The Digital Divide:
Free Expression, Technology and a Fair Democracy

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SUMMARY

       The U.S. Constitution protects freedom of expression by guaranteeing each citizen's right to free speech, free assembly and a free press. The purpose of these rights is to ensure that the elected government remains accountable to the people by denying it the power to silence the dissenting voice. The efficacy of freedom of expression depends on the citizenry having access to the free flow of information, access to quality education which enables effective analysis of this information, and access to open forums whereby they can freely discuss, analyze and argue the issues of the day. Effective free expression, a cornerstone of our democracy, is increasingly dependent on and determined by access to technology.

       The internet greatly expands access to information and avenues to express dissent, however, citizens do not have equal access to this resource. Commentators have discussed our growing "digital divide" in terms of limiting economic opportunity, but this paper asserts that the digital divide threatens the core principles of our democracy. The lack of equal access disenfranchises a significant segment of our population and silences their important voices. This paper proposes an innovative and flexible policy approach that seeks to reverse this growing divide and ensure that all Americans can take part in political dialogue. The establishment of a multi-stakeholder process will avoid the possible inefficiencies of top-down regulation and the tunnel vision of free market incentives, while providing policymakers with an efficient platform to draw in broad participation. By bringing to the table multiple stakeholders – including private industry, non-profits, local and federal government – we can create a body that can address this crucial issue and balance the competing and disparate interests involved.

       Freedom of expression is more than a lofty constitutional ideal. The founders believed that it was an essential feature of a democracy where an informed and educated electorate was free to discuss the issues. In our contemporary society, it is important that the flow of information be free in terms of ensuring broad access, but also in terms of including a broad spectrum of content. The electorate must have access to information regarding government action or inaction that bears on their rights and liberties, as well as access to education which enables them to make thoughtful decisions in the political arena. Widespread access to broadband internet and computer technology can help achieve these goals.

       Our citizens communicate their support or displeasure with government policy through three primary open forums: 1) voting, 2) public discourse – including the media and popular protest, and 3) buying power through economic markets. These modes of expressing dissent have become more and more dependent on access to technology. Unfortunately, due to the "digital divide" many do not have access to the basic tools necessary for effective political involvement. Without access to the free flow of information and ideas, without access to today's modern forums of discourse, and without access to today's modern economic markets the voices of some of our most vulnerable citizens will be silenced.

       The widening technology gap threatens to disenfranchise these citizens and undermine free expression, the foundation of our democracy.

Jason Lamb
The Digital Divide: Free Expression, Technology and a Fair Democracy

WHAT IS THE "DIGITAL DIVIDE"?

The "digital divide" is a term commonly used to describe the disparity in access to computer and Internet technology between various demographic groups within the United States. The three demographic groups most acutely affected by these disparities are the elderly, the less educated and the poor. For example, one in five Americans does not use the internet,[1] and "[a]ge (being 65 or older), a lack of a high school education, and having a low household income (less than $20,000 per year) are the strongest negative predictors for internet use".[2] Of those who don't go online, the main reason given by nearly half of those surveyed is that they don't think the internet is relevant to them.[3] This perspective, recorded in a 2012 study, closely tracks that of respondents in a similar Pew Institute study in 2000, indicating very little change in the attitudes of some segments of the population on the importance of the internet.[4] Educational attainment currently represents one of the widest gaps in internet access, as some 43% of adults without high school educations use the internet, versus 71% of high school graduates – and 94% of college graduates.[5] Household income is also strongly correlated to internet use, as only 62% of those living in households making less than $30,000 per year use the internet, compared with 86% of those making between $50,000 - 74,999 and 95% of those making more than $75,000."[6] Educational attainment and household income continue to be strongly correlated not only with internet adoption, but also with a wide range of internet activities and ownership of internet ready devices. The less educated, less wealthy, and more senior segments of our population are not taking part in the popular movement towards online connectivity.

The Move to Broadband Has Widened the Gap for the Elderly, the Less Educated, and the Poor

As the popularity of the internet has exploded, growing from 16 million users worldwide in 1995 to over 2.2 billion in 2012[7], disparities in computer and internet access have increased. The reasons these disparities have increased are due to the forces that drive them. The poor are locked out because they often cannot afford access, do not have employment that exposes them to internet technology on the job,

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[1] Kathryn Zickuhr & Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 2 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

[2] Id. at 6.

[3] Id.

[4] See Id. at 4.

[5] Id. at 6.

[6] Jim Jansen, Pew Research Center's Internet & American Life Project, Use of the internet in higher-income households 2, fig. 1 (2010), available at http://pewinternet.org/~/media//Files/Reports/2010/PIP-Better-off-households-final.pdf.

[7] INTERNET GROWTH STATISTICS - Today's road to e-Commerce and Global Trade Internet Technology Reports, Internet World Statistics http://www.internetworldstats.com/emarketing.htm (last modified Apr. 30, 2012).

or live in areas that are not served or are underserved by internet service providers. The rise in broadband internet adoption has exasperated the situation. Slower dial up internet connections dominated the internet landscape in its early days and were widely available due to the ubiquity of telephone lines. Nearly all households had access to telephone service and electrical service, the two utility components needed for dial up access. The high penetration rate of telephone technology, at over 94%,[8] made adoption of dial up internet as simple as buying a computer, buying a modem and signing up for service. Broadband internet, a much faster and reliable upgrade over dial up service, required internet service providers to build out higher bandwidth networks than the existing telephone networks. Broad access was lost overnight because internet service providers naturally rolled out these new more expensive services to higher income areas and charged accordingly. This left the poor shut out because they could scarcely pay for access to dial up service, let alone the higher prices for new broadband service. These higher prices had not eased much over time, as prices fell only 3% - 10% from 2004 to 2009, "nothing like the rates of price decrease that characterize the rest of the electronic world."[9] Also shut out were many rural customers whose locales were not populous enough to justify a major roll out of network infrastructure by internet service providers.[10] Poor and rural customers are still largely ignored by the broadband internet market.

The Move to Broadband Has Turned Dial-Up Users Into Second Class Citizens on the Internet

The increase in broadband adoption has left dial up users as second class citizens on the internet. In June 2000, 34% of American adults accessed the internet via dial up versus 3% who accessed the internet via broadband.[11] By May 2010, more than 66% of American adults accessed the internet via broadband and only 5% via dial up.[12] The rise in broadband adoption – primarily by high income and highly educated households – is problematic for those without access because the market has responded by creating content tailored to broadband users and inaccessible to dial up users. Many websites are now created to take advantage of broadband's greater speeds, and are virtually unusable by dial up users because of long load times. Video streaming web sites such as YouTube, Yahoo and Hulu are not worthwhile experiences on a dialup connection. Even web sites which do not serve video content often make use of animated elements, especially ads, which require more bandwidth than a dial up connection can provide. Because much of the internet is now accessed by broadband, much of the internet has

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[8] National Telecommunication and Information Administration, Falling Through the Net: Defining the Digital Divide 2 (1999), available at http://www.ntia.doc.gov/legacy/ntiahome/fttn99/FTTN.pdf.

[9] Shane Greenstein & Ryan McDevitt, Why Broadband Prices Haven't Decreased, Kellogg Insight (Sep. 2010) http://insight.kellogg.northwestern.edu/index.php/Kellogg/article/why_broadband_prices_havent_decreased/ (last visited Aug. 7, 2012).

[10] Rural areas still ignored in superfast broadband rollout, says CLA, Country Land & Business Association http://www.cla.org.uk/News_and_Press/Latest_Releases/Broadband/Broadband/1009154.htm/ (last visited Aug. 7, 2012).

[11] Kathryn Zickuhr & Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 8 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

[12] Id.

adopted content tailored to that segment, leaving dial up connections largely unusable. The increase in broadband service use has not only widened the digital divide for the elderly, less educated and the poor, but has also created a second class of internet users consisting of those stuck with dial up service. While some gaps in the "digital divide" have begun to close since the advent of broadband internet (such as gaps based on gender and race), the elderly, less educated and poor remain on the outside looking in.[13] The "digital divide" is of great national importance because it threatens to weaken one of our country's bedrock principles, Freedom of Expression.[14]

HOW THE "DIGITAL DIVIDE" HINDERS FREEDOM OF EXPRESSION AND DEMOCRATIC ACTIVITY

The First Amendment of our Constitution states that "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble".[15] These rights, along with the right to petition and the right of association "[comprise] what we refer to as freedom of expression".[16] Our Supreme Court has described freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom."[17] The First Amendment protects freedom of expression and ensures that the elected government remains accountable to the people by denying it the power to silence the dissenting voice. Effective free expression requires that the citizenry have access to the free flow of information, access to quality education which enables effective analysis of this information, and access to open forums whereby they can freely discuss the issues of the day, and communicate dissent to the government. These three points of access create an "Optimal Free Expression Environment" where ideas can flow amongst the electorate and coalesce into popular dissent if the issues carry enough weight. The "digital divide" adversely affects this optimal environment and hinders the free expression rights of the poor, the less educated and the elderly. This segment of the electorate is barred from many of the modern sources of information, the educational resources and the open forums that broadband internet service provides easy access to.

The "Optimal Free Expression Environment" Then and Now

In order to understand the importance of the "Optimal Free Expression Environment" to today's effective use of dissent, we must look to its importance at the time the founders created these rights. The

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[13] Kathryn Zickuhr & Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 6 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

[14] See U.S. Const. amend. I.

[15] See id.

[16] Freedom of Expression, American Civil Liberties Union (Oct. 31, 2005) http://www.aclu.org/free-speech/freedom-expression (last visited Aug. 19, 2012).

[17] Palko v. Connecticut, 302 U.S. 319, 327, (1937).

US revolutionary war period from 1775 to 1783 was a time of great upheaval and also great promise.[18] The American colonies had thrown off the yoke of British tyranny via a popular uprising which brought together disparate groups and interests under the common banner of "Life, Liberty and the pursuit of Happiness."[19] Essential to this unity was the optimal environment of access to the free flow of information, access to quality education which enabled effective analysis of the issues, and access to open forums where the revolutionaries could freely argue and discuss the issues.

The "Optimal Free Expression Environment" During the Colonial & Revolutionary War Eras

Point of Access #1: The Free Flow of Information

During the revolutionary era the free flow of information was facilitated by a relatively free press. Freedom of the press and the right to express dissent had taken root in the U.S. colonies as early as 1735, when Andrew Hamilton defended John Peter Zenger against charges of publishing seditious libels.[20] Zenger had come under fire for the publication of his *New York Weekly Journal* periodical which routinely criticized the Governor of New York, William Cosby, for his corrupt practices.[21] In this trial Hamilton was able to establish the precedent that a statement, even if defamatory, is not libelous if it can be proven true, thus affirming freedom of the press in America.[22] The importance of this case to the founders' notions of freedom of speech, freedom of the press and the free flow of information cannot be understated. From this case the seeds of freedom would flower and then spread from New York to its sister colonies. Fifty years after the Zenger trial, as the First Congress debated the proposed Bill of Rights, one of the Constitution's principal drafters and the man later known as the "penman of the Constitution"[23], Gouvernor Morris, would write of the Zenger case: "The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."[24] While sedition, libel, and censorship laws varied among the colonies, and some did follow the restrictive model set by England, the Zenger case sparked the fire of free press and free speech in America. By the

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[18] See American Revolutionary War, Wikipedia – The Free Encyclopedia http://en.wikipedia.org/wiki/American_Revolutionary_War (last modified Aug. 7, 2012).

[19] U.S. Declaration of Independence, para. 1 (US 1776).

[20] See Douglas Linder, The Trial of John Peter Zenger: An Account (2001), available at http://ssrn.com/abstract=1021258.

[21] Id. at 3.

[22] Id. at 8.

[23] Documents from the Continental Congress and the Constitutional Convention, 1774-1789, The Library of Congress – American Memory http://memory.loc.gov/ammem/collections/continental/constit.html (last visited Aug. 2, 2012).

[24] Douglas Linder, The Trial of John Peter Zenger: An Account 8 (2001), available at http://ssrn.com/abstract=1021258.

1790s, hundreds of different papers were in circulation in the colonies,[25] and by then these papers had largely transformed from general information sources to the political and polemical after the Stamp Act of 1765, which authorized the taxing of all printed materials produced within the colonies.[26] This Act was passed without representation from colonial assemblies and gave the colonials their cause célèbre – "No Taxation Without Representation".[27] In the wake of this transformation, political parties in the young nation began to utilize the free press.[28] The Federalist and Republican parties made great use of the press to regularly exercise their hard fought political rights.[29] Clearly the importance of the free flow of information had not been lost on the founders. Thomas Jefferson wrote in 1787 that "were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."[30] The first point of access of the "Optimal Free Expression Environment", the free flow of information, was alive and well in colonial times, and helped catalyze the American Revolution. The free flow of information was thus essential to free expression in the Colonial and Revolutionary War eras.

Point of Access #2: Quality Education

Access to quality education that is sufficient to enable the electorate to analyze the issues of the day is also essential to the "Optimal Free Expression Environment". Quality education, the second point of access of this optimal environment, was available to the colonial electorate and enabled them to garner broad support for the life threatening pursuit of revolution against the English Crown. Education was spearheaded in the New England and Mid-Atlantic colonies by religious institutions.[31] The New England colonies were dominated by Puritan immigrants and thus Puritan institutions also dominated the establishment of schools in those colonies.[32] The Puritans believed that education was necessary for salvation and they established a regiment of learning.[33] The Mid-Atlantic colonies had a much more

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[25] James Breig, <u>Early American Newspapering</u>, Colonial Williamsburg Journal (Spring 2003) http://www.history.org/foundation/journal/spring03/journalism.cfm (last visited Aug. 3, 2012).

[26] <u>Id</u>.

[27] <u>See The Virginia Stamp Act Resolutions — 1765</u>, USHistory.org http://www.ushistory.org/declaration/related/vsa65.htm (last visited Aug. 3, 2012).

[28] <u>See</u> James Breig, <u>Early American Newspapering</u>, Colonial Williamsburg Journal (Spring 2003), http://www.history.org/foundation/journal/spring03/journalism.cfm (last visited Aug. 3, 2012).

[29] <u>Id.</u>

[30] <u>Id.</u>

[31] Judy Gelbrich, <u>Section II – American Education, Part 1 - Colonial America</u>, http://oregonstate.edu/instruct/ed416/ae1.html (last visited Aug. 3, 2012).

[32] <u>Id.</u>

[33] <u>Id.</u>

diverse population consisting of the Dutch, English, Irish, Scottish, and German, and each group formed their own schooling systems promoting their particular cultures and traditions.[34] Notable among these groups were the Quakers of Philadelphia, which believed in promoting education and were tolerant of other group's beliefs and traditions.[35] The Quakers and Puritans greatly influenced schooling in the colonies as the Quakers established the first public schools and the Puritans in Boston established the first compulsory education laws as early as 1642, and founded Harvard College in 1636, North America's first post-secondary school.[36] By 1647, Massachusetts required that all towns of fifty or more households establish a school and that all towns of 100 or more households establish a secondary or Latin grammar school to prepare students to enter Harvard College.[37] By the 1750's the focus of education had begun to move away from its religious, European roots towards the more practical concerns of commercial, agricultural and shipping interests, and later onto the interests of liberty, freedom and democracy.[38] On the role of education, Thomas Jefferson wrote in 1782, "Every government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositories. And to render them safe, their minds must be improved to a certain degree".[39]

In the New England, Mid-Atlantic and Southern colonies advanced learning was initially available to only wealthy families who could afford private schooling.[40] Even where public schools were later established, people from lower socio-economic strata were only given access to practical instruction deemed necessary to run their private lives.[41] In contrast the wealthy often sent their children off to learn the classics at boarding schools and abroad to England for advanced instruction.[42] This stratification mirrored that of society at large and of the colonial electorate, which consisted primarily of landed, educated, white males and excluded women, the poor and minorities.[43] It is from this "upper class" of the population that sprung the writers, philosophers, military leaders and statesmen of the American

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[34] Judy Gelbrich, Section II – American Education, Part 1 - Colonial America, http://oregonstate.edu/instruct/ed416/ae1.html (last visited Aug. 3, 2012).

[35] Id.

[36] Id.

[37] Id.

[38] Judy Gelbrich, Section II – American Education, Part 2 - Education in the Revolutionary Era, ED416/516 — Foundational Perspectives in Education http://oregonstate.edu/instruct/ed416/ae2.html (last visited Aug. 3, 2012).

[39] Quotations on Education, Monticello.org http://www.monticello.org/site/jefferson/quotations-education (last visited Aug. 3, 2012).

[40] Judy Gelbrich, Section II – American Education, Part 1 - Colonial America, ED416/516 — Foundational Perspectives in Education http://oregonstate.edu/instruct/ed416/ae1.html (last visited Aug. 3, 2012).

[41] Id.

[42] Id.

[43] See Ed Crews, Voting in Early America, Colonial Williamsburg Journal (Spring 2007) http://www.history.org/foundation/journal/spring07/elections.cfm (last visited Aug. 3, 2012).

Revolution. The great majority of the 55 delegates to the Continental Congress, "a convention of delegates called together from the Thirteen Colonies that became the governing body of the United States during the American Revolution"[44], were educated men of means, and nearly all had experience and training in affairs of state.[45] The second point of access of the "Optimal Free Expression Environment", quality education, was widely available to the electorate during the Colonial and Revolutionary War eras. The ideals of revolution were able to easily take root in the fertile, educated minds of the colonial electorate, creating an environment conducive to popular dissent. Access to quality education was therefore essential to free expression as it developed during the colonial era and as it was being codified following the Revolutionary War.

Point of Access #3: Open Forums

Also key to free expression in the Colonial and Revolutionary War eras was the abundance of open forums whereby citizens could discuss the issues being disseminated from a relatively free colonial press. From these forums citizens could also communicate their dissent to the government. Open forums, the third point of access of the "Optimal Free Expression Environment", were the final pieces of the puzzle needed for effective dissent in Colonial America and into the Revolution. The Revolutionary War period benefitted from the existence of places of assembly where the information freely flowing to the electorate could be discussed and debated. Churches such as the Old South Meetinghouse in Boston, which was a meeting place for the Sons of Liberty and the launching point for the Boston Tea Party in 1773,[46] Freemason lodges, and popular taverns such as the Fraunces Tavern in New York City, also a meeting place for the Sons of Liberty and the launching point for an early tea dumping incident during the tea crisis of 1765,[47] were all places where the ideals of liberty were espoused and the flames of revolution fanned. From their pulpits, religious leaders across the colonies such as Jonathan Mayhew, pastor at Old West Church in Boston, Massachusetts, Abraham Keteltas from New York and Peter Muhlenberg from Virginia preached God's support for America's cause. [48] Some even took up arms and joined the fight.[49] In a dramatic display of patriotism, Muhlenberg, at the conclusion of a sermon before his congregation in

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[44] Continental Congress, Wikipedia – The Free Encyclopedia (Jul. 12, 2012 12:40 PM)
http://en.wikipedia.org/wiki/Continental_Congress (last visited Aug. 20, 2012).

[45] See The Founding Fathers: A Brief Overview, The National Archives – Online Exhibits
http://www.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html (last visited Aug. 3, 2012).

[46] Boston Tea Party, Old South Meetinghouse http://www.oldsouthmeetinghouse.org/default.aspx (last visited Aug. 3, 2012).

[47] Fraunces Tavern, New York Freedom Trail http://www.nyfreedom.com/Frauncestavern.htm (last visited Aug. 3, 2012).

[48] Part III: Religion and the American Revolution, Religion and the Founding of the American Republic
http://www.loc.gov/exhibits/religion/rel03.html (last visited Aug. 3, 2012).

[49] Id.

Woodstock, Virginia in January 1776, tore off his clerical robes revealing the uniform of a Virginia militia officer. He would retire years later from the army as a major general.

The layout and organization of the typical Puritan New England town in particular, lent itself to the dissemination and discussion of free flowing information. A typical Puritan New England town was centered around a "commons," or a central pasture for all to use.[50] The meeting house was the main religious and community building and it typically overlooked the commons. [51] Close to both the meetinghouse and the commons was usually a tavern, which was the main social institution for the community. The close proximity of the meetinghouse, the center of local religious and political activity, to the tavern, the center of social activity, allowed information to flow back and forth and discussion to flourish in these open forums. Political dissent could be expressed from these open forums through formal referenda, public protest in the commons, or organized actions such as those carried out at the Boston Tea Party.

The third point of access of the "Optimal Free Expression Environment", open forums, was available during the Colonial era along with access to the free flow of information and access to quality education. The colonial electorate had at their disposal the three essential ingredients to free expression and popular dissent throughout the Colonial and Revolutionary War eras. They would subsequently protect the right to dissent by barring government from abridging free speech, free press or peaceable assembly in the First Amendment.[52]

The "Digital Divide's" Effect on The "Optimal Free Expression Environment" Today

Point of Access #1: The Free Flow of Information

The free flow of information is no less important to today's broader electorate than it was for the colonial citizens. In fact, the efficiency and integrity of our democracy may depend on its vitality. Alexander Meiklejohn, noted philosopher and free speech advocate, was one of the first scholars to promote the link between free speech and democracy.[53] In his seminal work, *Free Speech and its Relation to Self-Government*, Meiklejohn argued that our "system of self government is a basic agreement, in which all the citizens have joined, that all matters of public policy shall be decided by corporate action"[54], and

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[50] Massachusetts Bay Colony, The New England Colonies, AP Study Notes http://www.apstudynotes.org/us-history/topics/the-new-england-colonies/ (last visited Aug. 3, 2012).

[51] New England town, Wikipedia - The Free Encyclopedia http://en.wikipedia.org/wiki/New_England_town#Historical_development (last modified Jul. 4, 2012).

[52] U.S. Const. amend. I.

[53] Alexander Meiklejohn, Wikipedia - The Free Encyclopedia (May 28, 2012, 9:07 PM) http://en.wikipedia.org/wiki/Alexander_Meiklejohn (last visited Aug. 4, 2012).

[54] Alexander Meiklejohn, Free Speech and its Relation to Self-Government 9 (Harper & Brothers, 1948), available at http://digital.library.wisc.edu/1711.dl/UW.MeikFreeSp.

that "no man is called upon to obey a law unless he himself … has shared in the making of it."[55] Meiklejohn further argued that for such a system to work an informed electorate is necessary, and that in order to be appropriately knowledgeable, there must be no constraints on the free flow of information and ideas.[56] He harkened back to the First Amendment to support this conclusion, stating "to be afraid of ideas … is to be unfit for self government. Any such suppression of ideas … the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged."[57] According to Meiklejohn, our democracy will not be true to its essential ideal if those in power are able to manipulate the electorate by withholding information and stifling dissent. He declares at the conclusion of his work: "We shall not understand the First Amendment unless we see that underlying it is the purpose that all the citizens of our self-governing society shall be 'equally' educated."[58] Free expression, and thus the free flow of information, is an essential component of our democracy, and our government should actively protect them.

The wide accessibility of information – on matters of both public and private import – espoused by Meiklejohn is not possible in the absence of the first point of access of the "Optimal Free Expression Environment", the free flow of information. Self-government is predicated on the consent of the governed. Such consent cannot be given by those uniformed about the actions their government is taking. The "digital divide" bars the elderly, the less educated and the poor from the internet, a major component of the free flow of information and ideas. This effectively disenfranchises this segment of the population by keeping them uninformed. Broadband internet is an important resource for the informed citizen, providing access to a wide array of alternate sources of information. The importance of broadband internet as an alternate source of ideas and perspectives is magnified by recent trends in U.S. mass media. Our traditional media outlets, which were once sources of diverse perspectives and ideas, have now become homogenized through corporate merger. In 1983, 90% of American media was controlled by 50 different companies but by 2011 over 90% of American media was controlled by only 6 different media conglomerates.[59] Only 232 media executives control the information diet of over 277 million Americans.[60] This consolidation of control has arguably led to an increased narrowing of perspectives in mainstream media. A readily available source of alternate content and perspectives counteracts this oligarchy of US information and thought. While those with access to modern computer and internet technology are exposed to the vast array of ideas and perspectives found on the internet, the elderly, less educated and poor are relegated to what only 6 media companies deem important. The "digital divide" helps keep this

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[55] Alexander Meiklejohn, <u>Free Speech and its Relation to Self-Government</u> 10 - 11 (Harper & Brothers, 1948), available at http://digital.library.wisc.edu/1711.dl/UW.MeikFreeSp.

[56] <u>Id</u>. at 102 - 103.

[57] <u>Id.</u> at 27.

[58] Alexander Meiklejohn, <u>Free Speech and its Relation to Self-Government</u> 103 (Harper & Brothers, 1948), available at http://digital.library.wisc.edu/1711.dl/UW.MeikFreeSp.

[59] Jason (Frugal Dad), <u>Media Consolidation: The Illusion of Choice (Infographic)</u>, Frugal Dad (Nov. 22, 2011) http://owni.eu/2011/11/25/infographic-media-consolidation-the-illusion-of-choice/ (last visited Aug. 3, 2012).

[60] <u>Id.</u>

segment of the population cut off from alternative sources of information which may be essential to their being informed and giving government their consent.

The consolidation of media in the U.S. also diminishes a key feature of the press and the free flow of information as it existed in the colonial and revolutionary periods: Easy access to varied sources of information pertinent to the local community. During the colonial and revolutionary war eras, papers were largely local in scope and disseminated news from abroad through the lens of the local perspective.[61] Today, consolidation creates local news sources that do the opposite and cast local concerns through the lens of a national agenda: An agenda set by a select few at the top of the 6 aforementioned media conglomerates.[62] The homogenization of US media by national conglomerates makes it harder for citizens to gain access to local information sources that haven't been filtered through their national affiliates. The internet greatly expands access to information sources untethered to the mainstream media, including grass roots sources started by ordinary concerned citizens. The ability of the internet to give small broadcasters, bloggers and publishers a platform allows citizens to get a better view of the local, national and international issues. It is imperative that the flow of information to our citizens be free in terms of ensuring broad access, but also in terms of including a broad spectrum of content. The electorate must have access to information regarding government action or inaction that bears on their rights and liberties, and it should be up to the citizens themselves – and not a select few corporate leaders – to determine what information is pertinent. The "digital divide" hinders broad access to the free flow of information and magnifies the narrow scope of content contained in mainstream media. This deficit helps to disenfranchise those on the other side of the divide, namely the elderly, less educated and poor. The first point of access of the "Optimal Free Expression Environment", the free flow of information, is therefore adversely affected by the "digital divide".

Point of Access #2: Quality Education

The second point of access of the "Optimal Free Expression Environment" is quality education. The citizenry must have access to education that enables them to analyze the issues found within the free flow of information. Several of our founding fathers wished to ensure that all of the electorate had access to a minimum level of education that enabled civic engagement. Thomas Jefferson in a letter to James Madison stated "Above all things I hope the education of the common people will be attended to ; convinced that on their good sense we may rely with the most security for the preservation of a due

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[61] See James Breig, Early American Newspapering, Colonial Williamsburg Journal (Spring 2003) http://www.history.org/foundation/journal/spring03/journalism.cfm (last visited Aug. 3, 2012).

[62] Jason (Frugal Dad), Media Consolidation: The Illusion of Choice (Infographic), Frugal Dad (Nov. 22, 2011) http://owni.eu/2011/11/25/infographic-media-consolidation-the-illusion-of-choice/ (last visited Aug. 3, 2012).

degree of liberty."[63] Not only did Jefferson regard education as necessary for civic engagement, but foundational to our democracy and its liberties.

The link between education and effective self-government may even be stronger today than it was Jefferson's day. Recent studies show a strong link between higher levels of education and more accountable government as "[j]ust about every measure that might be used to define the quality of government, such as the degree of democracy, political freedom, respect for property rights, absence of corruption, or efficiency in the provision of public services, is higher in richer and more educated countries."[64] This correlation holds true in autocratic governments as well as in democratic governments because "educated people are more likely to complain against official misconduct, and to complain more effectively."[65] As education levels in a country rise, "so do complaints when officials misbehave, raising the expected costs of misconduct and thus encouraging officials to follow the rules."[66] This dynamic of higher education levels catalyzing civic engagement and efficient government is magnified when the citizenry has a constitutional right to dissent and is also educated on civic matters.

Unfortunately, public education in the U.S. has not been up to the task of properly educating the electorate. The U.S. public education system, which during the 1950's ranked among the highest in the world is now average at best and below average in several areas.[67] If we cannot instruct our students in basic math and reading skills, how likely is it that non-core subjects such as civics are properly taught? Poorly educated adolescents often grow up to become poorly educated adults who are less likely to know and know how to assert their rights. Efforts at public school reform – which focus exclusively on raising core skill levels – have exasperated the problem of poor civic education and engagement. Several studies, including the International Education Assessment Civic Education Study, the National Assessment of Educational Progress (NAEP), and surveys conducted by the Center for Information and Research on Civic Learning and Engagement (CIRCLE) show that levels of civic learning and civic engagement in the areas vital to the exercise of citizenship are disappointing.[68] Civic or citizenship education has been defined by the *American Youth Policy Forum* as the process of acquiring (1) knowledge about American polity, politics and government, and about the rights and responsibilities of citizenship; (2) skills in understanding

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[63] Quotations on Education, Monticello.org http://www.monticello.org/site/jefferson/quotations-education (last visited Aug. 3, 2012).

[64] Juan Botero et. Al., National Bureau of Economic Research, Education and the Quality of Government 2 (2012), available at http://www.nber.org/papers/w18119.

[65] Juan Botero et. Al., National Bureau of Economic Research, Education and the Quality of Government 3 (2012), available at http://www.nber.org/papers/w18119.

[66] Id.

[67] See U.S. Falls In World Education Rankings, Rated 'Average', The Huffington Post (Dec. 7, 2001, 12:00 PM) http://www.huffingtonpost.com/2010/12/07/us-falls-in-world-education-rankings_n_793185.html (last modified May 25, 2011, 7:15 PM).

[68] Bruce O. Boston, American Youth Policy Forum, Restoring the Balance Between Academics and Civic Engagement in Public Schools 3 (Sarah S. Pearson et al. eds., 2005), available at http://www.aypf.org/publications/Restoring%20the%20Balance%20Report.pdf.

political communication and civic participation; and (3) the dispositions or motivations necessary to be engaged, not merely passive participants.[69] This education takes place primarily in the classroom and school but is contextualized through participation in community and civic life.[70] The poor state of our public education system makes the acquisition of civic and citizenship education difficult, and tends to produce graduates that later become adults apathetic about civic engagement.

Access to broadband internet can help mitigate some of the issues presented by our modern public school system by giving students of all ages access to thousands of supplementary sources of online instruction.[71] These sources range from no cost remote learning courses at Stanford University[72] and M.I.T.,[73] to completely online schools,[74] to rich interactive multi-media libraries. Alternate sources of educational instruction are especially advantageous to those whose public schools are very poor and who cannot take advantage of private schooling. Studies have even shown that "on average, students in online learning conditions performed modestly better than those receiving face-to-face instruction."[75] Because public school funding is often tied to local property taxes, those in poorer neighborhoods are disproportionately affected by poorer schools. These poorer citizens are also more likely to find themselves on the other side of the "digital divide" and barred from the computer and internet technologies necessary to take advantage of these online resources.[76] Broadband internet service represents an opportunity to overcome some of the shortcomings of our poor public schools, but the "digital divide" forecloses it. The "digital divide" will prevent the elderly, less educated and especially the poor from attaining the education needed to fully engage in civic matters and participate in our democracy. The second point of access of the "Optimal Free Expression Environment", quality education,

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[69] Bruce O. Boston, American Youth Policy Forum, Restoring the Balance Between Academics and Civic Engagement in Public Schools 5 (Sarah S. Pearson et al. eds., 2005), available at http://www.aypf.org/publications/Restoring%20the%20Balance%20Report.pdf.

[70] Judith Torney-Purta & Susan Vermeer, National Center for Learning and Citizenship of the Education Commission of the States, Developing Citizenship Competencies from Kindergarten through Grade 12: A Background Paper for Policymakers and Educators 4 (2004), available at http://www.ecs.org/clearinghouse/51/35/5135.pdf.

[71] Technology in Education, Education Week (Sep. 1, 2011) http://www.edweek.org/ew/issues/technology-in-education/.

[72] Stanford on iTunes U | Overview, Stanford on iTunes U http://itunes.stanford.edu/content/overview.html (last visited Aug. 7, 2012).

[73] Unlocking Knowledge, Empowering Minds., MIT OpenCourseWare http://ocw.mit.edu/index.htm (last visited Aug. 7, 2012).

[74] Accredited Online Colleges & Universities, Eleaners.com http://www.elearners.com/colleges/ (last visited Aug. 11, 2012).

[75] Barbara Means et al., U.S. Department of Education, Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies ix (2010), available at www.ed.gov/about/offices/list/opepd/ppss/reports.html.

[76] See Kathryn Zickuhr & Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 6 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

is therefore adversely affected by the "digital divide".

Point of Access #3: Open Forums

The third and final point of access of the "Optimal Free Expression Environment" is open forums. Once armed with the requisite education, and given access to the free flow of information, open forums are the final piece of the puzzle to enabling efficient self-government and a fair democracy. These fora represent perhaps the most important component of the "Optimal Free Expression Environment" because they provide a conduit for the free flow of information, give citizens a place to discuss and argue the issues, and are used to communicate dissent to our governing bodies. During the Colonial and Revolutionary War eras, US citizens used the vote and public protest as the primary methods of communicating dissent. These methods of communication were facilitated by the meeting houses of local assemblies, churches, and popular taverns of the 13 colonies. Today our citizens similarly communicate their support or displeasure with government policy through voting, public discourse, and buying power through economic markets. Our modern modes of expressing dissent are becoming more and more dependent on access to computer and internet technology, which is denied to the elderly, less educate and poor by the "digital divide".

Voting is the primary open forum used to express dissent and ensure governmental accountability in the US. As discussed in the previous section, civic activity in the US has declined and it has generally tracked the decline in our public school system. Growing civic apathy within our electorate resulted in the steady decline of voter participation from the early 1960s, when participation in the presidential election hovered around 64%, to the mid-1990s when participation in the presidential election had fallen to nearly 50%.[77] Although subsequent years have seen a rebound in voter participation, our highest contemporary rates in no way approach the 80 – 90% participation rates of presidential elections in the 19teenth century.[78] It must be noted that the 19teenth century electorate excluded women, Africa-Americans and voters under 21, and the broadening of the electorate led to some declines in participation rates,[79] but the general decrease in civic education is a more direct cause of civic apathy and lower voter participation. The vast array of sources of political information available online, as well as the many online forums whereby citizens can discuss opinions and ideas on government provide an important resource in fighting civic apathy. Although not conclusive, broader access to computer and internet technology should help increase civic engagement and voter participation. Because access to computer and internet technologies can increase civic education and likely civic engagement, the "digital divide" represents a barrier to political participation for the elderly, the less educated and the poor who are caught on the wrong side of the divide. The primary open forum for expressing dissent, voting, is therefore indirectly hindered by the "digital divide".

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[77] Claude Fischer, Why Vote?, Made In America – A Social History of American Culture (Oct. 26, 2010) http://madeinamericathebook.wordpress.com/2010/10/26/why-vote/.

[78] Id.

[79] Id.

Modern public discourse, the public discussion of issues either via interactive dialogue or via speech, is also a very important forum for dissent. It is also increasingly facilitated by the internet. What was initially facilitated by meetinghouses, churches and taverns in the past can now happen online. Discussion boards such as the US MessageBoard[80] and the Debate Politics Forums[81], blogs such as the White House Blog[82] and the official blogs of both the Democratic[83] and Republican[84] parties', and fact checking sites such as FactCheck.org[85] all add rich layers to the public discourse on political matters. A Pew Research Center study found that 54% of US adults used the internet "to get news or information about the 2010 midterm elections, or to get involved in the campaign in one way or another."[86] This study also found that nearly a quarter of all US adults "got most of their news about the 2010 elections from the internet, and the proportion of Americans who get most of their midterm election campaign news from the internet has grown more than three-fold since the 2002 campaign."[87] The pivotal 2010 mid-term elections, which legitimized the Tea Party[88] movement and broke up what had been Democratic control of the White House in combination with both houses of Congress, was influenced greatly by online activity. The "digital divide" excluded many of our citizens from that activity and debate. While those barred from important online forums by the "digital divide" can still rely on traditional venues of public discourse such as TV, radio, newspapers, polls, political panels, and town hall meetings they are nonetheless kept out of the online conversation. The emerging importance of technology in today's political arena is underscored by the White House's extensive use of internet technology such as an official blog, opt-in email updates and online streaming of presidential speeches, and the creation of an official mobile app[89]. Unfortunately, due to the "digital divide" the elderly, less educated and poor citizens of our country do not have access to these important mechanisms for public discourse. The "digital divide" therefore hinders this group's ability to become a part of the online conversation and effectively express their dissent.

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[80] US Message Board - Political Discussion Forum, US Message Board http://www.usmessageboard.com/ (last visited Aug. 5, 2012).

[81] Debate Politics Forums, Debate Politics http://www.debatepolitics.com/forum.php (last visited Aug. 5, 2012).

[82] The White House Blog, The White House – President Barak Obama http://www.whitehouse.gov/blog (last visited Aug. 5, 2012).

[83] Democrats Blog, Democratics.org http://www.democrats.org/news/blog (last visited Aug. 5, 2012).

[84] GOP Blog, GOP.com http://gop.com/news/gop-blog/ (last visited Aug. 5, 2012).

[85] FactCheck.org, FactCheck.org – A Project of the Annenberg Public Policy Center http://www.factcheck.org/ (last visited Aug. 5, 2012).

[86] Aaron Smith, Pew Research Center's Internet & American Life Project, The internet and campaign 2010 2 (2011), available at http://pewinternet.org/~/media//Files/Reports/2011/Internet%20and%20Campaign%202010.pdf.

[87] Id.

[88] What is the Tea Party?, TeaParty.org http://www.teaparty.org/about.php (last visited Aug. 7, 2012).

[89] Do you have the White House app for your phone?, The White House Blog (Apr. 19, 2011 3:34 PM) http://www.whitehouse.gov/blog/2011/04/19/do-you-have-white-house-app-your-phone.

Buying power through economic markets is also a very important open forum for expressing dissent in the US. In fact, this form of dissent pre-dates our country and has been traced by scholars and activists alike to the Boston Tea Party and the colonists' refusal to buy English tea in 1773.[90] Lawrence Glickman, in his book *Buying Power: A History of Consumer Activism in America*, lays out a continuous tradition of consumer political activism spanning from the Boston Tea Party[91], to abolitionist-led efforts to boycott slave-made goods[92], to a 1930s refusal of silk from fascist Japan[93], then to African American consumer campaigns against Jim Crow in the 1940s, 50s and 60s [94], and finally emerging contemporary movements like slow food[95]. Consumer activism is as American as free expression itself.

Expressing dissent through economic buying power cannot be engaged in if one is not a part of the mainstream economic markets, and our contemporary markets are steadily moving online. As of May 2012 retail e-commerce, commerce transacted with retail outlets through the internet, hit the $44.3 billion mark and had grown 17% year over year.[96] This came after 5 straight quarters of double digit year over year growth in the retail e-commerce market.[97] Despite the overall sluggishness of the US economy as a whole, retail e-commerce continues to grow. Gian Fulgoni, Executive Chairman and Co-Founder of comScore Inc., a leader in digital marketing intelligence and business analytics, has stated "While the economic recovery continues to be painfully slow, the channel shift to e-commerce appears to be accelerating."[98] The growing importance of online commerce, and the barriers created by the "digital divide" were also highlighted by the Department of Commerce in its study which stated "Digital infrastructure, though stellar in some respects, has not yet reached large portions of our population, making it difficult for them to participate in the 21st century economy."[99] The "digital divide" prevents those principally affected by it – the elderly, less educated and poor – from participating in our modern economic markets and diminishes their political voice.

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[90] Lawrence B. Glickman, Buying Power: A History of Consumer Activism in America 1-2 (University of Chicago Press, 2009).

[91] Id.

[92] Id. at 31.

[93] Id. at 58.

[94] Lawrence B. Glickman, Buying Power: A History of Consumer Activism in America 83 (University of Chicago Press, 2009).

[95] Id. at 221.

[96] Cynthia Boris, Retail eCommerce Spending Continues Double-Digit Growth, Marketing Pilgrim (May 10, 2012) http://www.marketingpilgrim.com/2012/05/retail-ecommerce-spending-continues-double-digit-growth.html.

[97] Id.

[98] See id.

[99] US Dept. of Commerce, The Competitiveness and Innovative Capacity of the Unite States 1-9 (2012), available at http://www.commerce.gov/sites/default/files/documents/2012/january/competes_010511_0.pdf.

By excluding the elderly, the less educated and the poor from computer and internet technology, the "digital divide" hinders their civic education and engagement, bars them from important online forums of public discourse and removes them from our growing online economic markets. These open forums are essential to political dissent and activity in the 21st century. The third point of access of the "Optimal Free Expression Environment", open forums, is therefore also hindered by the "digital divide".

By analyzing the three points of access of the "Optimal Free Expression Environment" – (1) the free flow of information, (2) quality education, and (3) open forums – one can see the adverse effect the "digital divide" has on the free expression rights of the elderly, the less educated and the poor. One can also see that without effective free expression, this segment of the electorate cannot fully participate in our democracy. This paper proposes broad governmental action to protect free expression by working to eliminate the "digital divide". Current telecommunications and internet policy will be analyzed below to determine its weaknesses in combating the "digital divide". Before analyzing current policy and proposing a new initiative, we will first look at whether our government has protected free expression through the preservation of the three points of access of the "Optimal Free Expression Environment" – free flow of information, quality education, and open forums – in the past.

PAST FEDERAL PROTECTIONS FOR THE "OPTIMAL FREE EXPRESSION ENVIRONMENT"

It is important to note that the significance of protecting and promoting free expression by preserving the three points of access of the "Optimal Free Expression Environment" has not been lost on our government. In fact, the free flow of information, quality education, and open forums have been protected by our Constitution, laws and federal government since the passing of the First Amendment.

The free flow of information is supported by the First Amendment's prohibitions on abridging freedom of speech, freedom of the press and the freedom to assemble peacefully.[100] Because the free flow of information is principally supported by rights guaranteed by the First Amendment, the judicial branch of our government has provided its most robust protections. The US Supreme Court has protected the free flow of information and the right to dissent through various free speech rulings over the years, including protecting the right to protest war within schools so long as no substantial disruption occurs,[101] the right to use offensive words and phrases to convey political messages[102], the right to contribute money (under certain circumstances) to political campaigns[103], and the right to engage in symbolic speech, e.g., burning the flag in protest.[104] The free flow of information has also been protected by the Supreme Court's rulings on the freedom of the press. Freedom of the press supports the free flow of information by

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[100] U.S. Constitution, amend. I.

[101] See Tinker v. Des Moines, 393 U.S. 503 (1969).

[102] See Cohen v. California, 403 U.S. 15 (1971).

[103] See Buckley v. Valeo, 424 U.S. 1 (1976).

[104] See Texas v. Johnson, 491 U.S. 397 (1989); See United States v. Eichman, 496 U.S. 310 (1990).

protecting members of the press from government interference.[105] The Supreme Court, in its rulings on freedom of the press has broadly defined the press as "every sort of publication which affords a vehicle of information and opinion",[106] and found that there can be no prior restraints on the freedom of expression,[107] and that in order to be found liable for defamation or libel of a public figure, the publisher must know of the falsity of the statement or act with reckless disregard as to the truth of the statement.[108] These robust protections for free speech and the free press, though not absolute,[109] illustrate the importance and history of protecting the first point of access of the "Optimal Free Expression Environment": The free flow of information.

The second point of access of the "Optimal Free Expression Environment" is quality education. Since education is not constitutionally guaranteed, its protection and promotion has come primarily by way of legislation and executive agency action. Although education is primarily a State and local responsibility, the federal government has had a pivotal role in its advancement. The original Department of Education was created in 1867 to collect information on schools and teaching that would help all the States establish effective school systems.[110] In 1890, the then-named Office of Education was given responsibility for administering the original system of land-grant colleges and universities with the passage of the Second Morrill Act.[111] Next, the federal government extended support to vocational education with the 1917 Smith-Hughes Act and the 1946 George-Barden Act which focused on agricultural, industrial, and home economics training for high school students.[112] World War II brought expansion of Federal support for education with the Lanham Act in 1941 and the Impact Aid laws of 1950 which authorized payments to school districts in communities affected by the presence of military installations.[113] In 1944, the "GI Bill" authorized postsecondary education assistance that would ultimately send nearly 8 million World War II veterans to college.[114] Later, as the Cold War heated up, Congress would pass the National Defense Education Act (NDEA) in response to the Soviet launch of Sputnik in 1958, helping to ensure a steady

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[105] U.S. Constitution, amend. I.

[106] Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

[107] See Near v. Minnesota, 283 U.S. 697 (1931); See New York Times Co. v. United States, 403 U.S. 713 (1971).

[108] See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[109] Henry Cohen, Congressional Research Service, Freedom of Speech and Press: Exceptions to the First Amendment CRS-1 (2004), available at http://www.fas.org/irp/crs/95-815.pdf.

[110] The Federal Role in Education, ED.gov http://www2.ed.gov/about/overview/fed/role.html (last modified Feb. 13, 2012).

[111] Id.

[112] Id.

[113] Id.

[114] Id.

supply of laborers highly trained in math and science.[115] The civil rights movement would spark the passage of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973 which together prohibited discrimination in education based on race, sex, and disability.[116] Congress would address the educational needs of the poor in 1965 with the passage of the Elementary and Secondary Education Act and the Higher Education Act, both of which directed funds to students in poor urban and rural areas.[117] By 1980, the Department of Education was established as a Cabinet level agency.[118] Today the Department of Education supports over 14,000 school districts and over 15 million postsecondary students through funding and aid.[119] From just after the Civil War our federal government had taken an active role in ensuring the education of our citizens. The second point of access of the "Optimal Free Expression Environment", quality education, has been protected and promoted by our government for over 130 years.

The First amendment also guarantees the right to peacefully assemble. This right, in combination with the right to free speech, undergirds the third point of access of the "Optimal Free Expression Environment", open forums. Once again the Supreme Court, in its capacity as arbiter of constitutional disputes, has spearheaded the protection of open forums of dissent. In *Hague v. CIO*, Justice Roberts established the public forum doctrine through dicta, stating that although title to the "streets and parks may rest in governments, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of *assembly*, *communicating thoughts between citizens, and discussing public questions*. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."[120] The public forum doctrine was refined in subsequent cases, as the Court would later establish a three tier system with traditional public forums such as parks, streets, and sidewalks receiving the greatest protections against government restriction.[121] The First Amendment protection of freedom of assembly includes protests, parades, and other large gatherings so long as they are peaceful. These assemblies are important means for individuals to express their ideas and their unity behind these ideas. The Supreme Court has consistently protected the right to free assembly but has also carved out exceptions for reasonable, time, place and manner restrictions.[122]

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[115] The Federal Role in Education, ED.gov http://www2.ed.gov/about/overview/fed/role.html (last modified Feb. 13, 2012).

[116] Id.

[117] Id.

[118] The Federal Role in Education, ED.gov http://www2.ed.gov/about/overview/fed/role.html (last modified Feb. 13, 2012).

[119] Id.

[120] See Hague v. CIO, 307 U.S. 496, 515 (1939) (emphasis added).

[121] See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

[122] See Cox v. New Hampshire, 312 U.S. 569 (1941).

Despite this limiting of the right, its inclusion in the First Amendment and the Supreme Courts history of protecting it illustrate the importance of open forums to our democracy.

This paper proposes that the federal government actively work to close the "digital divide" in order to protect and preserve our most vulnerable citizen's first amendment rights. Our legislative history regarding education, and our first amendment jurisprudence show that the three points of access of the "Optimal Free Expression Environment" – access to the free flow of information, access to quality education, and access to open forums – have traditionally been protected. A new initiative directed at changing technology policy so that the protection of these points of access continues does not represent a radical change, but a fresh approach to the traditional and legitimate state interest of preserving free expression.

CURRENT LAW AND POLICY REGARDING INTERNET AND BROADBAND ADOPTION

The importance of bridging the "digital divide" has been recognized and acted upon by our government to varying degrees since the mid-1990s. In fact, our federal government has a long history of regulating areas of technology that greatly impacts our society.

Past Efforts to Federally Regulate Technology

Congressional regulation of technology began as early as 1910 when it passed the Mann-Elkins Act.[123] The law, along with the Hepburn act of 1906, expanded the authority of the Interstate Commerce Commission to include the regulation of telephone, telegraph, and cable companies in addition to railroad companies.[124] Both the Mann Elkins Act and the Hepburn Act were representative examples of regulation during what came to be known as the "Progressive Era".[125] The "Progressive Era", a time of social activism and political reform running from 1890 through the 1920s, drew attention to and addressed the excesses of railroad and telecommunications monopolies.[126] The federal government was actively addressing the plight of the underserved and overcharged, and was working to make sure that distribution of these essential services was as broad as possible. Later, in the mid-1930s, President Roosevelt would create the Tennessee Valley Authority and the Rural Electrification Administration to address poor rural citizens that the large electrical service monopolies refused to extend service to (In 1930 only 10% of American farms

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[123] Mann-Elkins Act, Laws.com - Commercial http://commercial.laws.com/commerce/mann-elkins-act (last visited Aug. 6, 2012).

[124] Id.

[125] Progressive Era, Wikipedia – The Free Encyclopedia http://en.wikipedia.org/wiki/Progressive_Era (last modified Jul. 30, 2012 6:45 AM).

[126] Id.

had electrical service).[127] With the Communications Act of 1934, Congress authorized a newly created federal agency, the Federal Communications Commission (FCC), to impose telecom service requirements at regulated rates.[128] The FCC would later expand to the regulation of other technologies such broadcast, cable, and satellite television, and wireless spectrum.

Federal Efforts to Close the Digital Divide

Federal efforts to close the "digital divide" began in the mid-1990s. In 1996 Congress passed the Telecommunications Act of 1996[129]. This law gave the FCC the authority to create the Universal Service Fund (USF), a fund that all service providers must contribute to and that helps ensure that all schools, classrooms, health care providers, and libraries generally have access to advanced telecommunications services.[130] The School and Libraries Program of the Universal Service Fund, popularly known as E-Rate, provided discounts to assist most schools and libraries in the US to obtain affordable telecommunications and internet access.[131] The creation of the USF, and the resulting E-Rate program, would mark one of the federal government's first attempts at addressing the "digital divide". Also being implemented at the time was the Technology Opportunities Program (TOP) – administered by the National Telecommunications and Information Administration (NTIA), an agency within the Department of Commerce – which from 1994 to 2004 promoted the widespread availability and use of digital network technologies in the public and non-profit sectors through grants.[132] Later, the US Department of Education would launch the Community Technology Centers program (CTC) which ran from 1999 to 2004,[133] and the US Department of Housing and Urban Development (HUD) would launch the Neighborhood Networks Program which began in 1995 and is still operating.[134] Despite these efforts the "digital divide" continued to widen, as shown in a series of reports produced by the NTIA. These reports, jointly titled *Falling Through the Net*, were released

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[127] Richard F. Hirsh, Emergence of Electrical Utilities in America, Smithsonian Institution's National Museum of American History http://americanhistory.si.edu/powering/past/h1main.htm (last visited Aug. 6, 2012).

[128] Id.

[129] Telecommunications Act of 1996, Pub. L. No. 104-104 (1996).

[130] Universal Service Fund, Wikipedia – The Free Encyclopedia http://en.wikipedia.org/wiki/Universal_Service_Fund (last modified Jun. 29, 2012 8:41 PM).

[131] E-Rate, Wikipedia – The Free Encyclopedia http://en.wikipedia.org/wiki/E-Rate (last modified Apr. 24, 2012 12:36 AM).

[132] National Telecommunication and Information Administration, About TOP, Technology Opportunities Program http://www.ntia.doc.gov/legacy/otiahome/top/about.html (last visited Aug. 6, 2012).

[133] Community Technology Centers Program (CTC), Office of Vocational and Adult Education (OVAE), Ed.gov http://www2.ed.gov/about/offices/list/ovae/pi/hs/factsh/ctc.html (last visited Aug. 08, 2012).

[134] HUD, About Neighborhood Networks, HUD.gov http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/nnw/nnwaboutnn (last visited Aug. 6, 2012).

in 1995,[135] 1998,[136] 1999,[137] and 2000,[138] and all came to the conclusion that the "digital divide" was still rapidly widening. These and other reports spurred the Clinton-Gore Administration into action, who in February 2000 released a comprehensive proposal, *From Digital Divide to Digital Opportunity*, which outlined strategies to expand funding and address the "key civil rights issue of the 21st century".[139] Although their efforts saw increased funding for programs addressing the "digital divide", these programs would be questioned later by the Bush-Cheney administration because some government technology programs were being rendered obsolete, even before getting underway, by the rapid pace of technological advancement.[140]

Efforts towards closing the "digital divide" would gain momentum again in the wake of the Great Recession,[141] as President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA).[142] The ARRA would inject $831 billion into the economy, including $7.2 billion earmarked for broadband and wireless internet access programs. [143] The stimulus dollars would result in the FCC launching its National Broadband Plan, a broad digital infrastructure initiative which has as one of its main goals that "[e]very American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose", and that "[e]very American community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals and government buildings."[144] Also created through stimulus funds were the Broadband Technology

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[135] National Telecommunication and Information Administration, FALLING THROUGH THE NET: A Survey of the "Have Nots" in Rural and Urban America, NTIA (Jul. 1995) http://www.ntia.doc.gov/ntiahome/fallingthru.html (last visited Aug. 6, 2012).

[136] James W. McConnaughey et al., FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE, NTIA (Jul. 28 1998) http://www.ntia.doc.gov/report/1998/falling-through-net-ii-new-data-digital-divide.

[137] National Telecommunication and Information Administration, Falling Through the Net: Defining the Digital Divide, NTIA http://www.ntia.doc.gov/legacy/ntiahome/fttn99/contents.html (last visited Aug. 6, 2012).

[138] National Telecommunication and Information Administration, Falling Through the Net: Toward Digital Inclusion (2000), available at http://www.ntia.doc.gov/files/ntia/publications/fttn00.pdf.

[139] THE CLINTON-GORE ADMINISTRATION: FROM DIGITAL DIVIDE TO DIGITAL OPPORTUNITY, The White House (Feb. 2 , 2000) http://clinton4.nara.gov/WH/New/digitaldivide/digital1.html (last visited Aug. 6, 2012).

[140] See George W. Bush on Technology, On the Issues http://www.ontheissues.org/celeb/George_W__Bush_Technology.htm (last modified Jul. 4, 2012).

[141] 2008–2012 global recession, Wikipedia – The Free Encyclopedia http://en.wikipedia.org/wiki/2008%E2%80%932012_global_recession (last modified Aug. 6, 2012 10:56 AM).

[142] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).

[143] American Recovery and Reinvestment Act of 2009, Wikipedia – The Free Encyclopedia http://en.wikipedia.org/wiki/American_Recovery_and_Reinvestment_Act_of_2009 (last modified Jul. 27, 2012 6:54 PM).

[144] See FCC, National Broadband Plan – Executive Summary, Broadband.gov http://www.broadband.gov/plan/executive-summary/ (last visited Aug. 6, 2012).

Opportunities Program (BTOP) through the NTIA,[145] and the Broadband Initiatives Program (BIP) through the Department of Agriculture's Rural Utilities Service (RUS).[146] BTOP took a more targeted approach than the FCC's National Broadband Plan by focusing on community access points through its Public Computing Centers (PCC) initiative, by addressing broadband internet usage and adoption through it Sustainable Broadband Adoption (SBA) initiative, and by building out broadband infrastructure through the Comprehensive Community Infrastructure (CCI) program. These programs have had a measure of success, as the overall rate of broadband adoption has increased to 68% from 47% in the mid-2000s.[147]

WHY A CHANGE IN POLICY IS NEEDED

Despite our government's renewed efforts at closing the "digital divide" a wide gap still exists, and the overall rate of adoption of broadband internet has slowed. Nearly four out of ten Americans still do not have access to broadband internet services, and home broadband adoption has only grown by 2%, from 66% to 68%, in the last 2 years. The segments of the population most affected by the "digital divide", the elderly, the less educated and the poor are already among the most vulnerable in the country. That they would also be barred from the plethora of online resources that could improve their quality of life is unfortunate. That they would have their constitutional free expression rights hindered without a more concerted effort by our government is unthinkable. A change in policy is needed because our present efforts, though commendable, are not nearly enough. Because of the rapid pace of advancing technology, the "digital divide" is widening at a rate much higher than our current efforts to bridge the gap. If freedom of expression is more than a bygone constitutional ideal we must implement new strategies to reverse this trend and truly close the "digital divide".

PROPOSED SOLUTION

In order to address the "digital divide" issue and its adverse effect on our democracy this paper proposes two changes to the current policy approach. First, this paper proposes to recast the "digital divide" in terms of impairment of civil rights, as opposed to limiting the discussion to the traditional economic impairment argument. Second, this paper proposes a departure from the mainstream approaches to technology policy and embraces the multi-stakeholder process as an appropriate solution.

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[145] See National Telecommunication and Information Administration, Broadband Technology Opportunities Program (BTOP), BroadbandUSA http://www2.ntia.doc.gov/about (last visited Aug. 6, 2012).

[146] See BIP News, BroadbandUSA http://www.broadbandusa.gov/BIPportal/index.htm (last visited Aug. 6, 2012).

[147] See Kathryn Zickuhr and Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 6 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

Jason Lamb
The Digital Divide: Free Expression, Technology and a Fair Democracy

The "Digital Divide" Problem Must Be Recast in Civil Rights Terms

        The "digital divide" is most commonly discussed in terms of the economic inequalities and disadvantages it creates. While economic barriers for the already vulnerable elderly, less educated and poor is a major concern, this is only part of the story. As discussed above, the "digital divide" represents a substantial impairment of these citizens' free expression rights and could disenfranchise this segment of the population absent government intervention. When viewed in conjunction with the current erosion of American middle class jobs,[148] pushing more and more families into poverty, and in conjunction with the steady decline of our public school systems which are producing more and more citizens without adequate education, one can clearly see that without change the vulnerable segment of elderly, less educated and poorer citizens will continue to grow. Our country is at risk of becoming weighed down by a burgeoning underclass of citizens who are civically apathetic, disengaged, less educated, and in poverty. Worse yet, many will find themselves trapped in this situation due to forces largely outside of their control. This is not what the founders envisioned and it is certainly not what our country should strive for. America must educate itself on the "digital divide" issue in light of its consequences to our democracy. Then, popular support might be galvanized for the type of effort needed to finally close the "digital divide" gap.

A New Approach: Multi-stakeholder Process

        This paper proposes a departure from mainstream technology policy solutions. Traditionally, technology policy has center around one of two extremes: (1) Heavy, top down regulation or (2) free market, non-regulatory solutions. Neither one of these extremes, nor their various permutations, have proven to effectively address the "digital divide" and its effects on free expression. Instead, this paper proposed that a multi-stakeholder process be applied.

        Heavy, top down regulation has shown an inability to keep pace with rapidly advancing technology and lacks the flexibility needed to ensure that new "divides" created by emerging technologies do not go unaddressed. Because the "digital divide" is essentially a gulf between consumers and internet products and services, government can only bridge the gap if it can keep pace and move as flexibly as industry. This is fundamentally impossible, as government is not designed to move quickly or flexibly, but to carefully and deliberately address the concerns of the electorate. Businesses on the other hand are designed to extract as much value from moving quickly and nimbly while managing risk. The limitations of traditional regulation can be seen in recent broadband policy. Most current "digital divide" policies have centered around home broadband adoption and largely ignored the explosion of adoption in mobile internet devices, especially smartphones which provide broadband speeds in a mobile device. Nearly half (46%) of adult Americans by February 2012 had smartphones (up from 17% in late 2009 and 35% in April 2011).[149] Currently, "88% of American adults age 18 and older have a cell phone, 57% have a laptop, 19% own an e-

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[148] See Jenna Goudreau, Disappearing Middle-Class Jobs, Forbes.com (Jun. 22, 2012 1:53 PM) http://www.forbes.com/sites/jennagoudreau/2011/06/22/disappearing-middle-class-jobs/.

[149] See Kathryn Zickuhr & Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 16 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

book reader, and 19% have a tablet computer; about six in ten adults (63%) go online wirelessly with one of those devices".[150] In this case, the market moved much faster than regulation, but fortuitously resulted in the closing of "digital divide" gaps for women and African-Americans.[151] Had the market moved in such a way that the divide widened policy makers might be faced with a near insurmountable gap today. Traditional heavy regulation is not best solution because it cannot hope to keep pace with industry.

A free market, non-regulatory approach is also inappropriate because it has historically failed to reach consumers that do not correlate to healthy profits. Much like the rural customers that turn of the 20th century electricity utilities ignored, the poor urban and rural customers of today are being ignored by broadband internet service providers. Corporations are profit centers beholden only to their shareholders. Therefore, Corporations will naturally only provide services to those consumers that will in turn pay fees sufficient to generate revenues above costs. The elderly, less educated and poor citizens that have found themselves on the wrong side of the "digital divide" are not attractive customers. It could be said that the free market itself created the digital divide due its natural narrow focus on profit. Free market solutions, including tax incentives and federal subsidies for private companies, can only go so far and have historically failed.

In contrast to traditional regulation and free market solutions, the multi-stakeholder approach blends the broad scope of regulatory action with the flexibility and efficiency of private industry. It achieves a tailored solution that is flexible enough to adapt to changes in industry by bringing all the relevant stakeholders – private industry, non-profits, federal and local government – to the table. The multi-stakeholder approach is based on Stakeholder Theory, which is a theory of organizational management and business ethics that addresses morals and values in managing an organization.[152] It was originally detailed by R. Edward Freeman in the book *Strategic Management: A Stakeholder Approach*, and identifies disparate groups that comprise the stakeholders of a corporation, and both describes and recommends methods by which management can give due regard to the interests of those groups.[153] Stakeholder theory applies a systematic approach to looking beyond the traditional influential groups and tries to take into account the concerns of all those affected by an issue. This framework has been extended beyond the context of corporate governance to several areas of decision making. The implementation of a multi-stakeholder process for our country's "digital divide" issue would provide the comprehensive solution needed.

The term multi-stakeholder process describes the process whose goal is to bring together all major stakeholders in an innovative form of communication and decision-making on a particular issue. Important goals of any multi-stakeholder process are achieving equity and accountability in communication between stakeholders. These processes aim to develop partnerships and strengthen

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[150] See Kathryn Zickuhr & Aaron Smith, Pew Research Center's Internet & American Life Project, Digital differences 16 (2012), available at http://pewinternet.org/~/media//Files/Reports/2012/PIP_Digital_differences_041312.pdf.

[151] See id.

[152] Stakeholder theory, Wikipedia – The Free Encyclopedia (Jul. 30, 2012 7:23 PM) http://en.wikipedia.org/wiki/Stakeholder_theory (last visited Aug. 7, 2012).

[153] Freeman, R. Edward, Strategic Management: A stakeholder approach (Boston: Pitman 1984).

networks between stakeholders through democratic principles of transparency and participation. In the case of the "digital divide", the multi-stakeholder process would aim to bring together Internet Service Providers (both wired and wireless), Computer and Mobile Device Manufacturers, Poverty, Elderly and Minority Advocates, Legal experts, Federal government and Local government. A flexible solution, created and periodically adapted by such a group would properly address the "digital divide" while giving due regard to its effect on the integrity of our country's democracy. While the multi-stakeholder process is likely not a perfect solution to the problem – because it brings together the same imperfect stakeholders who bog down the traditional regulation and free market solutions – it represents a modern best effort at truly tackling the issue. A group consisting of all the stakeholders can craft and later adjust the appropriate solution. The problem of the "digital divide" and its effect on the free expression rights of the elderly, the less educated and the poor is well suited for the flexible multi-stakeholder process.