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Return of the Poll Tax: Does Technological Progress Threaten 200 Years of Advances Toward Electoral Equality?

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RETURN OF THE POLL TAX: DOES TECHNOLOGICAL PROGRESS THREATEN 200 YEARS OF ADVANCES TOWARD ELECTORAL EQUALITY?

Max Stul Oppenheimer[+]

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I. INTRODUCTION

Despite a commitment to equality expressed in the Declaration of Independence and a right of access to and control over the government expressed

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in the United States Constitution, the gap between the goal of equality and actual practice took generations to narrow. In his remarks prepared for the bicentennial anniversary of the U.S. Constitution, Justice Thurgood Marshall noted:

> Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government . . . we hold as fundamental today . . . .
>
> For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People."[1]

The right to vote—viewed as the central right in a democracy[2]—was not explicitly guaranteed by the original Constitution,[3] and it certainly was not universal at the time the Constitution was adopted.[4] As Justice Marshall pointed out, it was not until 1920 that universal suffrage existed, even in theory.[5]

The constitutional commitment to equality was eventually made with the ratification of the Nineteenth Amendment,[6] but practical barriers remained, principally in the form of poll taxes and literacy tests. For example, many states had enacted a poll tax pursuant to which non-payment would deny the taxpayer the right to vote.[7] While some states made the political decision to abandon the

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1. Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association 1 (May 6, 1987), *available at* http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website_llm_jsd_graduate_affairs/documents/ecm_dlv_007197.pdf [hereinafter Justice Marshall Remarks].

2. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 365 (1996) ("[T]he Supreme Court has often recognized the right to vote as the most 'precious' of all rights in a free society . . . .").

3. *See* ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 1 (1990) ("Nowhere in the First Amendment is there any reference to the fundamental right to vote or the right to hold free elections. At the convention, the Founding Fathers could not agree on who could vote, and as a result the Constitution left the qualifications of voters in federal elections to be determined by the states."); *see also* Minor v. Happersett, 88 U.S. 162, 165, 170–71 (1874) (holding that citizenship did not *per se* confer a right to vote and rejecting a woman's claim that the Fourteenth Amendment granted her the right to vote).

4. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 5 (2000) ("The lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property.").

5. Justice Marshall Remarks, *supra* note 1, at 1–2.

6. U.S. CONST. amend. XIX.

7. *See, e.g.*, Stone v. Smith, 34 N.E. 521, 521 (Mass. 1893).

poll tax,[8] it was not until the enactment of the Twenty-Fourth Amendment that poll taxes were barred at the federal level[9] and until 1966 that the United States Supreme Court ruled that state poll taxes violated the Equal Protection Clause.[10] Literacy tests were historically seen as guardians of an "independent and intelligent" election[11] and, as recently as 1959, the U.S. Supreme Court unanimously upheld a state literacy test.[12] Further, as late as 1966, three Justices were still of the view that such tests were constitutionally permissible.[13] Although those deliberate barriers to universal suffrage have fallen, the functional equivalent of the poll tax and the literacy test is currently emerging, motivated not by an explicit desire to restrict access to government but, ironically, by quite the opposite: a desire to make government more accessible and efficient by using the Internet.

The most recent Supreme Court cases on poll taxes and literacy tests hold that the government's motivation is irrelevant when fundamental rights such as voting and government access are involved.[14] However, in the recent voting rights case of *Crawford v. Marion County Election Board*,[15] the Supreme Court applied a balancing test—weighing the government's motivation against the impact of its actions on the right to vote—in upholding a state law that requires photo identification in order to vote notwithstanding the argument that the burden deprived some citizens of the right to vote.[16] *Crawford* only addresses the right to vote (a right itself not explicitly granted through the text of the Constitution but rather, arising by constructional interpretation), but the right to vote should be viewed broadly as a part of a larger set of rights constituting the right to govern.

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8. *See, e.g.*, *id.* The Massachusetts constitutional provision at issue in *Stone v. Smith* originally contained both a poll tax provision and a literacy test. *Id.* By the time the case reached the Supreme Judicial Court of Massachusetts, the tax requirement had been removed from the constitution. *Id.*

9. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

10. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax" and as such, the poll tax violated the Equal Protection Clause of the Fourteenth Amendment).

11. *See Stone*, 34 N.E. at 521.

12. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 52–54 (1959).

13. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969) (ruling unconstitutional a property ownership requirement for voting in a school district election). Justices Black, Harlan, and Stewart dissented, contending that "[s]o long as the classification is rationally related to a permissible legislative end, therefore—as are residence, literacy, and age requirements imposed with respect to voting—there is no denial of equal protection." *Id* at 637 (Stewart, J., dissenting).

14. *Id.* at 627–28 (majority opinion); *Harper*, 383 U.S. at 669–70. For a detailed review of the history of the demise of the poll tax, see Ackerman & Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).

15. 128 S. Ct. 1610 (2008). For a detailed discussion of *Crawford*, see *infra* Part V.C.

16. *Crawford*, 128 S. Ct. at 1613–16, 1622–23 (holding that voter identification may be required—despite posing a barrier for some eligible voters—because it supports a valid governmental interest in assuring that a voter's identity is valid).

Viewed as such, *Crawford* should apply equally to the full panoply of "governing rights" and therefore has profound implications for the emerging model of Internet-mediated government-citizen interaction.

Government entities at all levels have embraced the Internet as a vehicle for government-citizen interaction. The federal government, state governments, and many local governments use the Internet to provide information and conduct government business.[17] While this trend has provided unprecedented access for many Americans, it has also distanced the government from those without an Internet connection. A 2008 report published by the Federal Communications Commission found that while 99% of the wealthiest Americans have access to high-speed Internet service, only 92% of the poorest Americans have such access[18] and that only 29% of people with a severe disability have Internet access at home, regardless of economic status.[19] Thus, while the Internet is potentially the best vehicle for government access and transparency for most citizens, it simultaneously widens the gap for those citizens without Internet access. This phenomenon threatens to translate a lack of Internet access into a lack of government access, ironically posing the greatest threat to two hundred years of progress toward electoral equality.

This Article begins with a brief history of the right to govern, an explanation of the statutory barriers that have historically arisen to threaten public participation in government, and an examination of the arguments raised regarding those barriers. It then describes the challenges posed by the government's increasing use of the Internet and the current status, motivation, and direction of web-based delivery of government services. Next, this Article surveys the available data on

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17. *See, e.g.*, Internal Revenue Service, http://www.irs.gov (last visited Mar. 11, 2009) (providing tax forms and the option to e-file federal tax returns); Maryland State Department of Assessments and Taxation, http://www.dat.state.md.us (last visited Mar. 11, 2009) (providing state real property assessment data and links for filing assessment appeals); PACER Service Center Home Page, http://www.pacer.gov (last visited Mar. 11, 2009) (providing federal court pleadings and filings in electronic format); U.S. Patent and Trademark Office Home Page, http://www.uspto.gov (last visited Mar. 11, 2009) (providing a searchable database, published patent applications, and a method for e-filing patent applications).

18. INDUS. ANALYSIS & TECH. DIV., FED. COMMC'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2007 4 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf [hereinafter FCC INTERNET REPORT].

19. Press Release, U.S. Census Bureau, Americans with Disabilities Act: July 26, at 3 (May 27, 2008), *available at* http://www/census.gov/Press-Release/www/releases/archives/cb08ff-11.pdf [hereinafter U.S. Census Bureau Press Release]. This group of severely disabled survey participants had median earnings of $12,800, compared to the national average of $25,000. *Id.* Those without home Internet access have other resources available to them, including computer workstations at public libraries; however, these options may often be inconvenient or inefficient. In 2008, the Information Institute of Florida State University conducted a national survey of public libraries and reported that 57.5% of respondents noted that library computers' connectivity speed is insufficient at least part of the time, and 82.5% reported that they do not have enough computer workstations to meet demand. JOHN C. BERTOT ET AL., INFORMATION INST., PUBLIC LIBRARIES AND THE INTERNET 2008: STUDY RESULTS AND FINDINGS 12 (2008), *available at* http://www.ii.fsu.edu/projectfiles/plinternet/2008/Everything.pdf.

public access to the Internet, catalogs current requirements of various government agencies, and measures them against the principles established in the "right to govern" cases. It concludes that the poll tax cases, while grounded in the right to vote, are a subset of a broader category of limits on the government's power to require that its citizens approach the government through a specific medium—limits arising under the broader First Amendment right to petition the government. Finally, this Article suggests guidelines for limits on the government's use of the Internet to communicate with its citizens.

II. THE RIGHT TO GOVERN

The fundamental feature of a democracy is a citizen's right to participate in government; however, this right does not explicitly appear anywhere in the U.S. Constitution. Instead, it is guaranteed through the juxtaposition of several provisions. The right to vote has been described by the Supreme Court as "preservative of all rights."[20] However, voting is only one component of the right to participate in government. The right to vote implies the right to know what is at stake as well as what the government has done in the past and what candidates propose to do in the future.

Additionally, the right to vote implies the right to know the nature of the status quo and any proposed changes. The right to participate in government also includes the right to provide opinions, data, and arguments in general (as guaranteed by the free speech provision of the First Amendment[21]) to the government in order to influence how elected officials exercise their power. The First Amendment right to petition the government includes both the right to present requests to the government and the right to ask the government for information.[22] In fact, it is arguable that at some level, the right to petition the government is even more important than the right to vote.[23]

Yet the Supreme Court has established a hierarchy of protection among the different constitutional provisions that protect the right of the people to control their government. The various constitutional standards matter; they result in different methods by which the government will be permitted to use the Internet as a tool for interaction with its citizens. It is important to recognize that there is a right to control the government and that each component of that right must be protected in order for the right itself to be safeguarded. In particular, increasing government use of the Internet poses potential violations of the more restrictive

20. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

21. U.S. CONST. amend. I.

22. *See id.* ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

23. Certainly, there are levels at which this is not true. For example, if the right to vote was abolished, the right to petition the government—as currently understood—would be meaningless. Lobbying and campaign contributions are valuable only if there is a campaign in need of funding. In the absence of campaigning, influencing the government must take another form—bribery, for example.

standards of review. For example, the government's interest in economy and efficiency may explain its decision to make particular use of the Internet and thereby satisfy a rational basis test, but, when measured against the burden it places on the fundamental rights of certain citizens, that interest may not be sufficiently compelling to satisfy the more demanding strict scrutiny standard.

Although a guarantee of the right to vote did not appear in the original Constitution,[24] the Framers contemplated the concept of broad suffrage[25] and found the subject to be controversial.[26] Today, in the context of the right to govern, the great weight of emphasis has been on the right to vote, which now holds a special place in the spectrum of rights.[27] Although the right to vote is crucial, elections are intermittent while government is continuous; thus, citizen participation in government neither begins nor ends with the casting of a ballot. Voting is not the only right essential to participation in government: "the entitlement which is commonly referred to as 'the right to vote' substantively encompasses numerous distinct liberties which the Court has protected in varying degrees."[28] Even as to the right to vote, "[n]o bright line separates permissible election-related regulation from unconstitutional infringements."[29] The right to vote is not simply—or solely—a personal right through which the voter may express his or her views on electoral matters; rather, it is a "right to participate in

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24. *See* BOTT, *supra* note 3, at 1; David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 487–88 (2008) ("Initially, the Constitution appears to have left that right up to the states, which generally limited franchise to white male property owners who were citizens of a certain age and, occasionally, members of a specific religious faith."). "At the Constitution's founding, '[v]oting was in no sense a federal constitutional right.' . . . [T]he states variously restricted the electorate based on property, race, religion, and sex." Note, *Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2238 (2006) (quoting Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1512 (2002)).

25. THE FEDERALIST NO. 57, at 296 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The electors are to be the great body of the people of the United States.").

26. *See* BOTT, *supra* note 3, at 1 ("At the convention the Founding Fathers could not agree on who could vote . . . .").

27. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). The right to vote is "preservative of other basic civil and political rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

28. Cofsky, *supra* note 2, at 365. The liberties that make up the right to vote include: "the citizen's opportunity to cast a vote, the community's ability to be represented within a larger polity, a racial group's entitlement to cast an effective and meaningful vote, the candidate's right to be placed on the ballot, and a constituent's chance to contribute to a particular candidate." *Id.* Cofsky's list focuses on rights ancillary to the act of voting; however, government does not stop after its citizens have cast their ballots. Government is continuous and requires not only participation in the periodic election process but also the rights to petition and to know what the government is doing. *See infra* Part. II.B.

29. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (alteration in original) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997)).

an electoral process that is necessarily structured to maintain the integrity of the democratic system."[30]

Access is critical, both to information about what the elected government is doing and to the decisionmakers themselves for the purpose of influencing their decisions. While the right to vote is not expressly stated in the Constitution, the right to petition the government is.[31] It is tempting to conclude that this fact indicates that the Founding Fathers considered the right to petition more important than the right to vote, but the more likely explanation is the Founders' inability to reach a political consensus on the more volatile of the two issues: who should be entitled to vote.[32] In order for petitioning efforts to be meaningful, the petitioners need access to information concerning the government's actions.[33] Finally, the right to be apprised of the government's actions is necessary not only for effective exercise of the right to petition, but also as an indispensable counterbalance to, and monitor of, those who exercise the petition right.

While the right to vote,[34] the right to petition the government, and the guarantee of free speech are fundamental components of the right to govern, other less obvious provisions are also essential. For example, the Fourth, Fifth, and Sixth Amendments help to ensure that a citizen's exercise of the right to participate in government will not result in reprisals,[35] while the right to a jury trial and the right to just compensation for taken property help to assure that there will be no government reprisals for the exercise of other fundamental rights.[36] The right of access to the courts and the right to petition the government for redress of grievances find support in the free speech and right to petition clauses of the First Amendment, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments.[37]

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30. *Burdick*, 504 U.S. at 441.

31. *See* U.S. CONST. amend. I.

32. BOTT, *supra* note 3, at 1 ("At the convention the Founding Fathers could not agree on who could vote, and as a result the Constitution left the qualifications of voters in federal elections to be determined by the states.").

33. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents."); Pratt & Whitney Can., Inc. v. United States, 14 Cl. Ct. 268, 272–73 (1988), *aff'd*, 897 F.2d 539 (Fed. Cir. 1990) ("There is a . . . common law right of public access to judicial records . . . essential to the preservation of our system of self-government.").

34. Even the right to vote, described by the Supreme Court as fundamental to all rights, is only guaranteed directly as to federal elections. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) ("While the right to vote in federal elections is conferred by Art. I, §2, of the Constitution . . . the right to vote in state elections is nowhere expressly mentioned.").

35. *See generally* 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 6341, at 194 (1997) ("[T]he Confrontation Clause joins with other provisions of the Fourth, Fifth, and Sixth Amendments to make it more difficult to punish 'thought crimes' or political activism . . . .").

36. *See* U.S. CONST. amends. V, VII.

37. Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990).

A meaningful election depends not merely on what happens after the election, but also what is permitted in advance of the election.[38] The Supreme Court has recognized that the right to vote is merely one aspect of choosing a representative government. For example, in *Norman v. Reed*, the Supreme Court recognized that in order for the right to vote to be meaningful, candidates must have access to the ballot.[39] The *Norman* Court found that an Illinois law requiring third-party candidates to obtain 25,000 signatures in each district in order to be placed on the ballot unduly restricted a political party's access to the ballot.[40] Recognizing the inquiry as "the demonstration of a corresponding interest sufficiently weighty to justify the limitation," the Court concluded that the "severe restriction" was not justified by a compelling state interest.[41]

The right to govern encompasses not only the right to cast a vote, but the right to know the government's current activities and the right to attempt to influence its actions.[42] Nevertheless, the great weight of judicial attention is currently focused on the right to vote.[43] The specific aspect of the right to govern on which the judiciary focuses has varied over time according to cultural trends. Currently the hot topic is voting, but during the civil rights movement the more active topic was the right to petition the government through organized protests,[44] and during the post-Watergate reform era the more active topic was the right to information.[45] Each of these topics is required in a participatory democracy; each right is essential to meaningful participation in government, yet the Supreme Court has imposed different standards of review for statutory compliance with

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> The right of access to the courts is basic to our system of government, and it is . . . one of the fundamental rights protected by the Constitution. This right is one of the privileges and immunities accorded citizens under article 4 of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government for redress of grievances. . . . [T]he right of access is founded on the [D]ue [P]rocess [C]lause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Id.; *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 716, 719, 728–29 (2003) (discussing the right to petition in conjunction with the Due Process Clause and free speech doctrines).

38. The 2008 Presidential election convincingly demonstrated the importance of the Internet in the pre-election aspects of government with respect to fundraising, dissemination of information, and organizing supporters. *See generally* AARON SMITH & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, THE INTERNET & THE 2008 ELECTION i–iii (2008), http://pewinternet.org/pdfs/PIP_2008_election.pdf (examining the use of the Internet in the Obama campaign).

39. Norman v. Reed, 502 U.S. 279, 288–89 (1992).

40. *Id.* at 293–94.

41. *Id.* at 288–289.

42. *See* Kathryn Abrams, *Raising Politics Up: Minority Political Participation and Section 2 of Voting Rights Act*, 63 N.Y.U. L. REV. 449, 480 (1988).

43. See *infra* Part IV for a discussion of the judiciary's current focus on the right to vote.

44. *See infra* Part I.B.1 (discussing the right to petition).

45. *See infra* Part I.B.2 (discussing the right to information).

each of these provisions.[46] The practical impact of these differing standards may be seen clearly in government use of the Internet as a method for interacting with citizens. The attraction is obvious—the Internet enables cheap, rapid communication and dissemination of information around the clock. However, although the Internet has grown at a dramatic pace, it is not universally accessible, and inaccessibility correlates with several categories of citizens who are traditionally viewed as vulnerable. For example, Internet access has been shown to be less available to groups of citizens who are poor, elderly, or disabled.[47] Likewise, any attempt to tax access to the Internet would pose First and Twenty-Fourth Amendment issues. It is therefore important to understand the reason for the varying standards, to determine which standard applies to "government by Internet," and to establish parameters within which to appropriately circumscribe the government's use of this innovative technology.

A. The Right to Choose the Government: Voting

The notion that the right to vote is fundamental to a democracy[48] is well-grounded in the United States' political philosophy.[49] The objective of class-free suffrage dates back to the original Constitution. In 1788, James Madison expressed his support for this goal in Federalist No. 57:

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who

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46. *Compare* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622, 633 (1969) (applying strict scrutiny to overturn a New York statute that restricted voting in school board elections to property owners in the school district or parents of attending children), *with* Stromberg v. California, 283 U.S. 359, 361, 369 (1931) (declaring facially invalid and striking down section 403-a of the California Penal Code, which made it a felony to display a flag or banner as a symbol of opposition to the government), *and* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978) (recognizing a general right to inspect public documents, but noting that the right is not absolute).

47. *See supra* notes 18–19 and accompanying text.

48. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (asserting that "the right to vote is too precious, too fundamental" to be burdened by monetary obstacles); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (discussing the right to vote as fundamental to American jurisprudence); Cofsky, *supra* note 2, at 365 ("[T]he Supreme Court has often recognized the right to vote as the most 'precious' of all rights in a free society . . . .").

49. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.").

> exercise the right in every State of electing the corresponding branch of the legislature of the State.[50]

In 1886, the Supreme Court recognized that the right to vote is "a fundamental political right, because [it is] preservative of all rights."[51] Nearly one hundred years later, President Ronald Reagan called the right to vote "the crown jewel of American liberties."[52]

Although the right to vote was not explicitly included in the original Constitution,[53] successive amendments clarified and expanded suffrage.[54]

> After the Civil War, the nation adopted a series of [C]onstitutional amendments that addressed the right to vote. The Fifteenth Amendment prohibited states from denying the right to vote on account of "race, color, or previous condition of servitude." The Seventeenth Amendment permitted the direct election of United States Senators. The Nineteenth Amendment enfranchised women. The Twenty-Fourth Amendment banned poll taxes. The Twenty-Sixth Amendment directed states to allow qualified citizens who were age eighteen or older to vote. Yet, none of these amendments affirmatively granted the right to vote.[55]

Commentators have noted the continuing battle between the theoretical expansion of the voting franchise and practical efforts to limit the exercise of the franchise:

> There were repeated periods in American history where efforts were made to disenfranchise voters . . . . For example, after the Civil War, many Southerners used Jim Crow laws, poll taxes, literacy tests, [and] grandfather laws . . . to prevent newly freed slaves from voting.
>
> In the late nineteenth and early twentieth centuries, . . . so-called reforms were instituted to discourage immigrants and urban poor from voting. In both cases, the pretext for the suppression of voting rights was the claim of fraud; the efforts resulted in significant drops in voter turnout. This was America's first great disenfranchisement.

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50. THE FEDERALIST NO. 57, (James Madison), *supra* note 25, at 296.

51. *See, e.g., Yick Wo*, 118 U.S. at 370.

52. Remarks on Signing the Voting Rights Act Amendments of 1982, 1 PUB. PAPERS 822 (June 29, 1982) ("[T]he right to vote is the crown jewel of American liberties, and we will not see its luster diminished.").

53. *See Harper*, 383 U.S. at 665 ("[T]he right to vote . . . in state elections is nowhere expressly mentioned [in the Constitution]."); *see also* Schultz, *supra* note 24, at 487 ("[W]hile the Court has ruled that voting is a fundamental right protected under the Constitution . . . [n]owhere in the United States Constitution is there an explicit declaration of the right to vote.").

The Constitution confers the right to vote in federal elections, but the qualifications of voters are determined by state law: "The House of Representatives shall be composed of Members chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2; *accord id.* amend. XVII.

54. *See* Schultz, *supra* note 24, at 488.

55. *Id.*

> A second great disenfranchisement is afoot across the United States .... This time the tools are not literacy tests, poll taxes, or lynch mobs, but rather the use of photo IDs when voting.[56]

However, by the middle of the nineteenth century, nearly every state had dropped property ownership qualifications,[57] and today, while "[n]o bright line separates permissible election-related regulation from unconstitutional infringements,"[58] most federal election voting qualifications "other than age, residency, and citizenship are subject to strict scrutiny."[59] In *Reynolds v. Sims*, the Supreme Court explained that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[60] Five years later, in *Kramer v. Union Free School District No. 15*, the Court further declared that "statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."[61]

The government has an obligation to reduce impediments between itself and its citizens,[62] but even a right as fundamental as voting is not immune to being burdened. The critical question, explored most recently in *Crawford v. Marion County Election Board*, is the degree to which burdens on the right to vote may be imposed.[63] Two categories of burdens on the right to vote have been extensively debated, both legislatively and judicially: literacy tests and poll taxes. Although both these burdens have been eliminated, the debates provide guidance on methods of analyzing current technological burdens on citizen-government interactions.

1. Only Smart People Need Apply: Literacy Tests

Literacy tests (tests of some specific body of knowledge or of the ability to read English) implemented as a precondition to voting were purportedly designed to

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56. *Id.* at 484–85.

57. *See* KEYSSAR, *supra* note 4, at xviii.

58. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997)).

59. *Voter and Officeholder Qualifications*, *supra* note 24, at 2241.

60. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

61. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969).

62. *See* Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973) ("For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. ... If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."); *see also* Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (articulating the requirement for states to refrain from imposing an unnecessary burden on a substantial state interest).

63. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1614 (2008). For an extended discussion of *Crawford*, see *infra* Part V.C.

ensure an "independent and intelligent" exercise of the right of suffrage;[64] however, they also had the effect of excluding otherwise qualified voters from participating in elections.[65] As recently as 1959, the Supreme Court rejected an equal protection challenge and upheld literacy tests as a precondition to voter registration.[66] The Court reasoned:

> We do not suggest that any standards which a [s]tate desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, [and] previous criminal record are obvious examples indicating factors which a [s]tate may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a [s]tate might conclude that only those who are literate should exercise the franchise . . . . We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.[67]

The Voting Rights Act of 1965 prohibited conditioning the right to vote on passage of an English examination required of those educated in another language in Puerto Rico.[68] In 1966, the Supreme Court upheld the Act as a constitutional exercise of federal power in *Katzenbach v. Morgan*.[69] In the same year, the Court

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64. Stone v. Smith, 34 N.E. 521, 521 (Mass. 1893).

65. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665–66 (1966) (distinguishing *Lassiter* and noting that "[w]e were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class").

66. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51–53 (1959). At the time *Lassiter* was decided, nineteen states had a literacy requirement for voting. *Id.* at 52 n.7.

67. *Id.* at 51–53 (footnotes omitted) (citations omitted).

68. Voting Rights Act of 1965 § 4(e), 42 U.S.C. § 1973b(e) (2006); Katzenbach v. Morgan, 384 U.S. 641, 643 (1966). The Voting Rights Act of 1965 provides:

> [N]o person who has . . . successfully completed the sixth primary grade in a public school in, or private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language.

42 U.S.C. § 1973b(e)(2) (2006).

69. *Katzenbach*, 384 U.S. at 646–47. The New York Constitution mandated: "[N]o person shall become entitled to vote . . . unless such person is also able . . . to read and write 'English.'" *Id.* at 644 n.2. The Court struck down the New York English requirement on the grounds that the Voting Rights Act was a "proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment and that by force of the Supremacy Clause . . . the New York English literacy requirement cannot be

ruled in *Harper v. Virginia Board of Elections* that literacy tests, in general, were unconstitutional.[70]

2. Only Rich People Need Apply: Poll Tax and Property Cases

Poll taxes are fees that must be paid as a precondition to the right to vote. Dating back to colonial times, the taxes were used both to raise revenue and to limit the right to vote.[71]

As recently as 1937, the Supreme Court upheld poll taxes as constitutional in *Breedlove v. Suttles*.[72] The state constitution of Georgia authorized a poll tax of up to one dollar as a condition of registering to vote, and a statute imposed the tax on all citizens from age twenty-one through sixty, exempting blind citizens and females who did not register to vote.[73] The Supreme Court upheld the tax, noting that poll taxes had a long history of use dating to colonial times.[74] The Court found that the tax was not levied for the purpose of "denying or abridging" the right to vote (although it may in some instances have had such an effect) as evidenced by the fact that the tax applied to aliens who were not entitled to vote and did not apply to those over sixty years old, even if they voted.[75]

In 1964, the Twenty-Fourth Amendment[76] was ratified, providing that "[t]he right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[77] In 1966, the Supreme Court overruled *Breedlove* in *Harper v. Virginia Board of Elections*,[78] holding that although the right to vote "is subject to the

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enforced to the extent that it is inconsistent with § 4(e) [of the Voting Rights Act]." *Id.* at 646–47 (footnotes omitted).

70. *Harper*, 383 U.S. at 665–66. Although this may be dictum because the challenged Virginia statute only imposed a tax as a condition to participating in state elections, the broad language in *Harper* could be read as holding that the Equal Protection Clause of the Fourteenth Amendment prohibited restrictions on the right to vote in state or federal elections for reasons not related to voting; in other words, the right to vote could be conditioned only on "state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Id.* at 665 (quoting *Lassiter*, 360 U.S. at 51).

71. *See id.* at 664 n.1. Poll taxes were usually unrelated to the cost of conducting elections and were not assessed at the time of polling. *Id.* (discussing taxes used to fund public schools). Conditioning the right to vote on payment of the tax was simply a means for providing an incentive to pay the tax. *See* Breedlove v. Suttles, 302 U.S. 277 (1937).

72. *Breedlove*, 302 U.S. at 283–84.

73. *Id.* at 279–80.

74. *Id.*at 281.

75. *Id.* at 282–83.

76. U.S. CONST. amend. XXIV.

77. *Breedlove*, 302 U.S. at 282–83.

78. Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966). Virginia imposed the tax as a condition to participating in state elections, even though such taxes were prohibited in federal elections by the Twenty-Fourth Amendment. U.S. CONST. amend. XXIV, § 1; *Harper*, 383 U.S. at 664 n.1. The Court noted that the Virginia tax was not explicitly protected by the U.S. Constitution,

imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed,"[79] a provision that conditioned voting on payment of any fee[80] would violate the Equal Protection Clause[81] because wealth has no relation to one's qualification to vote.[82]

Likewise, property ownership cannot be required as a condition to voting. In 1969, the Court in *Kramer v. Union Free School District No. 15*, considered the validity of a New York law that limited voting in a school board election to those people holding property in the school district or having children enrolled in the district's schools.[83] Although the school district argued that those citizens owning property in the district (and therefore supporting the schools through property taxes) and those with children attending the district's schools had the

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but concluded that the Equal Protection Clause of the Fourteenth Amendment still forbade poll taxes in both state and federal elections. *Harper*, 383 U.S. at 666–67.

79. *Harper*, 383 U.S. at 665 (citing Lassiter v. Northampton Election Bd., 360 U.S. 45, 51 (1959)). The Court noted:

> We were speaking . . . [in *Lassiter*] of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot."

Id. at 665–66; *see also* Common Cause/Ga. v. Billups (*Billups I*), 406 F. Supp. 2d 1326, 1367–68 (N.D. Ga. 2005) (offering examples of the unconstitutional use of poll taxes to discourage certain categories of voters).

80. *Harper*, 383 U.S. at 664. The Court described Virginia's poll tax in a footnote:

> Section 173 of Virginia's Constitution directs the General Assembly to levy an annual poll tax not exceeding $ 1.50 on every resident of the State [who is] 21 years of age and over (with exceptions not relevant here). One dollar of the tax is to be used by state officials "exclusively in aid of the public free schools" and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution includes payment of poll taxes as a precondition for voting.

Id. at 664 n.1.

81. *Id.* at 665. The Court explained that

> [w]hile the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution, the right to vote in state elections is nowhere expressly mentioned. . . . [However,] once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."

Id. at 665 (citations omitted).

82. *Id.* at 666, 670 ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."). The Court ruled that the "the right to vote is too precious, too fundamental, to be so burdened or conditioned." *Id.* at 670; *see also* Lubin v. Panish, 415 U.S. 709, 718 (1974) (invalidating ballot-access fees imposed on those running for office); Bullock v. Carter, 405 U.S. 134, 149 (1972).

83. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

greatest interest in the decisions of the school board,[84] the *Kramer* Court found that the law did not withstand strict scrutiny and held that it unconstitutionally limited the right to vote.[85] Similarly, in *Cipriano v. City of Houma*, the Court considered whether Louisiana could allow only "property taxpayers" to vote in elections regarding the issuance of revenue bonds by municipal utilities.[86] Noting that the bonds "are to be paid only from the operations of the utilities," the Court held it unconstitutional for Louisiana to limit the right to vote in this manner, because both property and nonproperty taxpayers are "substantially affected by the utility operations."[87]

While the *Kramer* and *Cipriano* cases may be explained by differences in statutory interpretation, *Harper* cannot be reconciled other than by a shift in the Court's constitutional views. In his article *The Contested Right to Vote*, Richard Briffault explains this change in approach:

> In the 1960s, the Court changed direction and held voting to be a fundamental right for the purposes of the Equal Protection Clause of the Fourteenth Amendment. Applying strict scrutiny, the Court invalidated the poll tax; tax payment requirements for voting in municipal bond issues and school board elections; and durational residency requirements longer than fifty days. The Court flatly barred property ownership and tax payment requirements, and indicated it would look closely and suspiciously at tests justified in terms of improving the quality of electoral decision-making. The Court also upheld Congress's authority to ban literacy tests nationwide.[88]

B. The Right to Communicate with the Chosen Government

The right to interact with government is a deep-seated democratic right, with antecedents running from feudal England[89] through Colonial America[90] and into

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84. *Id.* at 630–31.

85. *Id.* at 632–33 ("The classifications [at issue] . . . permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.").

86. Cipriano v. City of Houma, 395 U.S. 701, 702 (1969) (per curiam).

87. *Id.* at 705–06.

88. Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1522 (2002) (footnotes omitted) (reviewing KEYSSAR, *supra* note 4).

89. *See* JOHN R. GREEN, A SHORT HISTORY OF THE ENGLISH PEOPLE 126–30 (1891). On June 15, 1215, a group of English barons found that a face-to-face meeting, supported by a nation in arms, was the most effective way of petitioning the government of King John of England to discuss the Great Charter of England. *Id.* Today, such a group might find it more convenient to use e-mail or an Internet chat room to discuss policy. The right to petition was enacted under the reign of William and Mary in the Bill of Rights of 1688: "[I]t is the right of the subjects to petition the King." Bill of Rights, 1688, 1 W & M 2, c. 2, § 1 (Eng).

90. *See, e.g.*, DECLARATION OF RIGHTS AND GRIEVANCES art. XIII (1765), *reprinted in* 1 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 196–98 (1980) (enacted by the Stamp Act

the explicit language of the U.S. Constitution.[91] The Constitution constrains the government's ability to limit interaction with its citizens. Not only must the government (both at the state and federal levels) respect this fundamental right, it must also provide due process in its interactions with citizens and treat equally-situated citizens equally.[92] On the other hand, there is a legitimate interest in government efficiency, and, as technological advances have provided new avenues for efficient government-citizen interaction, governments have acted to incorporate these technological improvements into day-to-day operations.[93]

A citizen's right to deal with the government (which includes, but is not limited to, the right to vote) has at least two additional components: (1) the right to inform the government and attempt to influence its actions (referred to as the "petition right" and explicitly conferred in the First Amendment)[94] and (2) the right to know what actions the government has decided to take (the "information right"—not expressed in the text of the Constitution, but implied in "[t]he very idea of a government, republican in form . . .").[95]

1. The Right to Petition

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances."[96] In *United States v. Cruikshank*, the Court declared: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[97] In fact, "the right to petition extends to all departments of the Government."[98] The right to petition must be afforded to the people because "[i]n a representative democracy . . . branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[99]

The right to petition is a strong one. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court upheld the right of a trade

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Congress of 1765); PA. CONST. arts. III–IV, VII, XVI (1776), *reprinted in* V FEDERAL AND STATE CONSTITUTIONS 3081–84 (Thorpe ed., 1993).

91. *See* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. I.

92. *Id.* amends. V, XIV.

93. *See supra* note 17.

94. U.S. CONST. amend. I.

95. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

96. U.S. CONST. amend. I. In the congressional debates on the proposed First Amendment, James Madison emphasized the importance of the people's right to "communicate their will" through direct petitions. 1 ANNALS OF CONG. 738 (Joseph Gales ed., 1837).

97. *Cruikshank*, 92 U.S. at 552.

98. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government."); *see also* 1 ANNALS OF CONG. 738 (Joseph Gales ed., 1837).

99. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

association to coordinate a campaign to lobby the legislature despite allegations that the campaign constituted a conspiracy to monopolize the freight business in violation of the Sherman Act.[100] The complaint described Eastern Railroad's campaign as being "vicious, corrupt, and fraudulent," because it sought to simply destroy the relationship between trucking companies and their customers.[101] These allegations did not, however, overcome a more basic concern:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives . . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms . . . .
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> . . . A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[102]

The right to petition extends beyond the right to submit written communications to the government, and it is the basis of the right to protest or demonstrate. In *Stromberg v. California*, the Court struck down a criminal statute prohibiting the display of

> a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character . . . .[103]

The Court ultimately ruled the statute unconstitutional as covering conduct that the state could not constitutionally prohibit.[104]

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the

100. *Id.* at 134–36.

101. *Id.* at 129–30.

102. *Id.* at 137–140.

103. Stromberg v. California, 283 U.S. 359, 361, 369–70 (1931).

104. *Id.*

> punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.[105]

The rights of citizens to access government and to offer input are not unlimited, and the balance has been difficult to articulate. In *Harris v. Huntington*, a case decided by the Supreme Court of Vermont in 1802, the plaintiff brought a libel action against a defendant who had petitioned the legislature not to reappoint the plaintiff as a justice of the peace.[106] The court dismissed the complaint, holding that "the right of petitioning the supreme power" gave the defendant "absolute and unqualified indemnity from all responsibility."[107] However, in *Gray v. Pentland*, the Supreme Court of Pennsylvania in 1815 held that "an individual, who maliciously, wantonly, and without probable cause, asperses the character of a public officer in a written or printed paper, delivered to those who are invested with the power of removing him from office, is responsible to the party injured in damages."[108] Almost 150 years later, the U.S. Supreme Court addressed the question and held that petitions to the president that contain intentional and reckless falsehoods "do not enjoy constitutional protection."[109]

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight* and *California Motor Transport Co. v. Trucking Unlimited*, the Supreme Court was asked to determine the scope of the right to petition in the antitrust context.[110] The Court held that antitrust laws do not extend to a railroad conspiracy aimed at changing legislative and executive practices.[111] However, in *California Motor Transport*,[112] the Court distinguished its holding in *Eastern Railroad*:

> In the present case, however, the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that petitioners "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases."
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> . . . .
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> Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway

105. *Id.* at 369.

106. Harris v. Huntington, 2 Tyl. 129, 129 (Vt. 1802).

107. *Id.* at 139–40.

108. Gray v. Pentland, 2 Serg. & Rawle 23, 25 (Pa. 1815).

109. Garrison v. Louisiana, 379 U.S. 64, 75 (1964); *see also* McDonald v. Smith, 472 U.S. 479 (1985) (holding that a letter written to then President-Elect Reagan criticizing potential U.S. Attorney nominee was protected by the First Amendment but not entitled to absolute immunity from allegations that it was libelous and defamatory).

110. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509–10 (1972); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 134–36 (1961).

111. *E. R.R. Presidents Conference*, 365 U.S. at 134–36.

112. 404 U.S. 508 (1972).

> carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.[113]

2. *The Right to Know What Actions the Government is Taking*

With some well-recognized exceptions,[114] participation in government requires that citizens know what actions the government is taking. The right to this knowledge stems from the Constitution, statutory enactments, and common law.[115]

The right to petition reaches all departments of the government.[116] In order for the right to petition to be meaningful, however, the petitioners need access to information concerning the government's actions.[117] The Supreme Court has said that "the courts of this country recognize a general right to inspect and copy public records and documents."[118] Further, "[t]his right of access is essential to the preservation of our system of government. It applies to the judiciary as well as to the legislative and executive branches of government."[119]

III. THE GOVERNMENT'S INTEREST IN EFFICIENCY AND THE INTERNET'S PROMISE OF INCREASED ACCESS: STRIKING THE BALANCE

The right to participate in government, including the right to vote, is not immune from burdens and restrictions. The critical question—explored most recently in *Crawford v. Marion County Election Board* in the context of state

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113. *Id.* at 511–14 (citation omitted).

114. There are some aspects of governmental authority that are not open to public scrutiny—for example, matters regarding national security and documents filed *in camera* with a court. *See* Black v. United States, 24 Cl. Ct. 461, 464 (1991) (citations omitted) (internal quotation marks omitted) ("[T]he right of public access applies to those records of criminal as well as civil adjudicatory proceedings. All such pleadings, orders, notices, exhibits, and transcripts filed in the [United States] Claims Court in a civil proceeding are made publicly available through the clerk unless the records are expressly filed *in camera*.").

115. *See, e.g.*, U.S. CONST. amend. I; Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006); Pratt & Whitney Can., Inc. v. United States, 14 Cl. Ct. 268, 272–73 (1988), *aff'd*, 897 F.2d 539 (Fed. Cir. 1990).

116. *See Cal. Motor Transp.*, 404 U.S. at 513 (discussing a citizen's right to petition agencies and courts).

117. *Pratt & Whitney*, 14 Cl. Ct. at 272–73 ("There is a . . . common law right of public access to judicial records . . . essential to the preservation of our system of self-government.").

118. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

119. *Black*, 24 Cl. Ct. at 464 (citations omitted) (internal quotation marks omitted); *see also* Craig v. Harvey, 331 U.S. 367, 374 (1947) ("There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.").

voter ID requirements[120]—is the degree to which the government may impose burdens in the interest of its own objectives.

Indeed, the right to participate in government is not absolute.[121] As noted in *Burdick v. Takushi*, a court evaluating a constitutional challenge to an election regulation must weigh the asserted injury to the right to vote against the "precise interests put forward by the [s]tate as justifications for the burden imposed by its rule . . . ."[122] The Supreme Court has also held that every election law, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends."[123] Despite the fundamental nature of the right to vote, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of [s]tates seeking to assure that elections are operated equitably *and efficiently*."[124] Further, the fact that a state's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel close scrutiny."[125]

More generally, when faced with a statute imposing a burden on a fundamental right, a court must identify and evaluate the interests put forward by the state as justifications for the imposed burden, and then make the "hard judgment" that our adversary system demands.[126]

As Stephen Gottlieb observed:

> The very existence of a government suggests a set of powers and interests based on the premise that the government must operate effectively and efficiently.
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> . . . .
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> . . . [N]ot all interests that smooth the workings of government may be treated as compelling.
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> The general goal of permitting more efficient and effective operation of government thus offers only vague support for specific means used to effectuate it. Indeed, classifying governmental efficiency as a compelling governmental interest would threaten a wide range of individual rights, including privacy and associational rights and the

120. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1613 (2008).

121. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992) (upholding Hawaii's prohibition on write-in voting as a "reasonable, nondiscriminatory restriction[]" despite the fact that it prevented some voters from participating in elections in a meaningful manner).

122. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

123. *Anderson*, 460 U.S. at 788.

124. *Burdick*, 504 U.S. at 433 (emphasis added).

125. Bullock v. Carter, 405 U.S. 134, 143 (1972).

126. *Anderson*, 460 U.S. at 789–90.

> right to avoid compulsory self-incrimination. Plainly, the logic has its limits.[127]

The critical question, then, is how to balance the government interest in efficiency against citizen rights. It is a difficult question—one commentator noted the confusion among the courts, and the lack of a bright-line test: "[c]ourts evaluating Equal Protection challenges to state voter ID laws have varied in the use of outright strict scrutiny and the *Burdick* test, often providing little or no direct insight into their choice of analysis."[128] The appropriate standard to apply is at issue not only in secondary literature but also within the Supreme Court. Another commentator, David Schultz, argued that voting cases should be analyzed under the strict scrutiny test:

> The legacy of *Classic*, *Reynolds*, and *Harper* is judicial recognition of voting as a fundamental right, subject to strict scrutiny. In addition to these three cases, the Court reached similar conclusions elsewhere. Collectively, these cases suggest that interference with or regulation of the fundamental right to vote must be subject to strict scrutiny and that the right may only be limited if a compelling government interest overrides it. Unfortunately, the Court created some confusion on this point in *Burdick v. Takushi*.[129]

Schultz noted, however, that the critical case, *Burdick*, left important questions unresolved:

> The *Burdick* decision is confusing. While it perhaps looks as if the Court ruled that all regulations affecting voting need to be examined from this new flexible and less rigorous standard, the language citations suggest otherwise. First, in referencing the cases where the Court held that the right to vote is not absolute, it cited not to cases about voting rights per se, but to cases involving ballot access and the rights of political parties . . . . Second, and more importantly, the Court sowed seeds of doubt by distinguishing between two different types of voting regulations—those which impose "severe" versus "reasonable" burdens. Regulations imposing the former types of burdens would continue to be examined under the strict scrutiny standard under which they must be "narrowly drawn to advance a state interest of compelling importance." But for the latter, the new standard would be used "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters . . . ." Unfortunately, the Court failed to

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127. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 962 (1988) (citations omitted).

128. Kelly T. Brewer, *Disenfranchise This: State Voter ID Laws and Their Discontents, a Blueprint for Bringing Successful Equal Protection and Poll Tax Claims*, 42 VAL. U. L. REV. 191, 216–17 (2007).

129. Schultz, *supra* note 24, at 490.

> describe what constituted a severe burden versus a reasonable one, creating confusion about which standard applies to which regulation.[130]

Another commentator rationalized the decisions as follows:

> Courts considering [Fourteenth Amendment Equal Protection] challenges [to voting regulation] have traditionally applied the strict scrutiny analysis, requiring that the regulation employ narrowly tailored means to accomplish a compelling regulatory interest. In more recent cases, however, courts have not automatically applied strict scrutiny analysis to all regulations impacting the right to vote, but instead apply the more flexible *Burdick* test. Under the *Burdick* test, a court must balance the "character and magnitude" of the harm imposed on the right to vote against the state's reason for enacting the regulation and the necessity of the regulation. When using the *Burdick* test, courts possess discretion to utilize either strict scrutiny or a standard similar to rational basis to review the challenged regulation, depending on how "severe" the court determines the imposed harm to be. If the court determines that the right to vote is severely harmed by a state regulation, the court will proceed under strict scrutiny analysis. However, if the court determines that the right to vote is not severely harmed, it will proceed under a rational basis-like review, requiring only that the regulation be reasonable to advance an important regulatory interest.[131]

The two views come to the same end: in one, the scope of review varies depending on the severity of the impact on a fundamental right to govern; in the other view, the scope of review is strict, but only if it is first determined that the regulation has a significant impact (otherwise, there is a more flexible scope of review).[132]

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130. *Id.* at 491–92 (citations omitted).

131. Brewer, *supra* note 128, at 195–96 (citations omitted).

132. Cofsky, *supra* note 2, at 386–87. "[R]emarkably, the Court utilized a standard of strict scrutiny in *Norman* and a balancing test in *Burdick* in the very same year." *Id.* at 386; *see also* Burdick v. Takushi, 504 U.S. 428, 430 (1992) (upholding Hawaii's ban of write-in ballots); Norman v. Reed, 502 U.S. 279, 293–95 (1992) (holding unconstitutional an Illinois statute requiring third-party candidates to obtain 25,000 signatures per component district in order to be a candidate on the ballot). Cofsky explained:

> In general, the Court would weigh the character and magnitude of the individual interests asserted against the state objectives. (This is essentially the *Anderson* balancing test.) The "rigorousness" of this inquiry however, would depend upon the extent to which the challenged statute burdened First and Fourteenth Amendment rights. Regulations that impose "severe" restrictions would have to be "narrowly drawn to advance a state interest of compelling importance" (a standard uncannily similar to strict scrutiny), but laws that subject voters to "reasonable, nondiscriminatory restrictions" would generally be held constitutional. Essentially, the Court created a "balancing test" which was no more than a veiled tiered scrutiny analysis—"severe restrictions" must be "narrowly drawn" to advance a compelling state interest (strict scrutiny); but "reasonable" restrictions are presumptively valid (rational basis).

IV. THE VOTER PHOTO ID DEBATE

The conflict between broad governing interests and the impact on certain groups of citizens recently came into sharp focus in the context of voting. Responding to concerns over possible voting fraud, a federal commission headed by former President Jimmy Carter and former Secretary of State James A. Baker recommended a carefully crafted system of voter identification set forth in its report, *Building Confidence in U.S. Elections*.[133] The report was commissioned due to a concern over the increasing amount of varying state voter ID laws and the fact that these "different approaches . . . might prove to be a serious impediment to voting."[134] More recently, the enactment of the Help America Vote Act of 2002 (HAVA) responded to the need for voter identification.[135] HAVA "include[s] a limited identification requirement, applicable only to first-time voters who registered by mail."[136] Voters comply with the statute by showing either a valid photo ID or other document, "such as a utility bill, bank statement, paycheck, or government document" displaying the voter's name and address.

Balanced against the governmental interest in verifying the identity of voters (and thereby enhancing confidence in the system which is central to democracy[137]) is the impact on certain voters whose ability to vote may be burdened, perhaps even to the point of disenfranchisement. Several legislators, including Speaker Nancy Pelosi and then-Senator Barack Obama have characterized voter ID requirements as a "modern-day poll tax" and "a poll tax for the 21st century" respectively.[138]

Georgia's attempt to require a photo ID for voting was held to be an unconstitutional poll tax,[139] although its revised statute was upheld[140] similar to

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Cofsky, *supra* note 2, at 386–87 (citations omitted).

133. COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18–20 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf [hereinafter Carter-Baker Report]. The Carter-Baker Commission recommended that states require photo identification for voters, but that the photo IDs "be easily available and issued free of charge" and that the requirement be phased in over two federal election cycles, to ease the transition. *Id.* at 19.

134. *Id.* at 18.

135. Help America Vote Act of 2002 (HAVA), 42 U.S.C. §§ 15301–15545 (2006); *see also* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1079–81 (2007) (discussing the need for voter identification with respect to the enactment of HAVA).

136. Tokaji, *supra* note 135, at 1078 (discussing HAVA § 15483).

137. Carter-Baker Report, *supra* note 133, at 1; *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 453–54 (1977) (recognizing a compelling interest in public confidence in government).

138. 153 CONG. REC. S7059 (daily ed. June 5, 2007) (statement of Sen. Obama); 152 CONG. REC. H6772 (daily ed. Sept. 20, 2006) (statement of Rep. Clay); 152 CONG. REC. H6769 (daily ed. Sept. 20, 2006) (statement of Rep. Pelosi); 152 CONG. REC. H6766 (daily ed. Sept. 20, 2006) (statement of Rep. Millender-McDonald); *see also* Tokaji, *supra* note 135, at 1078–79.

139. Common Cause/Ga. v. Billups (*Billups I*), 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005).

140. *Id.* at 1354–55.

laws in Arizona[141] and Michigan[142] and the Indiana law that reached the Supreme Court in *Crawford*.[143] One commentator concluded that

> Although no state has passed such a law, requiring voters to present an identification card that is available *only* for a fee paid to the state would almost certainly constitute a poll tax, violating the Twenty-fourth Amendment and the Fourteenth Amendment's Equal Protection Clause . . . even if it includes a provision to waive the fee for individuals who cannot afford to pay it.[144]

Georgia enacted a series of voter ID laws that were challenged in three cases.[145] Initially, Georgia required voters casting ballots in person to obtain a photo ID at a cost of $20, but also provided the ID free of charge to individuals who signed an affidavit of indigence, and ultimately the state did not require identification for absentee voting.[146] Applying the strict scrutiny test established by *Burdick*, the district court held that the cost and burden of traveling to obtain an ID was a severe burden on the right to vote and therefore enjoined enforcement.[147]

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141. Gonzalez v. Arizona, 485 F.3d 1041, 1049 (9th Cir. 2007) (holding that the requirement for a photo ID was not a poll tax because it was only indirectly connected to the right to vote).

142. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007). The Michigan law, however, provided that "[i]f the elector does not have an official state identification card . . . or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote." *Id.* at 451.

143. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827–28 (S.D. Ind. 2006), *aff'd sub nom.*, Crawford v. Marion County Election Bd., 472 F.3d 949, 950 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610, 1613 (2008).

144. Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 762 (2008). Langholz noted that the one court that had faced such a statute concluded that it was a poll tax because it only exempted those who could not pay, not those who refused to pay. *Id.* at 762–63 (citing *Billups I*, 406 F. Supp. 2d at 1369–70). Langholz further recognized that because *Harper v. Virginia State Board of Elections* was not based on the discriminatory effect of poll taxes on the poor or minorities, but rather on the fact that wealth has no relation to voter qualifications (and thus, its use as a qualification was irrational), "a poll tax is still unconstitutional even if it is only imposed against those who can pay it . . . ." *Id.* at 763 n.190.

145. Common Cause/Ga. v. Billups (*Billups III*), 504 F. Supp. 2d 1333, 1382, *vacated*, 554 F.3d 1340 (11th Cir. 2009) (upholding Georgia's voter ID law); Common Cause/Ga. v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1351 (enjoining a Georgia voter ID law as imposing an undue burden on the right to vote); *Billups I*, 406 F. Supp. 2d at 1376 (enjoining a Georgia voter ID law as imposing an undue burden on the right to vote).

146. *Billups I*, 406 F. Supp. 2d at 1337–38.

147. *Id.* at 1362–63. Plaintiffs submitted hundreds of affidavits of would-be voters lacking a photo ID; the affidavits alleged burdens, including physical or mental difficulties, lack of a car or access to public transportation, living far from the registrar's office, and difficulty accessing the voter outreach van. *Billups II*, 439 F. Supp. 2d at 1312–13; *Billups I*, 406 F. Supp. 2d at 1340–42. The district court explained the significance of the burden on voters:

> Many voters who do not have driver's licenses, passports, or other forms of photographic identification have no transportation to a DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain licenses, or cannot travel to a

The Georgia legislature responded in 2006 by making the ID available at no cost and by launching an education campaign.[148] Partially because of the short time between the approval of the education campaign and an upcoming election, the district court again granted a preliminary injunction against enforcement.[149] Following a trial on the merits, and with no election imminent, the district court ultimately found the Georgia voter ID law constitutional.[150] The court noted that the earlier injunction had "hinged in large part on the fact that many of the voters who might lack a Photo ID had no real notice of the Photo ID requirement or of how to get a Photo ID or vote absentee,"[151] but that given media attention, and the government's "exceptional efforts" to educate voters, the plaintiffs would be "hard-pressed to show that voters in Georgia, in general, are not aware of the Photo ID requirement."[152] The court found that the requirement to obtain the ID itself was not a significant burden.[153]

Although it was decided under a state constitution that expressly guaranteed a fundamental right to vote,[154] *Weinschenk v. Missouri* is instructive in its analysis and conclusion that photo ID requirements are unconstitutional.[155] The Missouri Supreme Court acknowledged that "some regulation of the voting process is necessary to protect the right to vote itself . . . and the Missouri Constitution . . .

DDS service center during the DDS's hours of operation because the voters cannot take off time from work.

Billups I, 406 F. Supp. 2d at 1362. The court also held that requiring indigent voters to sign a poverty affidavit is unconstitutional because the potential for embarrassment or fear of perjury had a chilling effect on voting, notwithstanding Georgia's alleged "no questions asked" policy regarding the affidavits. *Id.* at 1363–64. Although the state argued that the fee was necessary to offset the administrative costs of distributing the IDs, the court held that whether it was called a fee or a charge it was still a cost imposed on the right to vote. *Id.* at 1339–40, 1369. A similar provision in the Indiana voter ID law at issue in *Rokita* was held to be an adequate safeguard for preventing the disenfranchisement of indigent voters. *Rokita*, 458 F. Supp. 2d at 786–87, 823 & n.70. The Indiana law permitted indigent voters to vote by provisional ballot without an ID, but only counted the vote if the voter later signed a poverty affidavit. *Id.* at 786–87.

148. *Billups II*, 439 F. Supp. 2d at 1305, 1351.

149. *See id.* at 1360. Georgia did not begin to publicize the availability of the free ID cards until approximately two weeks before the July 18, 2006, primary elections. Under those circumstances, the State has failed to allow sufficient time to educate its voters, and has not taken into consideration the hardships that requiring voters to obtain a[n] . . . ID card within such a short time frame will place on many of the voters affected . . . .

Id. at 1351.

150. *Billups III*, 504 F. Supp. 2d at 1377–78, *vacated*, 554 F.3d 1340 (11th Cir. 2009).

151. *Id.* at 1378.

152. *Id.* at 1378–79.

153. *Id.* at 1380.

154. Weinschenk v. Missouri, 203 S.W.3d 201, 221–22 (Mo. 2006) (per curiam). The court focused on evaluating the right to vote protections under the Missouri Constitution instead of the U.S. Constitution. *Id.* at 211–12. Unlike the U.S. Constitution, the Missouri Constitution provides that "no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage." MO. CONST. art. I, § 25.

155. *Weinschenk*, 203 S.W.3d at 204.

specifically delegates to the legislature the right to regulate registration" and held that a law that would impose only a de minimis burden on the right to vote would not trigger as high a level of scrutiny as those that imposed a direct and significant or substantial burden on the right to vote.[156] In deciding which level of scrutiny to apply, the court found that complying with Missouri's voter ID law required that a voter "at the very least, expend money to obtain a birth certificate . . . [and] substantial planning in advance of an election to preserve [their] right to vote" and required "time and ability to navigate bureaucracies in order to vote."[157] Employing a strict scrutiny analysis similar to that used by the federal district courts in *Billups* and *Crawford*,[158] the court found that the right to vote was a fundamental right in Missouri, that the Missouri voter ID law was not necessary to accomplish its purported aim of reducing in-person election fraud, and that the law imposed more than a de minimis burden on the right to vote and therefore held that the voter ID requirements were unconstitutional.[159]

One commentator observed that the *Weinschenk* decision does not mean that voter photo ID laws cannot survive:

> This is not to say that imposing a Photo ID requirement will *always* have the effect of imposing an undue burden on the right to vote, or that requiring such identification as a prerequisite of having one's vote counted will always result in an unsatisfactory balance between the values of access and integrity. It simply means that legislatures need to ensure that, in implementing these requirements, certain classes of voters are not left effectively disenfranchised. In Missouri's case, this might mean a long phase-in period may be required during which forms of identification other than Photo ID are accepted. A longer phase-in would give time for the "mobile processing system" included in SB 1014 to reach elderly and disabled voters, and would give all voters more time to obtain a Photo ID and comply with the identification requirements, reducing the burden imposed on voters by the Photo ID requirement.[160]

As previously mentioned, a similar statute enacted in Indiana ultimately brought the voter ID issue to the Supreme Court. Until July 2005, Indiana voters were required to sign a polling book but were not required to present any form of

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156. *Id.* at 212, 215–16.

157. *Id.* at 213–15. The court found that the process of obtaining all of the documents necessary to obtain a photo ID was a "cumbersome procedure," noting particularly that evidence in the record demonstrated that it may take six to eight weeks to obtain a birth certificate, thus some voters without a photo ID would have to plan far in advance in order to vote. *Id.* at 214–15.

158. *Id.* at 215–16, 216 n.26; *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623–24 (2008). The court's "analysis of the voting restrictions under the Missouri Constitution seems to be substantially similar, if not identical, to that of the federal courts applying the *Burdick* test." Evan D. Montgomery, *The Missouri Photo-ID Requirement for Voting: Ensuring Both Access and Integrity*, 72 MO. L. REV. 651, 672–73 (2007).

159. *Weinschenk*, 203 S.W.3d at 211–13, 221–22.

160. Montgomery, *supra* note 158, at 674.

identification at the polls.[161] In 2005, the Indiana General Assembly enacted a voter ID law, requiring that voters casting a ballot in person present a government-issued photo ID.[162] As the Supreme Court explained:

> A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk's office within 10 days. No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and identity.[163]

Despite the fact that IDs under the Indiana statute were disbursed free of charge, certain members of Congress became concerned that voter ID requirements are, in effect, poll taxes.[164] However, as Langholz points out:

> If any regulation that causes voters to incur costs would constitute a "poll tax," the result would be absurd. For example, voters could conceivably challenge public-nudity laws because they require voters to purchase clothing in order to vote.
>
> Similarly, it seems too great a stretch to argue, as Professor Tokaji does, that a law merely requiring voters to get a free identification card "imposes a tax on the voters' time." Under such logic, numerous election administration decisions that increase the length of time a voter must spend in order to vote—such as moving a voting-site location or reducing the number of poll workers hired—would rise to the level of being a "poll tax."[165]

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161. Crawford v. Marion County Election Bd., 472 F.3d 949, 950 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008). As Dayna Cunningham points out, "[p]rior to the late nineteenth century there were no personal voter registration requirements for white men in this country." Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 373 (1991).

162. Act of Apr. 27, 2005, § 2, 2005 Ind. Acts 2005 (codified as amended at IND. CODE ANN. § 3-5-2-40.5, § 3-10-1-7.2 (Lexis Nexis Supp. 2008)).

163. *Crawford*, 128 S. Ct. at 1613–14 (2008) (citing IND. CODE ANN. §§ 3-11.7-5-1, 3-11.7-5-2.5(b)–(c), 9-24-16-10(b) (West Supp. 2007)).

164. 153 CONG. REC. S7059 (daily ed. June 5, 2007) (statement of Sen. Obama); 152 CONG. REC. H6772 (daily ed. Sept. 20, 2006) (statement of Rep. Clay); 152 CONG. REC. H6769 (daily ed. Sept. 20, 2006) (statement of Rep. Pelosi); 152 CONG. REC. H6766 (daily ed. Sept. 20, 2006) (statement of Rep. Millender-McDonald); *see also Tokaji*, *supra* note 135, at 1079–81 (examining constitutional challenges to voter ID laws as being similar to poll taxes).

165. Langholz, *supra* note 144, at 764 n.193. Daniel Tokaji argues that even if ID cards were free, voters would be forced to take the time to get them, and any imposition on a voter's time is a cost. Tokaji, *supra* note 135, at 1080–81.

However, in *Indiana Democratic Party v. Rokita*, the U.S. District Court for the Southern District of Indiana rejected the argument that secondary costs imposed by voter ID laws impose an impermissible poll tax as a "dramatic overstatement," holding that "election laws will invariably impose some burden upon individual voters. Thus, the imposition of tangential burdens does not transform a regulation into a poll tax."[166] Such "costs" also result from the requirement that voters register and vote in person, neither of which would reasonably be construed as a poll tax.[167] On appeal, the Seventh Circuit upheld the photo ID requirement.[168] The dissent contended that the law would make voting "significantly more difficult" for about four percent of eligible voters, "mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof."[169] Writing for the majority, Judge Posner acknowledged that the law would discourage some people from voting,[170] but also wrote that "it is exceedingly difficult to maneuver in today's America without a photo ID," and "the vast majority of adults have such identification"; and therefore, people who were discouraged by the photo ID requirement were easily persuaded by "very slight costs in time or bother."[171] Applying a balancing test, the Seventh Circuit found the ID burden was offset by the state's interest in preventing fraud.[172]

On April 28, 2008, a divided Supreme Court affirmed the Seventh Circuit's holding.[173] The balances drawn in the four separate opinions are instructive on the question of whether government use of the Internet is an unconstitutional barrier to citizen access to, and control of, the government.

The plurality opinion, written by Justice Stevens, begins with the principle announced in *Harper v. Virginia Board of Elections* that "Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50" because "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard . . . [and] [a]lthough the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications."[174]

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166. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008) (citations omitted) (internal quotation marks omitted).

167. *Rokita*, 458 F. Supp. 2d at 827.

168. *Crawford*, 472 F.3d at 954.

169. *Id.* at 955 (Evans, J., dissenting).

170. *Id.* at 951 (majority opinion). Judge Posner, however, also remarked that "not a single plaintiff" would be so discouraged. *See id.* at 951–52.

171. *Id.* at 951.

172. *Id.* at 952–54.

173. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624 (2008). Justice Stevens announced the judgment of the Court , which the Chief Justice and Justice Kennedy joined. *Id.* at 1613. Justice Scalia, joined by Justices Thomas and Alito, authored a concurring opinion. *Id.* at 1624 (Scalia, J., concurring).

174. *Id.* at 1615–16 (plurality opinion).

Justice Stevens further recounted that in *Anderson v. Celebrezze*, the Court refused to declare an across-the-board standard:

> Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands . . . .
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> . . . .
>
> . . . However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation."[175]

Turning to the pending case, Justice Stevens analyzed Indiana's interest in deterring and detecting voter fraud and observed that the voter photo IDs addressed only "in-person voter impersonation at polling places [and that] [t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."[176] However,

> flagrant examples of such fraud in other parts of the country have been documented . . . and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—though perpetrated using absentee ballots and not in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.[177]

Justice Stevens then analyzed the burden imposed on voters without sufficient photo identification:

> The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's [Bureau of Motor Vehicles (BMV)] are also free.[178]

Justice Stevens next considered non-monetary burdens:

> For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.
>
> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be

175. *Id.* at 1616 (citations omitted).

176. *Id.* at 1618–19.

177. *Id.* at 1619.

178. *Id.* at 1620–21.

> placed on a limited number of persons. They include elderly persons born out-of-state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.
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> . . . And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.[179]

Ultimately, Justice Stevens concluded:

> [O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.
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> . . . .
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> . . . The record does contain the affidavit of one homeless woman who has a copy of her birth certificate, but was denied a photo identification card because she did not have an address. But that single affidavit gives no indication of how common the problem is.
>
> In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters.
>
> . . . .
>
> The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting "the integrity and reliability of the electoral process."[180]

Thus, the plurality opinion suggests that the petitioners simply failed to meet their burden of proof.[181] Justice Scalia's concurring opinion viewed the missing proof

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179. *Id.* at 1621.

180. *Id.* at 1622–24 (citations omitted).

181. *See id.* at 1622–23. The evidence that the *Crawford* court found lacking was present in *Billups*. *Compare id.* at 1622 (observing an absence of evidence showing that the photo identification requirement burdened voters), *with* Common Cause/Ga. v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006) (describing numerous ways in which the ID requirement could burden voters). In addition, there is aggregate data bearing on the question. For example, the Brennan Center for Justice at New York University found that seven percent of the population lacked "ready access to citizenship documents," such as passports and birth certificates, that are necessary to vote; that eleven percent of the population does not have a government-issued ID; and that low-income individuals are

as irrelevant.[182]

> To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi*. This calls for application of a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote . . . . Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe. Burdens are severe if they go beyond the merely inconvenient.
>
> . . . .
>
> The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.[183]

Of particular importance to the analysis of the government's use of the Internet, the Scalia concurrence noted, "[the Court] ha[s] never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities."[184]

In dissent, Justice Souter began by recognizing the fundamental significance of the right to vote and concluded that the law is unconstitutional because "[t]he need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive."[185] Justice Souter also remarked that "[t]he State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of every election, likewise translate into unjustified economic burdens uncomfortably close to the outright $ 1.50 fee we struck down 42 years ago."[186] Also of significance to the analysis of governmental use of the Internet was

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less likely to have the requisite identification to vote. BRENNAN CENTER FOR JUSTICE AT THE NYU SCHOOL OF LAW, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2–3 (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf [hereinafter BRENNAN CENTER FOR JUSTICE]. For an analysis of the available data and the argument that these data indicate that voter photo ID laws cannot be sustained under judicial scrutiny, see Schultz, *supra* note 24, at 501–03.

182. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring) (citations omitted) ("The lead opinion assumes petitioners' premise that the voter-identification law 'may have imposed a special burden on' some voters, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.").

183. *Id.* at 1624–25 (Scalia, J., concurring).

184. *Id.* at 1626 n.* (emphasis in original).

185. *Id.* at 1627, 1629 (Souter, J., dissenting).

186. *Id.* at 1643.

Justice Souter's observation that "[t]he travel burdens might, in the future, be reduced to some extent by Indiana's commendable 'BMV2You' mobile license branch, which will travel across the State for an average of three days a week, and provide BMV services (including ID services)."[187]

In a separate dissent, Justice Breyer provided the data to support his conclusion that those affected by the photo ID requirement are likely to be poor, elderly, disabled, non-drivers or residents in rural areas,[188] and further, "many of these individuals may be uncertain about how to obtain the underlying documentation."[189]

V. THE PROBLEM IN CONTEXT: THE INTERNET-BASED GOVERNMENT/CITIZEN INTERACTION MODEL

In one respect, the U.S. federal government of the twenty-first century is probably the most universally accessible government in history. At the theoretical level, the right to effective participation in government is guaranteed by the right to vote, the right to free speech, the right to petition the government, and the Fourteenth Amendment; these rights are implemented through information-access legislation.[190] At the practical level, every citizen over the age

187. *Id.* at 1630 n.14.

188. *Id.* at 1644 (Breyer, J., dissenting). Breyer remarked:

> [A]n Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. . . . [O]ut of Indiana's 92 counties, 21 have no public transportation system at all and 32 others restrict public transportation to regional county service. Many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to $ 12 for a copy of a birth certificate; up to $ 100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $ 1.50 (less than $ 10 today, inflation-adjusted). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election.*

Id. (citations omitted).

189. *Id.*

190. *See, e.g.*, Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(1)–(2) (2006) ("(1) Each agency shall . . . publish in the Federal Register for the guidance of the public—(A) descriptions of its central and field organization and the established places at which, . . . the public may obtain information, make submittals or requests, or obtain decisions; . . . (B) statements of the general course and method by which its functions are channeled and determined . . . ; (C) rules of procedure . . . . (2) Each agency, . . . shall make available for public inspection and copying—(A) final opinions . . . (B) . . . statements of policy and interpretations which have been adopted by the agency . . . (C) administrative staff manuals . . . ."); *see also* National Freedom of Information Coalition, State FOI Laws, http://www.nfoic.org/state-foi-laws (last visited Mar. 12, 2009) (providing links to freedom of information laws in all fifty states and the District of Columbia).

of eighteen[191] may register and vote with fairly little effort.[192] Federal law even requires that a state driver's license application form may simultaneously "serve as an application for voter registration" in federal elections.[193] Theoretical access to information from the government is not even limited to individuals who are citizens;[194] in actuality, unprecedented access is made possible through the Internet.

Nevertheless, a problem remains in the form of disparity in citizens' access to the Internet. As government moves toward greater reliance on the Internet as its preferred medium of government-citizen interactions, disparity in access to the Internet translates into disparity in access to government information and services, which translates into disparity in participation in government.

The extent of the problem, and whether it is constitutionally tolerable, depends on several factors:

1. The manner in which the government uses the Internet;
2. The cost to the citizen (including government fees and inherent costs);
3. The degree and distribution of Internet accessibility;
4. The availability of alternatives to distributing the information;
5. The duration of the disparity and efforts to mitigate disparity; and
6. The potential benefits to governing.

A. Types of Government Uses

Governments use the Internet in several ways:

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191. U.S. CONST. amends. XIV, § 2; XXVI. However, the right to vote may be forfeited. The Fourteenth Amendment reduced state representation if states denied voting rights to citizens except if those citizens participated in "rebellion, or other crime." *Id.* amend. XIV, § 2; *see also* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding a California law that denied convicted and subsequently released felons the right to vote); Davis v. Beason, 133 U.S. 333, 345–46 (1890) (listing restrictions, some now historical, on the right to vote). Such laws were widespread: "[E]leven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons. Moreover, twenty-nine states had such provisions when the Fourteenth Amendment was adopted, and the total has now risen to forty-two." Green v. Bd. of Elections of N.Y., 380 F.2d 445, 450 (1967); *see also One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1942 (2002) (citations omitted) (considering that "[t]he nation seems to be nearing a consensus that the presently incarcerated should not have the right to vote").

192. *Contra Crawford*, 128 S. Ct. at 1631 (Souter, J., dissenting) (arguing that there are classes of citizens for whom this is not so, including "the poor, the old, and the immobile"). *See also supra* text accompanying notes 185–87.

193. 42 U.S.C. § 1973gg-3(a)(1) (2006).

194. *See* 5 U.S.C. § 552(a) (2006) ("Each agency shall make available [federal records] to the *public* . . . ." (emphasis added)).

1. Providing information online that was previously available in printed form;[195]

2. Providing information online that is either unavailable in printed form or is qualitatively different from that available in printed form;[196]

3. Providing information online which will eventually[197] be made available in printed form, but which is more timely online;[198]

4. Offering the option of submitting required information online or on paper;[199]

5. Mandating that certain required information[200] be submitted online; and

6. Offering the choice of submitting required information online or on paper,

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195. *See, e.g.*, District of Columbia Mail-In Voter Registration Form, *available at* http://www.dcboee.org/pdf_files/Mail_VRForm_HAVA2003.pdf; Maryland Voter Registration Application, *available at* http://www.elections.state.md.us/pdf/2007_English_InternetVRA.pdf; Virginia Voter Registration Application Form, *available at* http://www.sbe.virginia.gov/cms/documents/VoterRegistration/sbe_voter_app_DOJ-Printed.pdf.

196. *Electronic Government—Opportunities and Challenges Facing the FirstGov Web Gateway: Testimony Before the H. Subcomm. on Government Management, Information, & Technology of H. Comm. on Government Reform*, 106th Cong. 2 (2000) (statement of David L. McClure, Director, Information Technology Management Issues), *available at* http://www.gao.gov/archive/2000/d010087t.pdf [hereinafter McClure Statement] (discussing the advantages of the web portal entitled FirstGov.gov). An example of online information that is substantially different than its printed version is data in a database that is available as a printed table. Providing the same data online electronically in the form of a database allows the user to organize the same data in multiple ways. The same data is made available in both cases, but the database allows the user to use the data more efficiently.

197. "Eventually" may refer to a delay of only a few hours or days, but still may make a substantial difference in data quality. For example, there is a qualitative difference between the stock price quotations printed daily in the paper and real-time online prices. *See* Stock Market Investors.com, Newspaper and Online Stock Quotes, http://www.stock-market-investors.com/stock-investing-basics/newspaper-and-online-stock-quotes.html (last visited Mar. 16, 2009) ("The Internet provides investors with the opportunity to observe quote changes in real time. So, the Internet differs from newspapers by its dynamic nature. The newspapers give you just a report on the changes that have occurred the previous day, whereas the Internet allows you to actually observe these changes [almost immediately after they happen].").

198. *See* McClure Statement, *supra* note 196, at 3 ("[FirstGov] is generally intended to provide citizens with broad access to federal information and services in an organized and efficient manner.").

199. Memorandum on the Use of Information Technology, 2 PUB. PAPERS. 2317 (Dec. 17, 1999) [hereinafter Clinton Memorandum] (requiring the heads of all agencies to post online the "forms needed for the top 500 Government services used by the public").

200. Examples of required information range from those absolutely required (for example, tax returns) to those required only in order to obtain some benefit (for example, voter registration or driver licenses). Ironically, some U.S. Bankruptcy Courts require that petitions be filed electronically. United States Bankruptcy Court, Northern District of California, Electronic Filing Requirements, http://www.canb.uscourts.gov/procedures/sr/jaroslovsky/electronic-filing-requirements (last visited July 5, 2009). Although the rule permits exceptions, "[l]eave to deviate from the . . . requirements may be granted only by the Judge upon application *with [the] proposed order e-mailed* in .wpd or .doc format . . . . *Lack of computer equipment [or] computer illiteracy . . . will generally not be valid excuses*." *Id.* (emphasis added).

but offering an incentive for online submission.[201]

It should be obvious that each of these uses of the Internet poses different challenges to the goal of providing constitutionally required access to the government. There is a spectrum of governmental Internet use ranging from offering the type of convenience[202] that the majority in *Crawford* found unobjectionable, on one end, to requiring citizens to only use the Internet in order to obtain government information, on the other. Between the two ends of the spectrum lie situations where some incentive is offered for use of the Internet.[203] Within the middle of this spectrum are incentives that can be justified by differentials in the government's cost of providing the service[204] and other incentives that are designed purely to encourage Internet use.[205]

Conceptually, the uses may be categorized as follows: (1) additional alternatives—providing the same services over the Internet in addition to traditional means; (2) near alternatives—providing similar services over the Internet and by traditional means (but with Internet delivery having advantages that are either deliberately designed or incidental); and (3) substitution—providing services over the Internet and discontinuing traditional methods of providing those services.

Note that an analysis of the government's use of the Internet implicates the issues posed by both poll taxes and literacy tests: effective use of the Internet involves both the cost of access and knowledge of how to use it. Thus, a subtle barrier is developing as a result of the government agencies' shift to web-based delivery of services. This barrier excludes or limits participation by those without Internet access and, in effect, imposes a twenty-first century version of the poll tax and literacy tests.[206]

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201. *See, e.g.*, U.S. Patent and Trademark Office, FY 2009 Fee Schedule (Mar. 1, 2009), http://www.uspto.gov/web/offices/ac/qs/ope/fee2009january01_2009jan12.htm#patapp [hereinafter Patent and Trademark Office, FY 2009 Fee Schedule] (listing lower trademark processing fees if the registration application is submitted electronically).

202. Examples of convenience-type benefits include more rapid access (online access rather than waiting for a document to arrive in the mail) and savings on postage (by requesting a document online rather than mailing a request). *See* Clinton Memorandum, *supra* note 199, at 2642 (requesting agency heads to promote e-commerce and provide access to officials via e-mail).

203. For example, the U.S. Patent and Trademark Office offers discounts for e-filing patent and trademark applications. Patent and Trademark Office, FY 2009 Fee Schedule, *supra* note 201.

204. *See* Jones v. Opelika, 316 U.S. 584, 592, 598 (1942) (finding that a city may impose reasonable commercial licensing fees); Cox v. New Hampshire, 312 U.S. 569, 576–77 (1941) (upholding a New Hampshire statute mandating a sliding-scale licensing fee for public-street parades); Clark v. Paul Gray, Inc., 306 U.S. 583, 593 (1939) ("It is no longer open to question that the states have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate." (citations omitted)).

205. *See* Obama Administration's Technology Agenda, http://www.whitehouse.gov/agenda/technology/ (last visited Mar. 23, 2009) (pledging to use tax and loan incentives to ensure nationwide broadband access).

206. *See supra* note 138.

B. The Current State of Internet Access

The great majority of Americans have access to the Internet, either at home or at work, and Internet penetration is proceeding at a rapid pace. The most recent report of the Federal Communications Commission Wireline Competition Bureau states that high-speed Internet lines have increased from 65.3 million as of June 30, 2006 to 100.9 million as of June 30, 2007—an increase of 55%.[207] Of the 100.9 million lines, 65.9 million were "designed to serve primarily residential end users."[208] Nationwide, high-speed DSL connections were available to 82% of households with local telephone service, and high-speed cable modem Internet service was available to 96% of households with television cable service.[209]

However, access is not uniformly distributed, either geographically[210] or sociologically. As noted previously, the statistics are telling: while 99% of the wealthiest households have access to high-speed Internet service, only 92% of the poorest households have such access.[211] Overall, 51% of Americans have Internet access at home[212] but only 29% of people with a severe disability have Internet access at home.[213]

It may be argued, along the lines of the *Crawford* decision, that this disparity is both a benign result of other factors and a tolerable outcome because those without home Internet access have other resources available—for example, computers at local public libraries.[214] However, two problems remain. Merely providing access is only part of the solution; a user must still have some level of familiarity with the Internet. Fewer than 22% of public libraries offer assistance in accessing government documents online, and less than half offer any kind of Internet training in general.[215] In addition to the inconvenience and expense of

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207. FCC INTERNET REPORT, *supra* note 18, at 1.

208. *Id.* at 3.

209. *Id.* Comparing Internet service with telephone service as of March 2007, nationwide penetration of telephone service was 94.6% of the U.S. population, while only 88.4% of low-income households had telephone service. ALEXANDER BELINFANTE, FED. COMMC'NS COMM'N, TELEPHONE PENETRATION BY INCOME BY STATE 1 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280981A1.pdf.

210. *See* FCC INTERNET REPORT, *supra* note 18, at tbl 14. High speed DSL availability ranged from below 70% in the following states: New Hampshire (61%), Vermont (66%), Virginia (66%), and Maine (68%); high speed DSL availability ranged to 90% or more in Georgia (91%) and Nevada (90%). *Id.*

211. *Id.* at 4.

212. *Id.* This same group of disabled persons had median earnings of $12,800 as compared with the national average of $25,000. *Id.*

213. U.S. Census Bureau Press Release, *supra* note 19, at 3.

214. BERTOT, *supra* note 19, at 11. The Information Institute reported that "98.9 percent of public library branches offer public Internet[;] 72.5 percent of library branches report that they are the only provider of free public Internet access in their communities." *Id.*

215. JOHN C. BERTOT ET AL., INFO. USE MGMT. & POL'Y INST., PUBLIC LIBRARIES AND THE INTERNET 2006: STUDY RESULTS AND FINDINGS 17, 45 (2006), *available at* http://www.ii.fsu.edu/projectfiles/plinternet/2006/2006_plinternet.pdf [hereinafter 2006 BERTOT REPORT]. About one-third of Massachusetts public libraries offer Internet training. COMMONWEALTH OF MASS. BD. OF

reaching these resources, a 2008 Information Institute study found that 57.5% of respondent libraries reported that their connectivity speed is insufficient at least part of the time, and 82.5% reported that they have insufficient workstation availability some or all of the time.[216] For users with time-sensitive needs, the problem with depending on libraries for Internet access should be obvious. The current data on Internet access therefore indicate that differential access disfavors groups that are traditionally vulnerable—such as the poor, the elderly, and the disabled—but not necessarily entitled to special protection.[217]

C. The Consequences of Differential Impact: The Crawford *Debate*

The conclusion that laws have different impacts on different people cannot be avoided—different groups of people have different resources. In certain cases, the nature of a particular law may require that the government take steps to mitigate these different impacts. For example, in *Griffin v. Illinois*, convicted felons who were unable to pay for trial transcripts necessary for filing an appeal requested that the state furnish free transcripts.[218] In a 5-4 decision, the Supreme Court held that the state must provide the free transcripts, noting:

> Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court . . . . In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.
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> . . . .
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> . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[219]

However, the dissent contended:

LIBRARY COMM'RS, MASSACHUSETTS PUBLIC LIBRARY DATA: ELECTRONIC SERVICES 1 (2007), *available at* http://mblc.state.ma.us/advisory/statistics/public/repelec/elec_sum.pdf.

216. BERTOT, *supra* note 19, at 12.

217. Laws that disadvantage certain classes of citizens are viewed with greater suspicion. Examples of classes that have been given heightened protection under the Equal Protection Clause are those based on race, gender, and alienage. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–34 (1996) (applying heightened/intermediate level of scrutiny to VMI's gender-discriminatory policy); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 n.9 (1969) ("[W]e have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny . . . ."); *cf.* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (reiterating that age is not a suspect classification); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–43 (1985) (noting that mental retardation is not subject to a higher standard of scrutiny); Harris v. McRae, 448 U.S. 297, 322–23 (1980) ("[P]overty, standing alone, is not a suspect classification.").

218. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

219. *Id.* at 17, 19.

> [C]ertainly Illinois does not deny equal protection to convicted defendants when the terms of appeal are open to all, although some may not be able to avail themselves of the full appeal because of their poverty. Illinois is not bound to make the defendants economically equal before its bar of justice. For a State to do so may be a desirable social policy, but what may be a good legislative policy for a State is not necessarily required by the Constitution of the United States. Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot.
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> The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws.[220]

This prompted the majority to reply, "a law nondiscriminatory on its face may be grossly discriminatory in its operation."[221]

The Supreme Court extended this trend in *Bounds v. Smith* to require states to provide additional resources to assure that criminal defendants had access to resources necessary for a defense.[222] The Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[223]

In *Lewis v. Casey*, the Court stated that *Bounds* requires a showing of "actual injury" and a "nonfrivolous" underlying claim—for example, a demonstration "that the alleged shortcomings in the prison library or legal assistance program hindered his efforts to pursue a legal claim."[224] As noted previously, in his concurring opinion in *Crawford*, Justice Scalia noted that courts cannot "require[] exceptions for vulnerable voters" as such practice "would effectively turn back decades of equal-protection jurisdiction."[225]

While the facts of *Crawford* are limited to voting, its implications are far broader. Construed most generally, *Crawford* deals with the tension between citizen interests and government interests. Those who characterize the voter ID requirement as a form of poll tax take the argument part of the way. At its most general interpretation, *Crawford* poses the question of what burdens may be placed on some in order that the government may function "better" for most, whether "better" means more reliably, more transparently, or more efficiently.

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220. *Id.* at 28–29 (Burton, J., and Minton, J., dissenting).

221. *Id.* at 17 n.11 (majority opinion).

222. Bounds v. Smith, 430 U.S. 817, 824–25 (1977).

223. *Id.* at 828.

224. Lewis v. Casey, 518 U.S. 343, 351–53 (1996).

225. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring).

Although a majority of the Court considered the issue of the validity of Indiana's photo ID law and concluded that, under the evidence available on appeal, the theoretical inconvenience of a hypothetical few did not overcome a governmental interest in confidence in the system of government,[226] there is a second majority in *Crawford*. The lead opinion and the two dissenting opinions can be interpreted as agreeing on the issue of balancing and only disagreeing on whether the petitioners sustained the burden of proving impact.[227] In evaluating constraints on governmental use of the Internet, it is helpful to consider how *Crawford* might have been decided had there been proof of the facts which the dissents considered dispositive.

The factors that the *Crawford* dissenters found compelling and the lead opinion found not proven included:

(1) Government Fees: All justices agreed that *Harper* was still good law; had the state imposed even a minor direct fee[228] for the privilege of voting it would have been an invidious, even if rational, unconstitutional poll tax.[229] The lead opinion and dissents also appear to be in agreement that charging a fee for the photo ID would likewise have been an unconstitutional, although indirect,[230] charge.[231]

(2) Non-monetary Burdens: The lead opinion and the dissents acknowledged that some (undefined in the view of the lead opinion) citizens faced special burdens in complying with the photo ID requirement:

> For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . .

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226. *Id.* at 1623–24 (plurality opinion).

227. *See id.* at 1622–23; *id.* at 1627, 1632 (Souter, J., dissenting); *id.* at 1643–44 (Breyer, J., dissenting).

> [O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.
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> . . . .
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> In sum, on the basis of the record . . . we cannot conclude that the statute imposes "excessively burdensome requirements . . . ."
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> . . . .
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> . . . The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting "the integrity and reliability of the electoral process."

Id. at 1622–24 (plurality opinion) (citations omitted).

228. The fee struck down in *Harper* was $1.50, a sum that the Breyer dissent calculated as equivalent to less than $10 in current monetary value. *Id.* at 1644 (Breyer, J., dissenting).

229. *See id.* at 1615–16 (plurality opinion). The fee would be invidious because the ability to pay is not relevant to one's qualification to vote. *Id.*

230. The charge would not be for the privilege of voting, but rather for an ID card which, in turn, was required in order to vote. *Id.* at 1620–21.

231. *See id.* at 1620–21; *id.* at 1634 (Souter, J., dissenting); *id.* at 1644 (Breyer, J., dissenting).

> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out-of-state, . . . persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation . . . homeless persons; and persons with a religious objection to being photographed.[232]

A plurality of the Court found the evidence insufficient to establish the level of incidence of these burdens.[233]

(3) State interest: All agreed that there was a state interest in maintaining confidence in the system of government although the stated specific objective of deterring and detecting voter fraud was unsupported by any evidence of the type of fraud that a photo ID might deter or detect.[234]

VI. CONCLUSION

A. The Internet and Crawford *Compared*

The State Interest: In *Crawford*, the Court found a governmental interest in the general integrity of the governing system, despite the fact that the specific remedy did not match an ill for which there was any evidence.[235] The Internet as a medium for government/citizen interaction offers general advantages of efficiency and the potential for greater transparency and access. There is little room to argue that no valid government interest exists in using the Internet as the vehicle, or even the preferred vehicle, for government-citizen interactions.

Government fees: In *Crawford* (and the other voter ID cases that were upheld at the circuit court level) the government did not impose a direct charge for the necessary government-issued photo ID.[236] Likewise, the government does not impose a direct charge for Internet access.[237] The current political climate does not seem conducive to efforts to tax Internet access. Of the state legislatures that have considered the question, most have introduced bills to prohibit taxation of Internet access.[238] At the federal level, Congress has consistently favored

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232. *Id.* at 1621 (plurality opinion).

233. *Id.* at 1622–23.

234. *See id.* at 1617–18. Justice Stevens ultimately concluded: "The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process." *Id.* at 1624.

235. *Id.* at 1623.

236. *Id.* at 1621.

237. *See, e.g.*, Permanent Internet Tax Freedom Act of 2009, H.R. 1560, 111th Cong. (2009) (attempting "to make the moratorium on Internet access taxes . . . permanent").

238. Various states have either passed or introduced legislation prohibiting the taxation of Internet access. *See, e.g.*, COLO. REV. STAT. § 24-79-102 (2009) (passing legislation prohibiting

exempting Internet access and transactions from state taxation.[239] Congress's rationale appears to rest on the Commerce Clause and the belief that state taxation on Internet transactions would impede interstate commerce.[240] Nevertheless, cash-strapped states looking for new sources of revenue may be tempted to consider the Internet,[241] and the federal government itself might be tempted to tap such a large and growing source.

If the underlying theory of the objection to taxation of Internet access is that such taxation places an unacceptable burden on interstate commerce, then whether to allow such taxation or not is entirely within the discretion of Congress. Congress has the power to regulate interstate commerce[242] but has no obligation to do so in any particular way. However, an additional objection to taxing Internet access is that such taxation imposes a burden on the right of access to the government, and Congress does not have the discretion to permit such a burden. Any future decision to tax Internet access would need to be crafted with this objection in mind, and under *Harper* and *Crawford*, it is hard to see how any such tax, however small, could be found constitutional.

Non-monetary Burdens: At the time *Crawford* was decided, there were groups that (whether the proof was of record or not) clearly faced greater burdens than most in complying with the voter ID requirement. The Brennan Center for Justice found that 7% of the population lacked ready access to citizenship-type papers, such as passports and birth certificates that are necessary to vote,[243] that 11% of the population did not have a government-issued ID, and that low-income individuals were less likely to have the requisite identification to vote.[244] Current

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taxation of Internet access); S. 901, 74th Legis. Assem., Reg. Sess. (Or. 2007) (introducing legislation prohibiting the taxation of Internet access).

239. S. 1525, 107th Cong. (2001) (proposing to extend the moratorium on taxation of Internet access for five additional years).

240. H.R. REP. NO. 105-808, pt. 1, at 1 (1998) ("The Committee on the Judiciary, to whom was referred the bill (H.R. 3529) to establish a national policy against State and local interference with interstate commerce on the Internet or online services, and to excise congressional jurisdiction over interstate commerce by establishing a moratorium on the imposition of exactions that would interfere with the free flow of commerce via the Internet, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.").

241. At least one state, Texas, has already begun taxing Internet access. *See* TEX. TAX CODE § 151.325 (2006) (permitting the collection of taxes on the amount of monthly Internet access fees that exceeds $25.00). Texas is permitted to tax Internet access even in light of the prohibition of the Internet Tax Freedom Act, because Texas was already taxing such access before the enactment of the Internet Tax Freedom Act. *See generally* Michael Mazerov, Ctr. on Budget & Policy Priorities, Renewing the "Internet Tax Freedom Act" Could Have an Especially Adverse Impact on Kentucky, Michigan, Ohio & Texas 1–3 (2007), *available at* http://www.cbpp.org/files/7-26-07sfp.pdf (identifying the adverse effects the Internet Tax Freedom Act will have on the tax regimes of Kentucky, Michigan, Ohio, and Texas).

242. Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 573 (1886) (stating that the Commerce Clause gives "[C]ongress the power to regulate commerce among the states, and with foreign nations . . . .").

243. BRENNAN CENTER FOR JUSTICE, *supra* note 181, at 2.

244. *Id.* at 2–3.

Internet data presents a similar picture. While a smaller percentage of the overall population lacks Internet access, there is still a significant disparity based on wealth[245] and disability.[246]

Rearranging the alignment of the *Crawford* opinions on the assumption that adequate proof would be available, these non-monetary burdens would be enough to constrain the government's use of the Internet. The constraints, however, need be neither insurmountable nor permanent.

B. Outgrowing the Problem

Crawford arises because of technological progress, admittedly based on a technology that has been available for a century. The delay between the availability of photographic technology and its use in personal identification, and the further delay in its use to verify a voter's identity may be an important factor. It is not difficult to imagine that a century from now, it will seem inconceivable that anyone would question the use of the Internet to deliver government information or to facilitate communication with the government.[247]

If *Crawford* had been decided in 1908 Indiana, the decision would likewise seem impossible of any resolution other than unconstitutionality due to both the cost of a photographic ID and the significantly greater inconvenience of traveling to obtain it in a pre-Interstate Highway, pre-mass transit, pre-mass ownership of the automobile society.

C. Interim Mitigation of Disparate Impact

Justice Breyer's *Crawford* dissent acknowledged that the government can mitigate the burdens it has imposed.[248] Indeed, "[t]he travel burdens might, in the future, be reduced to some extent by Indiana's commendable 'DMV2You' mobile license branch, which will travel across the State for an average of three days a week, and provide BMV services (including ID services)."[249] Presumably, such mitigation could have moved the dissent to join Justice Stevens's opinion to turn the plurality into a majority.

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245. *See* FCC INTERNET REPORT, *supra* note 18, at 4.

246. *See* U.S. Census Bureau Press Release, *supra* note 19, at 3. Overall, 51% of Americans have Internet access at home, in contrast to only 29% of people with a severe disability. *Id.* This same group has median earnings of $12,800 as compared with the national average of $25,000. *Id.*

247. *See Developments in the Law–Voting and Democracy*, 119 HARV. L. REV. 1144, 1153 (2006) (arguing that "the constitutional viability of photographic identification provisions might well increase in the future, both as states improve election administration and as voters and election officials grow more aware of their respective responsibilities, thus . . . diminishing the burden of photographic identification requirements").

248. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1644–45 (2008) (Breyer, J., dissenting).

249. *Id.* at 1630 n.14 (plurality opinion).

In addition, both the Breyer dissent in *Crawford*[250] and the development of the Georgia photo ID litigation[251] indicate the role that education can play in transforming an unconstitutional burden into an acceptable "ordinary and widespread" burden.[252]

In the context of voter ID requirements, one commentator, Samuel P. Langholz, suggested the following:

> To craft the requirement into one that can pass constitutional scrutiny, three key areas of change are likely necessary. First, the state must ensure that the requisite photo identification is available at no cost to all eligible voters. Second, the state should consider proactively educating voters about the requirement and developing a program to help ensure that all eligible voters obtain identification. Third, the state might consider creating a safety-valve by exempting some classes of voters from the requirement to ease the burden on those for whom it is heaviest.[253]

Translating these voter ID recommendations into the Internet-mediated government-citizen interaction model, the first requirement is already met and will continue to be met, provided that no tax or other burden is imposed on access to the Internet. The second requirement might be met by improving Internet access through public libraries (or government buildings), or by creating a program similar to Indiana's DMV2You vans. Further, education on how to use

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250. *Id.* at 1644 (Breyer, J., dissenting) ("[M]any of these individuals may be uncertain about how to obtain the underlying documentation .... And some may find the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $ 100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50 (less than $10 today, inflation-adjusted).").

251. *Compare* Common Cause/Ga. v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1346 (N.D. Ga. 2006) ("PPSA's [Paid Public Service Announcements] began running only two weeks before the July 18, 2006, primary elections."), *with* Common Cause/Ga. v. Billups (*Billups III*), 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007), *vacated*, 554 F.3d 1340 (11th Cir. 2009) ("Here, however, the State has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards ....").

252. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring) ("Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe.").

253. Langholz, *supra* note 144, at 788 (citations omitted); *see also* Montgomery, *supra* note 158, at 674. Montgomery notes, however, that

> [t]his is not to say that imposing a Photo ID requirement will *always* have the effect of imposing an undue burden on the right to vote, or that requiring such identification as a prerequisite of having one's vote counted will *always* result in an unsatisfactory balance between the values of access and integrity. It simply means that legislatures need to ensure that, in implementing these requirements, certain classes of voters are not left effectively disenfranchised. In Missouri's case, this might mean a long phase-in period may be required during which forms of identification other than Photo ID are accepted. A longer phase-in would give time for the "mobile processing system" included in SB 1014 to reach elderly and disabled voters, and would give all voters more time to obtain a Photo ID and comply with the identification requirements, reducing the burden imposed on voters by the Photo ID requirement.

Id.

the Internet in general and how to use it to communicate with the government in particular would also be a mitigating factor.

The "safety valve" factor might be met by continuing to offer services through traditional means in parallel to the Internet and by carefully considering the possibility of, and taking steps to avoid, unintended preferences to Internet users.

In deciding the degree to which the government must take special steps to accommodate users, the spectrum of government uses[254] should be considered. For example, less government accommodation should be required for highly-regulated profit-motivated activities than for individual entitlements.[255] Similarly, the government should be entitled to assume Internet competence in areas otherwise requiring technological sophistication.[256] Adding Internet delivery of services to traditional methods is unobjectionable. For the great majority of citizens, however, the government needs to proceed with caution. In doing so, it should replace current forms of delivery of services only after assuring widespread access to the Internet, both in terms of physical access to the tool and the education necessary to make effective use of the tool.

254. *See supra* Part V.A.

255. For example, there should be a decreased need for special treatment of a large, well-funded, profit-motivated pharmaceutical company filing an application with the Food and Drug Administration than for an individual applying for a driver's license or unemployment benefits or registering to vote.

256. A potential example is an application for a permit to construct a nuclear power plant or a hazardous waste landfill, where the activity itself requires technological sophistication of a level that would also imply familiarity with computers and the Internet.