people could only be protected by those by whom they were governed, that the good of all could only be served through the relatively smaller governing leadership at the state level.

Madisonian Federalism varied by virtue of the educational background of Mr. Madison. Madison was a scholar of the philosophers John Locke (*The Second Treatise of Government)*, and David Hume (*A Treatise of Human Nature).* Hume, as a relative contemporary of Madison, possibly had the strongest influence on Madison's notion of the individual. Madison believed that while the human individual is essentially "good", man's penchant for egoism and self-interest set him up for unintentionally striving for the *lesser* good of all, that is to say, man is not able to govern himself at the same time that he is trying to enhance the greater good. However, the idealist in Madison allowed that man, working in his own interest, is able to select and elect into the position of leadership another man who has the time and knowledge to think forwardly with the goal to protect and advance the common individual. It is this intellectual paradox that caused Madison to be predisposed to act so ably in the role of arbiter when the two extremes, personified in Jefferson and Hamilton, "went at it".

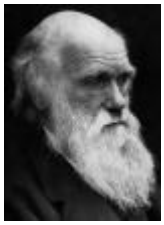

David Hume

Hamilton believed that the public good could be served best and only by those men who were considered the most talented and learned, and who, by virtue of their standing in society, were able to predict and objectively debate issues which might impact the greater good. Hamilton agreed with Madison's assessment of man's ultimate nature, that is that man could not be trusted to dispassionately (intellectually) consider matters of state importance. Hamilton extended this premise further, however, when he advocated the life-appointment of a president; he

believed that the common individual was not capable of determining his own fate via the participatory election of his government.

Beyond the variety of political theories championed during the late eighteenth century, there was a teeming of intellectual discovery and invention occurring throughout Western Civilization, including (but not limited to) Germany, France, Britain, and the United States. Additionally, also throughout all of Western Civilization, the "common man" was gaining worth as a member of the greater society; the aristocracy and nobility as Jefferson, Madison, and Hamilton had been born into was ceding human rights to those who had not previously been considered worthy of accomplishment. Jefferson was particularly influenced by this "revolution" by virtue of his extended residency in France just prior to the Second Constitutional Convention. The French had come to view education as the responsibility of society, and with that responsibility, came the right to every member of the society to be educated. Madison was most likely more influenced by the [at that time] German student Immanuel Kant. Kant lectured that while man does learn from his environment, he comes to his society with an *a priori* sense of morality, that is to say, that man does not learn his morals; rather, he is born with his morals. (This thesis surely added strength to Madison's belief that man is good by nature.) Additionally, Hume was publicly discussing his theory that personal freedom is simply an illusion, an idealistic construct taught to individuals via their respective religious practice.

~~We must remember, too, that this is the era of Charles Darwin who was commissioned by his government to gather knowledge in the interest of a greater understanding of the human in his world. Mr. Darwin forced our philosophizing framers (and indeed the world) to reconsider the role of a supreme being with his emphasis on the survival of the fitness; it is most likely a reasonable presumption that the framers also began to generalize Darwin's theories to political behavior and law. Hamilton and Jefferson very possibly took heart in the concept of the fittest, both believing themselves "brighter" than the average or common man. Likewise, one may presume that Mr. Madison felt a renewed incentive to protect the commoner from those who may seem "fitter". It was in this climate of discovery and invention, revolution and rebellion, the rise of the common man to the status of one who is encouraged to become educated, that our framers set to the task of writing what we have come to interpret to be the "Progress Clause".~~



The members of the Continental Congress (both the first and the second delegations) were men of their times. Our three were elitist, learned men who were attempting to define a set of rules from which to centrally govern without denying the states' rights to govern themselves, while also looking to the future implementation and interpretation of their doctrine. The framers were acutely aware that while the Constitution should clearly define the mechanisms of government, it should not define rights and privileges to the extent that the states, municipalities, and individuals were left with nothing more (or less) than the monarchy from which they had just recently rebelled. The care taken toward this balance was not as philanthropic as history has written it; the framers, rather, deliberately intended that the Constitution with its Amendments would give the *impression* that those rights and privileges were guaranteed.

The original *Articles of Confederation* had effectively caused the freedom of speech to be potentially an act of treason against the Federal Government, while at the same time, the right to question the process by which they were being governed was assured to the individual states. The members of the Second Continental Congress found themselves in the position of rewriting a Constitution which legally defined each of them, as leaders of their respective states, treasonous – simply by virtue of the act of rewriting. It became immediately apparent to the framers that a clarification in the form of a Bill of Rights had to be added to the Constitution. Hamilton was determined that the Bill of Rights would not unintentionally grant additional rights and responsibilities to the people [by the government]; Madison worked toward protecting the individual's right to question all levels of government; Jefferson maintained his quest to ensure state autonomy. This combined effort resulted in three "Rights" pertinent to this paper:

> *The First Amendment*: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> *The Ninth Amendment*: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> *The Tenth Amendment*: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Mr. Madison receives credit for the First Amendment which he advocated as a protection to the individual as the individual may be impacted by the federal government. The intent of the inclusion of the First Amendment was to eliminate the default act of having committed treason by virtue of questioning the mechanics of the federal government; its primary purpose was to define a set of individual rights which could be guaranteed to all citizens, without regard to particular state or political allegiance. Simply put, the First Amendment allows political and religious discourse without any legal implication of treason.

The Ninth and Tenth Amendments were designed to be "how-to" statements. The Ninth Amendment defines "how to" interpret the delineations put forth in the Constitution; the Tenth Amendment effectively passes everything that has not been defined in the body of the Constitution on, to the purview and responsibility of the state governments. An example of the division of responsibility laid out by the Tenth Amendment can be seen with the right to the freedom of speech itself. The Federal Government assures each citizen the right to speak his thoughts -- aloud, or in printed form. However, the State Government has the right to limit, for example, the *forum* of speech, or the *type* of speech, or even the *amount* of speech. It is the Federal Government which allows us to speak; it is the State Government that puts limits on our speech. The Ninth Amendment further assures the State Governments (and their constituents) that the absence of the address of new and or particular human rights in the Constitution does not intend that the particular right is denied. These two amendments are based in the premise that individuals will elect representatives to their State Governments who will serve in the interest of the constituency, as compared to the Federal representatives who must always consider the larger picture of the entire nation. It was determined that it would be up to the State Government, via majority elected representation of the particular state's constituency, to write law or confer rights specifically with regard to how particular human rights would be manifest.

It is expected that the reader, by now, is scratching his head, and wondering, 'What on earth has all of this got to do with the Internet and The Progress Clause in 2005?' Let's quickly review what has been suggested up to this point. Hamilton, as a Federalist, advocated one large central government in which the individual would be protected by a national government. His was a plan designed to write large, global "rules" toward a larger, greater good. Hamilton was willing to concede the rights of the people (of the entire nation) in the form of large general elections and, incidentally, tax bases; the large federal congress would write law for the country. Jefferson, our Democrat, preferred a confederation of states in which the state governments would be responsible for writing law

for their particular constituents. His preference left only national defense to the federal or national level; he believed the state government, alone, could act on behalf of its individuals. Mr. Madison is our humanistic Republican with his hope that the individual is able to elect appropriate representatives to each the state and the federal governments toward having the sense of a personal investment in the government.

All three of our framers, along with most of their contemporaries, were primarily concerned with the protection of the new government; the protection of those who were to be governed was simply a pragmatic default. The intellectual climate of their time was growing at an incredible rate; those new and great inventors were coming up with ideas that seemed to require protection – financially and intellectually. The educating of the common citizen was fast becoming the norm. While our framers would have much preferred a continuation of the concept of the elite as they knew it, they were aware that allowances for the new intellectual elite must be provided for and protected in the Constitution. The compromised solution was penned in Article I, Section 8, Clause 8, and explained in the First, Ninth, and Tenth Amendments: the federal government will set the minimum rights and logistics; the state governments will determine how those rights and logistics will be manifest legally; the individual will have the power of participatory election toward being assured fair representation of and for the majority. With regard to The Progress Clause, the framers believed that this breakdown of responsibilities would serve the greater good by protecting the scientist who had the right to financial gain, while allowing the individual to question any law or mandate set by either the federal or state government(s); by *inference* all members of the larger society are allowed to think. It is through the inference or interpretation on the side of the governed that a *sense* of a Constitutional responsibility and right *seems* to exist.

Additionally, our three framers all were scholars of philosophers who espoused the individual and collective necessity to be informed in order to participate in a democracy. From Aristotle, the concept of knowledge as an enhancement of the greater good; from Socrates came the implication that the individual can be made responsible for his choices if he is educated enough to understand predictable outcomes; Locke influenced our framers with his assertion of the *tabula rasa*, the blank slate which requires experience and information to thrive. Jefferson, Madison, and Hamilton each were of a whence which encouraged learning by way of the gathering of information and experience; each knew that his place in society had been determined by his intellectual proficiency. However, none of our three incorporated a national responsibility to inform or educate the individual into their

respective political philosophies. Each of the three worked with the premise that the elite were the elite because they were intellectual, that the intellectual elite were the only individuals who would require or appreciate the ability to collect information with an intention to enhance the greater body of scientific knowledge, even while acknowledging the need, in a democracy, for the individual elector to be informed before casting his vote. It is likely that, by virtue of considering themselves as the elite, it simply did not occur to the group to protect the common individual's right to become informed.

It is a reasonable conclusion to suspect that the framers did not intend to write into the Constitution and Bill of Rights either the responsibility or the right of the individual to gather or disseminate information. Jefferson, Madison, and Hamilton each were concerned with the protection of personal and government interests [in this context] only to the point that the individual, or government agency, could claim ownership of an idea [in the form of "Writings and Discoveries"] in order to benefit financially. Article I, Section 8, Clause 8 of the Constitution does not guarantee the opportunity to "do science"; rather, it speaks to the responsibility of the federal government to protect the end product of one's creative work(s) to the extent that it becomes income-producing. Neither does the First Amendment guarantee the right to publish or gather information; rather, it is simply the protection from an accusation of treason based on the speaking of one's personal opinions about government (as an example) in a group of people or via the press. Neither independently, nor as combined conceptually, can the Article I, Section 8, Clause 8, and the First Amendment be seen as an implication on the part of the framers as a Constitutional responsibility and right to gather information with the intent to increase human knowledge in order to enhance the greater good of society.

One can easily imagine the framers enthusiastically participating in what we call the 'net': using email as a media for corresponding, publishing papers for other learned members of their respective political and intellectual societies, gleaning information from all contributors to the internet – one might even imagine Mr. Madison in particular creating a blog as his own lecture hall. The framers might also have considered the internet worthy of being addressed in the Constitution with regard to one's ability to create and produce income. This author suspects that the framers would consider the internet in much the same way they addressed print media and law-making. That is to say, it seems probable that the framers would see the potential for the need to protect the intellectual property of contributors to the 'net' with regard to individual financial gain, in the form of a statement similar to Article I,

Section 8, Clause 8. It seems as likely that the framers would recognize the individual contributor's vulnerability to the misinterpretation and accusation of treasonous or libelous behavior, and would attempt to protect the individual with an amendment similar to the First Amendment. It does not seem intuitive to expect that the framers would have successfully attempted to mandate (at the federal level) a set of rules of interaction with and contribution to the internet. This author suspects that the framers' political leanings would have generalized to the process of regulating the internet: Mr. Hamilton might have considered the need for a global examination, with one governing body; Mr. Jefferson might have advocated for a confederation of regulation, similar to the W3 organization today; and Mr. Madison, ever the idealist, might have preferred to sit back, allowing the participating individuals to react to the 'net' as one giant society, while protecting the individual right to contribute.

Despite the presumption that the framers would not attempt to regulate the internet, it does seem probable that our framers would eventually write "rules" and guidelines into a revision of the Constitution that would indeed imply (or even define) a formal Progress Clause. It is probable that the ease of access by all members of all societies (to the internet) would cause the general need to be informed before acting to become an inalienable right of the individual, and a responsibility of government. As scholars, our three framers were personally aware of the need to be informed in all areas, particularly with regard to politics; it seems likely that were they to look back at their intentions in 1857 through our eyes and technology [in 2005], they would feel compelled to protect the individual's right to have access to all information by creating an *actual* Progress Clause.

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