Echoes from History:
Language of Participatory Democracy and Self-Governance

The rhetoric surrounding Open Source initiatives has something in common with the passionate and upending debates accompanying the revolutionary phase of American history. Unfortunately, it is not uncommon for Open Source rhetoric to be found lacking reason, wisdom and a sense of strategic direction. However, many well considered commentators and advocates have also made constructive contributions to the emerging debate on the proper role of Open Source Code. Stanford Law Professor Lawrence Lessig has opined on this subject at length – at once scolding the overreaching of some advocates of Open Source while at the same time persuasively presenting a thesis in its favor. The fundamental premises supporting Open Source Code deserve serious consideration and are worthy of attempted application to many types of software – especially Participatory Governance Environments.

Massachusetts Constitution

It is helpful to consider the foundational texts supporting public sector self-governance in the United States as a reference point. The Constitution of the Commonwealth of Massachusetts (one of the original 13 colonies whose constitution predates that of the United States); has much to say on the question of participatory democracy and self-governance.

On the topic of representative government, Article V of the Massachusetts Constitution provides:

> All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

This text strongly curtails the discretion of elected and appointed government officials by restraining them to act only according to the express desired of the people they represent. Despite the fact that this language exists within the Constitution itself – the basic controlling social compact enabling the state government – it is now common knowledge that government does not resemble this provision. In fact, as of the middle of this semester, the Massachusetts legislature is embroiled in a law suit by backers of an initiative petition creating "clean elections" enacted into law by a substantial majority of voters during the last election. This ballot question method is a recognized manner of enacting law in Massachusetts – and yet the House of Representative of the state has nonetheless decided not to fund the law. The Massachusetts Supreme Judicial Court has ruled that the publicly funded elections must be given adequate financial disbursement or the legislature must act to repeal the law. However this particular contest ends, it stands as clear evidence that government does not always act as the humble, responsive and accountable servant of the people that was envisioned and commanded under the Constitution.

What is supposed to happen when representative government fails? The Massachusetts Constitution contains at least two clear solutions. First, Article VIII instructs citizens of the Commonwealth to clean out the house. Article VIII provides:

> In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life;

and to fill up vacant places by certain and regular elections and appointments.

Second, in the event that elections are not working Articles IV and VII of the Massachusetts Constitution instruct citizens that they own government, and they can and must change the government when it fails them in a fundamental manner. Respectively, these articles provide:

> Article IV. The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America in Congress assembled.

> Article VII. Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

While having incumbents wantonly maintain an impervious stance toward legitimate and majority backed "clean elections" laws does not constitute a failure to assure protection, prosperity, safety AND happiness – it is nonetheless deeply vexing to many citizens. In the spirit of the founders, it is possible that the answer to these insults to the public can be found in the "reform and alteration" of some aspects of government. Could the use of online eDemocracy software – if it were sufficiently accessible, robust and tied to legally binding decision making, form the basis of better citizen participation in government and more responsive and accountable government? Does the advent of the information age open new opportunities to more fully realize the Constitutional imperatives that lie at the cornerstone of our system?

Sale of Self-Governance Computer Code: Absurd and Unnatural?

Interestingly, the Massachusetts Constitution indirectly sheds some light upon topic of Open Source Code versus Private Property Code. If it is true, as Dean Mitchell posits, that "Code is Law", then it should be troubling that this software, owned by a corporation or individual, is in effect "passed down" from generation to generation. Code is handed down: from CEO to CEO; passed from Non-Profits to NGO; from start up to acquiring conglomerate; from Copyright Owner to family or other beneficiaries named in the Owner's last will and testament or through probate. Intellectual property, whether copyrighted, trademarked or patented, is personal property – pure and simple. And Congress continually extends the numbers of decades during which the monopoly can be enforced under copyright laws. In any case, software code revisions and other repackaging methods entitle the software to new copyright protections – in effect restarting the clock for copyright all the time. Article VI of the Massachusetts Constitution, using language reminiscent of the polemics employed by Open Source advocates of the day, holds that it is "absurd and unnatural" to have a corporation or any person transfer or inherit the right to act as "law giver or judge". Specifically, Article VI provides:

> No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver,

or judge, is absurd and unnatural.

Does ownership of code in fact open the door to overreaching by the code proprietor in ways that are undesirable and perhaps incompatible with self-governing communities – especially in the public sector? Is the act of making design and functionality determinations about how the code supporting a digital participatory decision making processes work tantamount to setting the procedural law governing that community? If so, then it may be unconstitutional to permit such power to be transferred as part of a commercial IP assignment or through a gift or probate transfer. In fact, it may even be termed "absurd and unnatural". Rather, the community itself should exercise final authority and opinion regarding the framework and methodologies by which government operates.

Declaration of Independence

The same thread of political philosophy runs through the Declaration of Independence. The concept that free people must govern themselves, and that only the governed can determine the nature and methods of such government through their fashioning, consent, oversight and participation is replete in early American political texts. In relevant part, the Declaration of Independence reads as follows:

> Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Modern Applications

In this context, the open source licensing agreement is akin to a constitution or declaration of independence and the software configuration/Filter setup decisions are akin to laws and regulations implementing the constitution. As such, the members of communities using the MIT eCommerce Architecture Program's "Participatory Governance Environment" to exercise their affairs will be entitled to assure that the manner in which the Code supports and reflects the governance of the community is at all times in synch with the needs of the community, implemented according to the consent and creativity of the community, and that the processes by which the code evolves is transparent, accountable and responsive to members of the community. Complex Code that has been long established should not be changed for light and transient reasons, and users of even low quality, unsecure and bug-ridden code have demonstrated an aversion to migrate to other packages; but when the needs of a Community require a change to the Code, it must always be the Right of that Community to make whatever change it deems appropriate without ever having to answer to an external corporation or other vendor. Therefore, if the manner in which the Code is implemented or evolves ever becomes destructive of the desired processes or aims of the Members, it is the Right of the Members – including any subset among them - to alter or to abolish it, and to institute new Code, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to realize their aims, provided that such new Code is made freely and openly available to any person or legal entity.

Rights and Duties and Enforcement

The basic governance texts from antiquity carry far more than an irritated recitation of rights. They also describe duties and responsibilities. Paying taxes, providing for the common defense of the community, abiding by rules made "fair and square" through the community governance methods, etc. Will members of digital governance systems participate to the degree necessary to actually maintain continuity and quality? Will they carry out the duties of the community?

The tailoring of these and other principles of self-governance to an online decision making forum in meaningful ways remains an emergent enterprise. The first field trip this semester to a Town Meeting (in the town of Westborough) revealed that every session of the meeting includes at least one on-duty police officer. This uniformed, armed officer of the law stands at the back of the room. The elected Town Meeting Moderator has, in his job description, the ability to rule participants "out of order". That job description also allows the Moderator, if need be, to order an unruly participant to be removed from the meeting environment. If the participant refuses, and the mere paper and rhetoric proves insufficient, then the Moderator is authorized to have the police remove the participant. If there are multiple unruly participants, then more police can be quickly assembled. If necessary, police from neighboring municipalities can be summoned under reciprocal agreements among towns. If a real pinch, the Governor can mobilize the National Guard, including armored divisions, heavy weapons, jet fighters and so forth. In short – the full power of the state lies behind the gavel of the Moderator. That power can be used to compel any user of the existing "Participatory Governance Environment" to play by the community rules. Or else. Same goes for the obligation to pay taxes, abide by the criminal and civil statutes, and so on.

Of course, this power also stands behind the enforcement of the rights of community members. If someone continually bothers you – eventually they can be put behind bars and their bank accounts can undergo forced funds transfer to your account. Those same uniformed, armed police and the rest of the state power apparatus serves to protect as well as to coerce.

What equivalent methods exist in – or applied to - the digital arena? At what point will digital tools be used as official methods of decision making in official governance channels? If a shareholder at a corporate meeting is unruly, eventually the police are authorized to use whatever force is necessary to remove that person – just as in a Town Meeting. When online environments house the virtual presence of participants, how can community norms be efficiently and effectively enforced?