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Cover Page Footnote
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How to Evaluate the Constitutional Legitimacy of Regulating Speech Intermediaries: Lessons from a Century-Long Experience of Media Regulation

Asaf Wiener*

This Article aims to supply policymakers and jurists with an ideologically-neutral framework for evaluating the legitimacy of imposing public interest duties on today's dominant communicative technologies, such as Netflix, YouTube, or Facebook. In contrast to current literature, which often advocates for adopting either a libertarian or a distributive position about communication policies and free speech values, this Article suggests an ideologically-neutral, fact-based examination for evaluating the various sources of legitimacy with regard to both "old" and "new" media regulation.

The first Part of the Article begins by adopting a socio-historical perspective to taxonomize consensual sources for legitimizing media regulation within the public interest framework.

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By unraveling these various rationales and justifications, it further examines the sources' theoretical and practical applicability to contemporary debates about the constitutional permissibility of regulating internet-based content providers and platforms. The second Part suggests that, although both utilitarian-economic and egalitarian-democratic justifications for traditional media regulation can generally apply to new forms of commercial media, free speech jurisprudence lacks sufficient consensus about the conditions for the legitimacy of such regulation, as it suffers from two primary flaws: (a) lack of rationality or basis in social facts; and (b) lack of sensitivity to the hidden constitutional costs of media regulation within the public interest framework. The third Part of the Article offers a consensual framework for bridging today's ideological divides—over media regulation and free speech jurisprudence alike—by suggesting common ground for evaluating the legitimacy of media law and policy, which both libertarian and egalitarian ends of the liberal-democratic spectrum can support.

INTRODUCTION

Contemporary mass media, from television to online content providers and platforms, are an inseparable part of contemporary human society.[1] They function as mediators of politics, culture, and information; thus, they possess a unique social power to influence our lives and thoughts. The centrality of mass-communicative technologies to the wellbeing of individuals and society at large comprises both the engine and barrier of its regulation. In fact, ever since the appearance of mass communicative technologies at the beginning of the twentieth century, the regulation of "the media," in contrast to "the press," has always been viewed as a necessary (and thus, legitimate) governmental activity.[2] In practice, governments have regulated the twentieth century's mass media in ways that were either impossible or perceived as illegitimate concerning the printed media in the modern era.[3] Back then, communication law and policy were coextensive with broadcast regulation. Prime examples of the unique coercive powers that the state used over the dominant electronic media of the twentieth century are rules that prohibited unlicensed media activities, ownership limitations, and access

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1 *See* Vineet Kaul, *Changing Paradigms of Media Landscape in the Digital Age*, 2 J. of Mass Comm. & Journalism 110 (2012).

2 *See infra* Part II.

3 For a critical analysis of the justifications for heavier regulation on broadcasting, in comparison to the commercial press, see ERIC BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY (1995) (identifying the justifications for heavier regulation of broadcasting, in comparison to the commercial press, as largely contingent upon historical circumstances and constitutional form and tradition, rather than resting upon clearly defined principles).

rules, as well as regulations stipulating negative and positive content duties.[4]

This Article suggests an analytical toolkit for evaluating the permissibility and desirability of regulating the new mediators that have replaced the traditional media. Today, both policymakers and jurists are engaged with new challenges when considering the legitimacy of regulating the emerging communicative technologies of the twenty-first century—such as Netflix, YouTube, or Facebook, which are rapidly replacing traditionally regulated media.[5] The regulatory responses to the twenty-first century developments are still a work in progress: while in the United States, new media such as Netflix or YouTube are not subjected to the same vast regulatory regime as broadcast,[6] the European Union and its member states responded by applying the same regulatory framework to traditional and online media since the enactment of the Audiovisual Media Services Directive in 2010,[7] and its further update in November 2018.[8]

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[4] Negative content duties are prohibitions or limitations on defined "bad" or harmful content, such as graphic violence, nudity, or indecencies. Positive content duties are duties that coerce the media to supply defined regulatory-prescribed "positive" content, such as news, children's programming, or local content. For discussion of the typical content duties of any media regulation and their rationales, see *infra* Part II.

[5] *See* Stuart Cunningham & David Craig, *Online Entertainment: A New Wave of Media Globalization*, 10 INT'L J. COMM. 5409 (2016).

[6] *See* 1 BRENNER ET AL., CABLE TV § 1:23 ("These newer competitors do not have a regulatory regime affecting their video content per se, unlike cable and DBS. Instead, the regulatory issues often revolve around the technology bucket into which they fall: licensing and interference issues for cellular and other mobile video or access or nondiscrimination for broadband video providers traveling over another's network.").

[7] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) [hereinafter *AVMSD*].

[8] *Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services in View of Changing Market Realities* (Nov. 14, 2018). On November 6, 2018, the European Parliament's Committee on Culture and Education adopted an update for the AVMSD to include further regulation on matters such as protection of minors, prohibition of hate speech, promotion of European works and extending the scope regulation to video-sharing platforms.

The need to further develop the theoretical and doctrinal foundations of media law and policy emerges from the most consensual conclusion from the century-long experience with regulation of the electronic media: in the absence of clearly defined rationales and objectives for regulation, there can be no clear notion of how to evaluate its political or constitutional legitimacy. Achieving this clarity is the aim of this Article.

At present, following a century-long experience with media regulation, the core questions of media law and policy—why, whom, and to what end should we regulate?—remain highly contested with regard to both the "old media" and new communicative technologies. The preliminary argument of this Article is that, in order to evaluate the legitimacy of both "old" and new media, it is necessary to understand these regulations' political and constitutional rationales and examine their applicability to the new online mediators of information, politics, and culture.

The historical rationale (or justification) for creating a vast apparatus of state regulation over the electronic media during the twentieth century was the scarcity argument, which was conceived with regard to broadcast media (radio and television). In short, this practical reason for prohibiting unlicensed broadcast activity was that, without central control over the allocation of broadcast frequencies, there could be no effective or valuable use of broadcast.[9] Alternately stated, regulation was justified as a necessity, because of the unique technical nature of the broadcast

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[9] *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, REGULATING BROADCAST PROGRAMMING 204 (1994) ("Scarcity—the need to ration licenses—was the first and remains the foremost rationale for the disparate application of the First Amendment to broadcasting [in comparison to the press]"); Amit M. Schejter & Moran Yemini, *Justice, and Only Justice, You Shall Pursue: Network Neutrality, the First Amendment and John Rawls's Theory of Justice,* 14 MICH. TELECOMM. & TECH. L. REV. 137, 140 (2007) (Describing scarcity as the guiding principle in regulating the "old" media [broadcast radio and television]. Scarcity, in this context breaks down into "physical/technological scarcity," as determined by either technological or economic constraints; and "content scarcity," as reflected either in the number of conduits for content or in the diversity of content within those conduits).

spectrum, in which "with everybody on the air, nobody could be heard."[10]

This coordination problem, as the historical reason or justification for creating a unique regulatory apparatus over the electronic media, is mostly obsolete. Since the end of the twentieth century, the dominant audio-visual media use digital delivery methods (such as cables or internet-based delivery), to which the scarcity argument for media regulation does not apply.[11] Hence, broadcast media and the scarcity rationale play a very limited role in the twenty-first century's media landscape, since digital mass media services and platforms are rapidly replacing broadcast as primary social channels for mediating information, culture, and politics to the public.

Now, more than ever, policymakers, judges, and citizens need analytical tools for evaluating the legitimacy or desirability of regulatory practices over the many forms of new mass media. To do so, it is necessary to look back at the century-long experience of media law and policy (and its judicial review), and to understand the competing *raison d'etre* of using the states' coercive power over society's dominant mediators of information to the public. In addressing this challenge, the discussion in this Article suggests a consensual framework for assessing the political and constitutional legitimacy of regulating both "old" and "new" media, to which both utilitarian and rights-based approaches to constitutional rights are in agreement.

Part I of this Article begins by adopting a socio-legal analysis to identify and taxonomize the various consensual sources for legitimizing media law and policy in the last century. Part II turns to the present and discusses the contemporary problems of judicial review and free speech jurisprudence with respect to evaluating the legitimacy or permissibility of media regulation. First, it addresses the constitutional debate over the permissibility of using the state's

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[10] Nat'l Broad. Co. v. United States, 319 U.S. 190, 212 (1943).

[11] At present, scarcity is an old problem of "old media." *See* Schejter & Yemini, *supra* note 9, at 243 (framing communication policy through a prism of scarcity is no longer relevant in the age of broadband internet).

coercive power for the allocative/distributive management of speech. Second, it addresses the political-moral dispute within liberalism about the competing values of free speech and media regulation. Third, it identifies the principle of state neutrality as the unifying challenge for both political theory and free speech jurisprudence in evaluating the legitimacy of any public-interest regulation of private power in the public sphere. Part III proceeds to suggest a consensual framework for assessing the legitimacy of typical regulatory duties over the media by developing the primary conditions for political and constitutional legitimacy: (1) *rationality* (the factual question of the necessity; requirement for social facts); and (2) *proportionality* between the relative weight of the competing values that both media regulation and free speech jurisprudence share: liberty, equality, and diversity.[12]

I. THE COMPETING JUSTIFICATIONS OF COMMUNICATION LAW & POLICY: TAXONOMY AND APPLICABILITY

The political and legal reasoning about media regulation and its desirability were formulated during the twentieth century with regard to broadcast media as the emerging communicative technology of the time.[13] Although the broadcast medium plays a very limited role in today's information age, the discussion in this Section suggests that the primary rationales for public-interest regulation of broadcast can be applied to new communicative technologies as a matter of principle. By adopting socio-historic analysis as a legal realism approach,[14] this Section offers a taxonomy of the various reasons and rationales for regulating

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[12] For a discussion of the consensual value of diversity in media law and policy, see *infra* Section III.C.

[13] *See* 1 BRENNER ET AL., *supra* note 6, § 1:10.

[14] Socio-historical analysis, as a branch of legal realism, focuses on the work of society's coercive normative institutions and avoids the normativity impulse of common legal scholarship. *See* Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671, 675 (2010) (Socio-historical analysis considers law to be a subject matter or a field of inquiry distinct from traditional legal science, while suspending direct normative evaluation of law and public policy).

media and communicative technologies in the name of the public interest.

Section A of this Part begins by presenting the moral and practical importance of "the public interest" concept, as the guiding framework of both policy-making and legal reasoning about media law and policy. The next Sections of this Part (B–D) taxonomize the competing approaches to the meaning of the public interest in the context of media regulation, and, respectively, the competing theories of justice and legitimacy that have guided and still guide media regulation and its judicial review.

A. The Importance and Ambiguity of "The Public Interest" in Communication Law and Policy

The concept of "the public interest" plays an essential role in the political and legal justifications of mass-media regulation.[15] The public interest framework had key importance during the twentieth century, both as the common source to justify media regulation and as the standard for evaluating such regulation's efficiency, desirability, or, more generally, its legitimacy. Moreover, it continues to be the guiding standard of contemporary media law and policy.[16]

The "public interest" stands for the principle that the special interests of the public (or of society) regarding the media serve as the primary source for legitimizing coercive regulation over it. As McQuail elaborated:

> The public interest expresses the idea that expectations from, and claims against, the mass media on the grounds of the wider and longer-term good of society—can be legitimately expressed and

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[15] *See* MIKE FEINTUCK & MIKE VARNEY, MEDIA REGULATION, PUBLIC INTEREST AND THE LAW 74–77 (2d ed. 2013) (regarding the United Kingdom and the European Union); KRATTENMAKER & POWE, *supra* note 9, at 13 (regarding the United States).

[16] Currently, public-interest regulation of online content providers has been adopted in Europe since 2010 by the AVMSD, which stipulates technology-neutral regulation of audiovisual media, guided by the principle of "the public interest."

> may lead to constraints on the structure or activity of media.
>
> The content of what is "in the public interest" takes various forms. Its most minimal interpretation is that the media should meet the needs of their audiences, but ethical, ideological, political and legal considerations may also lead to much stronger definitions.[17]

Before beginning to reason about the actual content of the public interest with regard to the media, it is important to understand the moral and political significance of this term, as it is the primary political reason or constitutional justification for imposing public duties over private-commercial media services.[18]

As the literature suggests, it is possible to identify three competing perceptions of what constitutes the content of the public interest in the context of public policy[19]: (1) the "Preponderance Theory," which identifies the public interest with the preferences of the majority in a political community (to wit, the public interest is "what the public wants"); (2) the "Common Interest Theory," by which the public interest is composed of any interest that all members of the political community are presumed to share in common (such as the interest in utilities or policing), with little room for dispute or negotiation about individuals' actual preferences; and (3) the "Unitary Theory," which defines the public interest on the basis of a normative theory or wide ideology about what the public needs, absent sensitivity to popular preferences. With regard to media law and policy, the literature identifies the rationales underlying media regulation in the twentieth century as guided mostly by unitary theory, hence

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[17] *See* DENIS MCQUAIL, MCQUAIL'S MASS COMMUNICATION THEORY 568 (6th ed. 2010) [hereinafter MCQUAIL-2010].

[18] Of course, regulation of private or commercial activity in the name of the public interest is not unique to media law and policy. As Feintuck & Varney identified, much regulatory activity—not only of the media, but also of utilities—is usually justified in terms of the public interest. FEINTUCK & VARNEY, *supra* note 15, at 74.

[19] This classification is based on Denis McQuail, Media Performance: Mass Communication and the Public Interest 23–25 (1992) [hereinafter *McQuail-1992*].

described as having a "frequently authoritarian, paternalistic or ideologically contestable character."[20]

However, the clearest lesson from the century-long experience of media regulation is that the public interest concept with regard to media regulation is highly vague; therefore, it is of little use to evaluate whether a specific law or policy meets this indefinite standard. Even after almost a century of experience, the contemporary literature suggests that, in the context of media regulation, the public interest standard remained highly vague and contested, as "the rationales for regulation ('why regulate?') and the objectives of regulation ('with what end in mind?') have been insufficiently addressed."[21] Despite the various theoretical attempts to define the public interest in the context of old or new media, this term remains "both vague and contentious."[22]

As elaborated upon in the next sections, the various, often-competing views of what constitutes the public interest in the media—which were conceived of with regard to the media regulation in the twentieth century—are still the source of contemporary tensions and conflicts about desired policies and their legitimacy. The following sections reveal that the vagueness of the public interest term as the guiding standard for evaluating the legitimacy or desirability of media regulation over the last century does not stem from lack of ideas about the meaning of the term, but rather from the plurality of competing understandings of what it implies.

B. The Utilitarian / Market-Based Justification: Giving the Public What It Wants

When we perceive the public interest as "giving the public what it wants," the reason for using the state's coercive power over any private-commercial activity is grounded in the utilitarian principle of satisfying preferences or optimizing social welfare.

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20 *Id*. at 25.

21 *Id*. at 5.

22 *Id*. at 75 ("[E]ven when attempts have been made to define the concept, they tend to incorporate rather than resolve tensions between competing versions of it.").

This utilitarian, market-based approach to justice in communication law and policy can be identified (and distinguished from Rawlsian distributive justice) by these three principles[23]: (a) the utilitarian approach is goal-oriented, rather than rights-based; (b) the utilitarian approach focuses on maximizing the general welfare, rather than on the way the benefits of the media are distributed; and (c) the utilitarian approach may justify and require favoring the few at the expense of the many, in the name of the common good.[24]

Within this economic-utilitarian framework, the legitimacy of a specific regulatory rule or policy is mostly an empirical matter, in the sense that this approach offers no normative prescription of "the good life" or valuations regarding media outputs. Instead, the economic-utilitarian approach considers the aim of regulation to involve fulfilling individual preferences and maximizing social welfare through an efficient allocation of resources.

This reasoning regarding media law and policy is often categorized as the "economic justifications" for media regulation. In essence, this classic utilitarian-economic rationale for media regulation is that unregulated media markets exhibit strong tendencies to succumb into oligopolistic patterns.[25] Consequently, unregulated media markets are limited in their ability to supply their audience with what it wants.[26] Thus, utilitarian arguments for using the state's power to regulate media ownership and content comprise a private case of the familiar classic/neo liberal

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23 Schejter & Yemini, *supra* note 9, at 142–43.

24 *Id.*

25 FEINTUCK & VARNEY, *supra* note 15, at 97.

26 C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (W. Lance Bennett & Robert M. Entman eds., 2001) (justifying media regulation by identifying the structural limits of media markets with serving the public interest in terms of 'giving people what they want.'); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967) (justifying media regulation by showing how the market of mass media tend towards concentration, which in turn limits the diversity and vibrancy of their outputs).

justification for markets regulation[27]: correcting market failures that limit the ability of a free market to optimize social welfare. "Regulation in such cases is argued to be justified because the uncontrolled marketplace will, for some reason, fail to produce behavior or results in accordance with the public interest."[28]

In its basic meaning, market failure is identified by economic parameters, such as monopolies, market share, or externalities—which lead to inefficient competitions or incentives in designated markets.[29] Within this framework, the economic justifications for media regulation take root in the notion that media outputs, as commercial products, may not be distributed efficiently without market regulations.[30] That is, the underlying assumptions about the ability of free markets to supply people with what they want do not apply so well to media products.[31] As such, the utilitarian-economic justification for media regulation is highly-consequential, as the legitimacy of using the state's coercive powers depends on a straightforward utilitarian notion of comparing the consequences of regulation to those of its absence (regarding the goal of maximizing utility and individual preferences).

In the constitutional domain, the utilitarian reason has comprised the basis for adopting the freedom of speech into American jurisprudence and the "marketplace of ideas" concept as

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27 *See, e.g.*, Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629 (2015).

28 ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 15 (2d ed. 2012).

29 *Id*.

30 BAKER, *supra* note 26, at 7–14.

31 BAKER, *supra* note 26, at 8–13 (explaining the ability of markets to efficiently supply people with what they want, is based on two primary assumptions: (1) products are sold in competitive markets at a price close to their marginal cost; (2) the production and consumption of the product does not involve significant externalities on third parties. In this regard, Baker showed that media products have unique features vis-à-vis regular products: media have significant 'public good' aspects, at least with regard to broadcast and other payment-free media services. Moreover, with both 'free' and pay-based commercial media, the marginal cost of serving an additional consumer predictably will be substantially less than the average cost).

the dominant reason in judicial review of media regulation in the twentieth century.[32]

Moreover, the economical-utilitarian approach to the public interest—and to justice in general—not only justifies the existing regulation of traditional media but can generally be applied to the commercial media of the twenty-first century. That is, present commercial mass-media, such as Facebook and YouTube, have similar economic characteristics that are inconsistent with the classical assumption about the ability of unregulated markets in supplying people with what they want. First, contemporary technologies of mass-media—as was with the twentieth century media and media markets—are trending toward concentration and consolidations, due to the medium-natural effects of size in content production and distribution.[33] Second, as was the case in the twentieth century, contemporary content platforms operate within two-sided market conditions, whereby profits are not derived from users, but rather from advertisers (to which the media sell advertising slots) or third parties (to which the new media sells information about the users).[34] Third, since both traditional and new media are the primary mediators of information and politics,

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[32] *See* Schejter & Yemini, *supra* note 9, at 143, for a discussion about the utilitarian nature of American free speech jurisprudence.

[33] *See,* e.g., BEN H. BAGDIKIAN, THE NEW MEDIA MONOPOLY (2004); Guy Rolnik, *Digital Platforms and Concentrations*, U. CHI. BOOTH SCH. BUS. (2018), https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf [https://perma.cc/SNM3-7DBV].

[34] Within the utilitarian-economic justification for broadcast regulation, the character of media markets as two-sided markets means that the media's revenues derived from advertisers and not directly from their audiences. Hence, those conditions inherently limit the ability of unregulated content platforms to maximize their consumers' preferences. *See* BAKER, *supra* note 26, at 11 ("advertisers in effect pay the media firm to gain an audience by providing the audience with *something that audience wants*, although not necessarily *what the audience most want*"); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 514 (2000) ("television is not an ordinary product, for broadcasters do not sell programming to viewers in return to cash . . . this phenomenon introduces some serious distortion, at least if we understand an ideal broadcasting market as one in which viewers receive what they want.").

their products have significant positive and negative social externalities,[35] which the media do not internalize.

Pointing to those economic similarities between broadcasting and contemporary mediators of speech does not aim to suggest that they are identical, or that they should be economically regulated in a same manner.[36] They serve to support a more-modest argument: those who adopt the utilitarian/economic approach to justice should not consider regulation of both new and old media as categorically impermissible. As the discussion in this Section illustrated, the utilitarian/economic justification for media regulation may legitimize regulation of the "new mediators" by asserting its necessity and proportionality.[37]

C. Harm-Based Justification: Mass-Communication Technologies as a Social Risk

In any version of liberal democracy, individuals are morally and legally obliged not to harm other individuals. Thus, the state may prohibit or limit harmful activity, and the legitimacy of such state actions depends on the liberal harm principle: "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[38]

As a descriptive argument, consensus exists that, during the twentieth century, commercial media were perceived as possessing significant ability to harm individuals or society at large.[39] This

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[35] BAKER, *supra* note 26, at 10 ("Media products often produce extraordinary significant positive and negative externalities. Externalities typically refer to the value some item has to someone who does not participate in the transaction").

[36] *See* Jack M. Balkin, *The First Amendment in the Second Gilded Age*, BUFF. L. REV. (forthcoming 2019) (describing today's digital capitalism, in which people pay for information though digital surveillance and exploiting personal data of their audiences, as economically different than the twentieth century's media).

[37] For discussion about the conditions of rationality and proportionality in this context, *see infra* Part III.

[38] JOHN STUART MILL, ON LIBERTY 13 (Batoche Books 2001) (1859).

[39] *See*, *e.g.*, FEINTUCK & VARNEY, *supra* note 15, at 5 (describing the democratic justification for media regulation as power-based, whereby those who exercise either governmental or private power legitimately have their powers limited, guided by the

public notion of the media posing a severe risk to the wellness of individuals and society naturally called for regulation in order to protect the wellbeing of media audiences.

This harm-based justification of media regulation is no less potent regarding new media today than it was historically with regard to broadcasted media. In debating the need to regulate YouTube or Facebook, we should acknowledge that the liberal harm principle was and still is the primary source of political legitimacy for any suppressive content duties on the media, comprising a particular use of the state's restrictive powers. A notable example is the question of regulating "fake new" on social media. Contemporary calls to use the state's coercive power to suppress or limit this kind of content rely on the consensual harm principle, as it focuses on the harmful consequence of this content.[40]

To understand the important role of the harm principle in media regulation and free speech jurisprudence, consider the medium-dependent regulation of indecencies as an example of the risk-based reason for regulating the media (and for diminishing the media's constitutional protection against governmental regulation). The prohibitions or limitations on indecencies make a good test case for illustrating the harm-based rationale of media regulation,

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democratic principle of decentralization social power; thus, given the broad extent of power that the media exercise as dominant mediators of information, politics, and culture, they must be regulated to prevent their unique potential to induce individual and social harms); KRATTENMAKER & POWE, *supra* note 9, at 221–24 (identifying the rationale of protecting individuals and society from the unique pervasive power of the media as the main political and constitutional justification for denying full First Amendment Protection to the 20th century media); *see also,* MCQUAIL-2010, *supra* note 17, at 564 (identifying the unique social concerns with regards to the electronic media of the 20th century as irrational or unfounded mass anxiety and concern about the media's harmful effects on individual behavior and social order).

40 *See, e.g.*, Adam Kucharski, *Post-Truth: Study Epidemiology of Fake News*, 540 NATURE 525 (2016) (harm-based call for state intervention by identifying fake news as a matter of social risk that must be regulated to protect society against its harmful consequences).

since they stipulate negative content duties for the media,[41] which are considered to be protected speech elsewhere.

The robust American debate over the legitimacy of regulatory limitations on indecencies reveals the liberal harm principle as guiding both the governmental policy and its judicial review. One of the most notable examples of the harm principle's application with regard to medium-specific suppression of indecent content is the case of *Pacifica Found*, in which the Supreme Court demonstrated the harm-based rationale for both regulating the media and limiting their constitutional protection under the First Amendment:

> [T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.[42]

The constitutional outcome of this harm-principle reasoning, besides upholding the regulatory rules in this case, is the Court's general position that, "[o]f all forms of communication, broadcasting has the most limited First Amendment protection" due to its unique potential to harm its audiences.[43]

A more contemporary example of the harm principle as a potential source of legitimizing negative content duties regarding indecencies is the ongoing attempt to regulate indecencies over the

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41 *See, e.g.*, 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both").

42 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

43 *Id*. at 728; *see also* Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 743 (1996). Courts' willingness to uphold statutory provisions designed to screen children from indecent programming continued later with regard to cable television. *See infra* note 50.

internet. The Communication Decency Act of 1996 (CDA)[44] comprised the first notable attempt to regulate indecencies or pornography on the ground of preventing harm to viewers and third parties that would be affected by the viewers' beliefs or behavior.[45] The Supreme Court struck down this use of the state's coercive power in the case of *Reno v. ACLU*.[46] As a direct response, the US Congress passed the Child Online Protection Act of 1998 (COPA),[47] with the aim of restricting minors' access to harmful materials. Once again, the courts struck down COPA, as an unjustified violation of the First Amendment.[48]

Despite the different constitutional treatment of indecency regulation over broadcast and the Internet, the reasoning remains the same: negative content-duties (censorship or suppression of speech) with regard to (any) mass media may be legitimate in preventing harmful consequences of unregulated access to harmful content.[49] In the context of regulating indecencies over the

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44 47 U.S.C. § 223 (2012).

45 *See generally*, Lili Levi, *The FCC's Regulation of Indecency*, FIRST AMENDMENT CENTER, First Reports Vol. 7, No. 1 (Apr. 2008) https://www.freedomforuminstitute.org/wp-content/uploads/2016/10/FirstReport.Indecency.Levi_.final_.pdf [https://perma.cc/BS8F-ZHRS].

46 Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

47 47 U.S.C. § 231 (2012).

48 In *Ashcroft v. Am. Civil Liberties Union*, the Supreme Court upheld an injunction on enforcement of COPA, ruling that the law was likely to be unconstitutional. 535 U.S. 564 (2002). The Court later referred the case back to the district court for a trial. 564 U.S. at 656. In 2007, the district court struck down COPA, finding the law facially in violation of the First and Fifth Amendments. Am. Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *cert. denied*, 534 F.3d 181 (3d Cir. 2009).

49 For an elaborate discussion of indecency regulation in broadcast, cable, and new media on the grounds of these medias' unique pervasive and harmful nature, see Matthew Bloom, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 YALE J.L. & TECH. 109 (2006). For more on the Supreme Court's consistent tendency to strike-down regulatory rules that sought to limit indecencies on cable television and on the Internet, on the grounds of violating the First Amendment, see Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS*, 10 COMM. L. & POL'Y 179 (2010) (about cable and satellite television); Emily Vander Wilt, *Considering COPA,* 11 VA. J. SOC. POL'Y & L. 373 (2004) (about the internet); Christopher M. Kelly, *Spectre of a Wired Nation: Denver Area Educational Telecommunication Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J. L. & TECH. 559 (1997) (comparing the Supreme Court

Internet, the Court reasoned that the legitimacy of such regulation depends on the questions of necessity and proportionality,[50] while approving the fundamental reasoning of the harm principle as a consensual justification for media and content regulation.[51]

The use of the classic harm principle to justify suppressive content duties is not limited to indecencies, of course. During most of the twentieth century, broad public and governmental anxiety surrounded the unique harmful effects of the media and their content on individuals and society.[52] The magnitude of risk and potential harms that are associated with mass-communicative technologies often legitimizes broader content regulation (and, therefore, limited constitutional protections), in order to restrain the media's unique power to harm individuals and society at large.[53] As the twentieth century's media were perceived as a tremendous social risk, it was considered legitimate to force special content limitations on various of allegedly harmful media content, such as violence, drug use, and other anti-social depictions.[54]

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tendency to allow suppression of indecent content on cable television while striking-down such regulation on internet-based media).

[50] In the case of *Reno*, the Court reasoned (correctly) that as a matter of history, broadcast media had "'received the most limited First Amendment protection,' in large part because warnings could not adequately protect the listener from unexpected program content," in contrast to Internet users, who must take "a series of affirmative steps" to access explicit material. 521 U.S. at 867 (internal citations omitted).

[51] *See id.* at 868.

[52] A prime example is the regulation of graphic violence on the 20th century's media, based on the reasoning that exposure to such content might cause harmful behavior. For the question of causality regarding media exposure and harmful behavior of views, *see infra* Section III.A.2.

[53] In literature, this harm-based rationale is often characterized as 'Media accountability.' This term stands for the idea (and the processes associated with realizing it) that media can and should be held account for the consequences of their publishing activities to society in general and/or to other interest that may be affected. MCQUAIL-2010, *supra* note 17, at 562.

[54] For the focus of early and contemporary studies on these kinds of "bad" or "harmful" media content as the basis for regulatory limitations on such content, see W. JAMES POTTER, MEDIA EFFECTS 35 (2012); Leonard Reinecke & Mary Beth Oliver,

At present, the harm principle remains a powerful rationale for content regulation with regard to the dominant mediators of content in the twenty-first century (namely, Facebook and YouTube) as it was with respect to television in the twentieth century. Given the public interest in assuring the accountability of dominant media and the protection from various harms, the harm principle should apply to both traditional and new media, as long as they pose a potential threat to the wellbeing of individuals or society.[55] Thus, content regulation of both old and new commercial media can be morally and constitutionally justified, but only if such regulation meets the general conditions of rationality (a proven risk from the regulated content) and proportionality (the regulation is narrowly tailored to the harmful content and is applied to result in the least collateral damage to free speech values).[56]

D. The Distributive / Democracy-Based Justification: Giving the Public What It Needs

The typical "positive" or "prescriptive" regulatory duties that were imposed on the twentieth century media, such as universal or accessible service, the fairness doctrine, or the duty to supply preferred content (news, local content, or children programming), accomplish something other than satisfying individual preferences or negating potential harms to individuals' wellbeing. They *coerce* the media to actively use their resources to promote the collective needs of a democratic society: equality and self-governance, and not just the value of individual liberty. In the constitutional sphere, this kind of reasoning underlies the democratic or progressive

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Preface, *in* THE ROUTLEDGE HANDBOOK OF MEDIA USE AND WELL-BEING (Leonard Reinecke & Mary Beth Oliver eds., 2017).

[55] For example, contemporary calls for content-regulation on social networks and other content platforms focus on materials which might cause harm to their audience (such as graphic violence, drug-use or unrealistic body images), or influence their audience to harm others (such as content supporting terrorism or racism).

[56] For a discussion of the importance of rationality and proportionality as conditions for political and constitutional legitimacy, see *infra* Part III.

positions in which state regulation of the media is consistent with, and may even be required by, the right to free speech.[57] Hence, this distributive or democracy-based justification of both the right to free speech and media regulation shares an instrumental, values-oriented conception of the First Amendment.[58] In essence, this democratic-distributive rationale for media regulation perceives the constitutional right to free speech as justifying (and even requiring) the state to reallocate speech opportunities to secure the collective needs of a democratic society.[59]

This democratic-distributive rationale for media regulation emerged as a response to the political economy of speech in the twentieth century,[60] in which the (commercial) media and their markets served the interest of only those who could or were willing to pay for them.[61] The inclusion of egalitarian values within the public interest approach to media law and policy in the second half of the twentieth century relied on the "maturation" of classical liberalism into political liberalism (as a matter of principle), as well as on the political economy of the media markets (as a matter of policy).[62]

This shift in the understanding of the right to free speech as a source for legitimizing media regulation gained its greatest prominence in the *Red Lion* case, during the golden age of mass

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[57] Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987). For previous formulation of this democratic-affirmative interpretation of the first amendment, see Barron, *supra* note 26; Thomas I. Emerson, *The Affirmative Side of The First Amendment*, 15 GA. L. REV. 795 (1981). For a contemporary formulation of this democratic reasoning of the First Amendment as an "active liberty" which justifies regulation and enhances public discourse, see STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39 (2005).

[58] *See* Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1213 (2007).

[59] *See id.* at 1217 ("In all cases, the government is intervening in media markets by redistributing power over the means and content of communication to further First Amendment speech values.").

[60] *See* Sunstein, *supra* note 34, at 514.

[61] *See id.*

[62] For a discussion of the joint maturation of liberalism and free speech theory from utilitarianism to distributive justice and its effect on free speech jurisprudence, see *infra* Part II.A.

media.[63] In this landmark case, the Court reasoned that although broadcast regulation might violate the First Amendment, the Government could legitimately act to enhance public discourse by recognizing a "collective right" of the audience to free speech, which is paramount to that of the media as a speaker.[64]

In fact, this progressive shift of free speech jurisprudence in the second half of the twentieth century was a direct result of the establishment of the electronic mass media as the dominant public discourse arena. As Balkin suggested:

> [I]t is no accident that the progressivist/republican approach to free speech arose in the twentieth century, for this was also the century of mass media. People who endorse democratic theories of free speech understand that although mass media can greatly benefit democracy, there is also a serious potential conflict between mass media and democratic self-governance. The reason is that mass media are held by a comparatively few people, and their ownership gives this relatively small group enormous power to shape public discourse and public debate.[65]

As such, the democratic-distributive justification for using the state's coercive power to either suppress or promote different kinds of speech and speakers rests on three evaluative arguments about the dangerous consequences of avoiding regulation[66]: (1) the people who control mass media (wealthy or powerful individuals) will skew the coverage of public issues to promote views that they support; (2) the mass media will omit important information, issues, and positions that the public should take into account,

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[63] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). This legal reasoning was originally formulated about the printed press in Associated Press v. United States, 326 U.S. 1 (1945).

[64] *Red Lion*, 395 U.S. at 390.

[65] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information* Society, 79 N.Y.U. L. REV. 1, 30 (2004).

[66] *Id.*

resulting in exposure to only a limited set of facts or ideas; and (3) the mass media will reduce the quality of public discourse in the quest for higher revenues and other profits that come with them, resulting in over-simplification and "dumbing down" of discussions on public issues and transforming news and politics into forms of entertainment and spectacles.

By relying on these factual assumptions, the democratic theory of free speech, supported by Rawlsian political liberalism, supplies a powerful counter-reason to the straightforward utilitarian approach to the public interest in the media. It is not just *what the public wants*, but also *what democratic self-governance needs*.[67] Thus, both democratic theory of free speech and Rawlsian distributive justice share the notion that those who exercise (political or private) social power should legitimately have their powers limited, guided by the democratic principle of decentralization of social power.[68]

Thus, the democratic-distributive justification for regulating the twentieth century's dominant media might be applied to the new commercial media of the twenty-first century (such as Facebook and YouTube), as they have replaced the power of

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[67] As Balkin explains:

> [D]emocracy-based theorists of free speech in the twentieth century have argued that government must regulate the mass media in a number of different ways: (1) by restricting and preventing media concentration; (2) by imposing public-interest obligations that require the broadcast media to include programming that covers public issues and covers them fairly; and (3) by requiring the broadcast media to grant access to a more diverse and wide-ranging group of speakers in order to expand the agenda of public discussion.

Id. at 30–31.

[68] *See* FEINTUCK & VARNEY *supra* note 15, at 5 ("The centrality of the media to democracy, as the primary information source, cannot be overemphasized, and the very fact that democracy requires citizens to be informed if they are to act effectively as citizens, serves as a *prima facie* justification for regulation within a democratic context."). Thus, the democratic justification for media regulation differs from the utilitarian reasoning, by rejecting treatment of the media as pure commercial activity. "Given its essential nature in relation to democracy, the media cannot be treated like a commodity; the democratic premium on diversity and universal availability means that these features cannot be left to chance." *Id.* at 103.

television as the dominant commercial mediators of information, politics, and culture.[69] In fact, notable scholars point out that today's new media are even more powerful than the "old" media in their abilities to influence the flow of information and politics to the public.[70] Since the democratic-distributive framework for communication policy and free speech jurisprudence adopts an instrumental-collectivist conception of the right to free speech, it is not limited to broadcast or traditional media.[71] This framework may justify further regulation of new communicative technologies—in order to secure the speech rights of the *public* against the predictable outcomes of concentrations in ownership over the means to deliver information to the public.[72]

In concluding this Part, the socio-historic analysis reveals various sources of political and constitutional legitimacy of media regulation.[73] Alongside the harm principle, the primary sources for legitimizing media regulation are the competing theories of justice about media regulation and free speech jurisprudence: the utilitarian-economic approach (which perceives of media audiences as consumers) and the democratic-distributive approach (which regards media audiences as citizens).[74] Both of which tolerate speech regulation in the name of "the public interest,"

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[69] *See* Schejter & Yemini, *supra* note 9 (adopting the democratic-distributive rational for media regulation in the context of contemporary debates over communication policy in the era of broadband internet).

[70] Balkin, *supra* note 36; TIM WU, THE ATTENTION MERCHANTS (1st ed. 2016) (describing the digital media's unprecedented powers to capture and influence their audience attention, which was made possible by their new technological abilities to collect and analyze personal data about their users).

[71] *See* source cited *supra* note 65.

[72] Contemporary calls for addressing information intermediaries (namely, Facebook or Google) as fiduciaries or public trustees. *See, e.g.,* Tim Wu, *Is the First Amendment Obsolete?* KNIGHT FIRST AMENDMENT INSTITUTE (Sept. 2017), https://knightcolumbia.org /content/tim-wu-first-amendment-obsolete [https://perma.cc/J4XE-LQ9Y] (arguing for imposing public trustee duties on major speech platforms, in the spirit of *Red Lion Case*, in which the Court prioritized the speech rights of the public over the speech rights of the media. The specific duties that Wu suggests imposing on major speech platforms as public trustees include "general duties to police fake users, remove propaganda robots, and promote a robust speech environment surrounding matters of public concern").

[73] *See infra* notes 74–77 and accompanying text.

[74] *See* FEINTUCK & VERRNEY, *supra* note 15, at 78; GOODMAN *supra* note 58, at 1231.

while emphasizing the undesired results of concentrated control of communicative resources.[75]

At present, as was in the second half of the twentieth century, these two competing theories of justice still inform policy-making and judicial review.[76] The contention between those two theories of justice is ideological, as both theories take different stands on the proper relationship between economics and political power, as well as on the role that the state and the constitutional right to free speech should play in structuring that relationship.[77]

II. PRESENT PROBLEMS: EVALUATING THE CONSTITUTIONAL LEGITIMACY OF NEW MEDIA REGULATION

The discussion in the previous Part demonstrates how both the utilitarian and the democratic rationales that legitimized the twentieth century's media regulation can explain the sources of contemporary calls for content regulation of new communicative technologies.[78] With that, it also illustrated the fundamental divide over the social aims that communication law and policy should promote, or what justice demands with regard to private power and state authority in the public sphere. The present Part aims to show how those old questions about justice in media regulation stand at the core of today's robust debate over the constitutionality of regulating new communicative technologies.

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75 *See* sources cited *supra* note 74.

76 OWEN FISS, LIBERALISM DIVIDED (1996) (arguing that the liberal tension between liberty and equality could be described as the familiar unsolved tension between capitalism and democracy); Schejter & Yemini, *supra* note 9, at 141 (although the Rawlsian approach to justice embraces capitalism and the role of markets in fair regulation, it directly contradicts traditional utilitarianism due to its focus on correcting the ills of the past before adopting new policies).

77 *See supra* note 76.

78 *See supra* Part I. The prominent contemporary example is the moral and constitutional debate over the constitutional permissibility of imposing new neutrality rules on ISPs. In this debate, as was with broadcast regulation in the 20th century, it is divided between market-based theory of justice (which seeks to maximize economic efficiency) and the democratic-distributive theory of justice. *See* Schejter & Yemini, *supra* note 9.

That said, the discussion here does not take sides on the ideological divide over the competing theories of justice about media law and policy. Rather, it shows how the failure to identify, acknowledge, and address the tension between the competing reasons and justifications for regulation undermines any attempt to regulate. To better inform current debates about speech regulation with regard to new forms of mass communicative technologies, this Part identifies the theoretical and practical challenges facing current free speech jurisprudence in ensuring the legitimacy of government regulation over the media and their content.

A. The Challenges of Political Theory and Free Speech Jurisprudence: Liberalism Divided

The challenge of present political theory regarding media regulation and free speech jurisprudence stems from the maturation of Liberalism during the second half of the twentieth century.[79] Until the mid-twentieth century, liberalism was defined almost exclusively by the principle of protecting individual liberty from state intrusion.[80] The progressive change in liberal thought is mostly associated with John Rawls's *Theory of Justice* (1971), which introduced the egalitarian Difference Principle of redistribution in favor of the worst-off social groups.[81] Thus, equality has become one of the defining goals of progressive or political liberalism and a legitimate source for the coercive use of state power.[82] Moreover, within this approach of political liberalism, sometimes individual liberty must be "sacrificed" to protect disadvantaged groups from unjust subordination, which in turn protects substantial democratic participation in the public sphere.[83]

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79 *See* Schejter & Yemini *supra* note 9, at 146–54.

80 FISS, *supra* note 76, at 4.

81 *See* JOHN RAWLS, A THEORY OF JUSTICE (Harv. U. Press eds., Revised ed. 1999) ("[t]he primary subject of justice is the basic structure of society, or more exactly, the way which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation").

82 FISS, *supra* note 76, at 1.

83 *Id.*

Presently, free speech jurisprudence—as the source of and constraint on media regulation—is highly divided between competing versions of liberalism as a political theory.[84] This challenge involves the ongoing conflict between the libertarian and progressive poles of liberalism, as was notably described by Owen Fiss at the end of the twentieth century:

> Liberals are at war with themselves. For some time, freedom of speech has held them together, but now it is a source of division and conflict [. . .] this division within liberalism arises not from its pluralistic commitments and inability to prioritize equality and liberty but rather from a dispute over the very meaning of freedom. What is at issue is two different ways of understanding liberty.[85]

The conflict between "two different ways of understating liberty" in this context can be summarized as follows: should we understand liberty and constitutional rights as shields to protect individuals (and thus, prioritize individual freedom over the collective needs of a free society), or rather, should we understand liberty and constitutional rights as a source for an allocative use of state power?[86] Respectively, should the constitutional right to free speech serve individuality (as classic liberalism demands) or collective needs (as political or progressive liberalism demands)?

Two decades after Fiss's observation, this liberal divide is still the primary problem of media law and policy, as exemplified by the conflicting libertarian and Rawlsian understandings of the right to free speech as both the barrier and justification for media regulation. At present, liberalism—as a normative theory for evaluating the many uses of state power—seems too rich or plural to offer consensual conditions for evaluating the legitimacy of the allocative use of state power vis-à-vis speech and the flow of information in society. In this plurality of reasonable regulatory aims, the utility-based and rights-based reasons for media

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84 *Id.*
85 *Id.*
86 *Id.*

regulation should be understood as ideological divisions over the relative importance of liberty and equality—as the core values of free speech.

In fact, the egalitarian shift in liberalism, as a political theory, is directly connected to a significant shift in free speech jurisprudence during the second half of the twentieth century, namely the democratic theory of free speech.[87] At its core, the democratic theory of free speech examines the proper relationship of economic and political power in a democratic society and the role that the constitutional right to free speech might play in structuring this relationship.[88] As discussed above, this line of reasoning underlies the democratic-distributive justifications of media regulation as "giving the public what it needs."[89]

This shift in the legal understating of the right to free speech is manifested in progressive legal theories and doctrines that focus on the unique nature of the right to free speech as a *public* rather than individual right.[90] Thus, the democratic theory of free speech suggested that the purpose of free speech (and of media regulation) is not only individual self-actualization of the speaker (or negative liberty, which shields speakers from state interference), but also the preservation of a functioning democracy by ensuring an uninhibited, robust, and wide-open public discourse.[91] Thus, it calls to discard the conservative-liberal skepticism about state intervention and acknowledges the "irony of free speech": under conditions of economic inequality, private power is as much of an

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87 *Id.* at 2.

88 *Id.* at 2.

89 *See supra* Section I.D.

90 This formulation of the right to free speech as an instrument for ensuring the collective needs of a democratic society was suggested by Lee C. Bollinger, as a notable founder of the democratic theory of free speech. *See* Lee C. Bollinger Jr, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976); Lee C. Bollinger, *Free Speech and Intellectual Values,* 92 YALE L.J. 438, 451 (1983); LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN (1st ed. 2010).

91 *See supra* note 90.

enemy of free speech as is the state; therefore, the state can be a friend of freedom and its enemy.[92]

Through this lens of political theory, we can now understand how current debates over regulating both old and new media are divided on an ideological or moral level, between the egalitarian and libertarian ends of the liberal spectrum. That is, both the practice and theory of media regulation and free speech are divided over the relative importance of liberty and equality, as various models of liberal democracy (such as "the minimal state" or the "welfare state").

The lens of political theory reveals that the liberal divide over what justice demands with regard to the old media is still the primary challenge for contemporary policy-making and judicial review regarding media regulation. That is because the traditional rationales for media regulation seem to fit much of today's commercial mass-communicative technologies. Moreover, the same rationales for either regulation or diminishing the constitutional status of broadcast television seem to apply to any powerful, commercial, profit-driven medium.[93] The focus of regulation may have shifted from CBS to Facebook or YouTube (as today's dominant commercial media), but the ideological divide between utilitarian and distributive perceptions of justice remains the most significant challenge to media regulation specifically. Moreover, the libertarian-egalitarian divide is the

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[92] OWEN FISS, THE IRONY OF FREE SPEECH (1998). For similar contemporary arguments which identifies the private power of dominant speech intermediaries (such as Facebook or Google) as the gravest threat of free speech in our current digital age, see, e.g., Balkin, *supra* note 5; Wu, *supra* note 72.

[93] For the democratic reason for media regulation as based on the commercial nature of the dominant mass-media (rather than on their delivery methods), see FEINTUCK & VARNEY, *supra* note 15, at 246 ("[i]t will be necessary to regulate the new media just as much as the old if the potential benefits are to be reaped and the blight of domination by commercial interests avoided"). *See also* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335, 340 (2017) (describing the democratic/progressive theory of free speech as soft-Marxist, since it justifies media regulation and lesser constitutional protection based on their commercial, profit-driven nature). Thus, the democratic reason should apply to any dominant profit-driven media outlet—be it Time Warner, Netflix, or Facebook.

most significant challenge of free speech theory and doctrine.[94] Thus, the question about the necessity or permissibility of today's dominant commercial media depends on one's ideological position about the relative importance of liberty and equality as the two competing values of liberal democracy.[95]

B. The Practical Challenge of Judicial Review: Reaching Consensus on Affirmative/Distributive Regulation

Communication policy consists of regulatory interventions specifically designed to promote communicative opportunities by allocating speech opportunities from communications proprieties.[96] The legal arena in which the discussion about the legitimacy of both "old" and "new" media regulation takes place is the realm of public law; and, specifically, the right to free speech as a political principle and as a constitutional right. In this constitutional arena, the main function of public law and judicial review should be understood as instruments for ensuring the legal permissibility of the many uses of state power. From this instrumental perspective, public law and judicial review supply our political society with ideas and doctrines to evaluate whether a specific use of the state's

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[94] For contemporary positions that support the libertarian or counter-majoritarian reasoning for the right to free speech, see Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 555 (1991); Bambauer & Bambauer, *supra* note 93, at 340. For contemporary positions that criticize the libertarian use of the First Amendment as the right of powerful corporates to evade public-interest regulation and calls for a participatory-distributive understanding of free speech as a public right, see Sunstein, *supra* note 34; Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (Mar. 6, 2003); Julie Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015). For the positive argument by which the Supreme Court in the last decades continually adopted the libertarian understating for the First Amendment see Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition,*" 69 STAN. L. REV. 1389 (2017).

[95] For a discussion of the contemporary divide between the values of liberty and equality in First Amendment jurisprudence see Jeremy K. Kessler & David Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV 1953, 1953–60 (arguing that there exists an inegalitarian tendency within First Amendment jurisprudence, which has become more pronounced during the Roberts Court era).

[96] Goodman, *supra* note 58, at 1211.

coercive power is justified, and hence constitutionally permissible.[97]

In the constitutional sphere, the tension between classic and progressive conceptions of liberalism is manifested by the question of whether the use of state power over the media should be viewed as violating the constitutional right to free speech, or as advancing it. Specifically, this tension raises a fundamental question about the social function of the right to free speech: is it an individual right (that shields speakers against governmental interference) or a public right (that justifies or necessitates active governmental actions to ensure)?

At present, after the egalitarian shift of political liberalism, the right to free speech is "at war with itself."[98] It seems consensual that using state coercive powers to pursue allocative ends should not be regarded categorically as unconstitutional (or unjust). With that, the movement from suppressive/negative state actions to an affirmative use of state power created new challenges for both political theory and free speech jurisprudence. Namely, we agree that the affirmative use of state power may be permissible under some conditions, but we are having great difficulty in specifying those particular conditions. Put simply: when the state acts affirmatively, there is no consensual standard for judicial review to evaluate the legitimacy of positive content duties.[99]

Hence, the practical problem of the contemporary legal reasoning about the constitutional legitimacy of media regulation is that the foundations of public law and judicial review are rooted in the classical liberal framework of individual/negative rights. As such, they were structured to protect the rights and interest of individuals from illegitimate use of state power. When the state

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97 For a similar instrumental approach to the theory and doctrines of the First Amendment supplying the means, vocabulary, and structural basis for evaluating the legitimacy of speech regulation, *see* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. Rev. 1, 7 (2016).

98 *Id*.

99 For the theoretical and doctrinal limitation in evaluating the political and constitutional legitimacy of an affirmative use of the right to free speech, see FISS, *supra* note 76, at 21.

acts as a censor or stipulates negative content duties, the political and constitutional legitimacy is evaluated by the familiar harm principle.[100] However, when the state acts affirmatively, no consensual standard of review exists, despite the broad agreement that such action is not categorically wrong or unconstitutional.[101] This leads to the practical problem of evaluating the legitimacy of public-interest media regulation, which is done with the concept of "interests" or "values," instead of individual rights, on which constitutional law is traditionally founded. Since First Amendment doctrine favors right over values and negative liberties over positive ones,[102] it is limited in its instrumental capacity to guide judicial reasoning over the legitimacy of media regulation.

C. State Neutrality as the Unifying Challenge of Political Theory and Free Speech Jurisprudence

At present, the challenges of political theory and free speech jurisprudence with regard to communication policy stem from reasonable disagreements about the relative importance of free speech rights versus values, and positive liberties versus negative liberties. In order to deal with these ideological and practical challenges, it is crucial to understand how both political theory and free speech jurisprudence are divided over the principle of state neutrality as a constraint for any law and policy.

The liberal principle of state neutrality articulates a constraint on permissible or legitimate state actions, by which the state should not exercise its coercive powers to promote any specific version of the "good" unless societal consensus exists in its regard.[103] Thus, both classical liberalism and Rawlsian political

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100 *See infra* Part II.C.

101 FISS, *supra* note 76, at 28–31.

102 Goodman, *supra* note 58, at 1218 ("if a communications proprietors is an editor and is constrained by a speech regulation, courts will privilege her rights to be free from such constraint over the values served by the regulation by reviewing skeptically and regulation that limits her rights in more than an incidental way"). *See also id.*, at 1227–28.

103 As Wall suggests, there are three common formulations of the state neutrality constraint on the use of state power: "(1) The state should not promote the good, either coercively or non-coercively, unless those who are subject to the state's authority consent

liberalism hold that the state should be neutral among rival understandings of the good. In contrast, the distributive/democracy -based justification for free speech and media regulation must reject the principle of state neutrality, as it stipulates tangible values that the state should actively promote by application of its coercive powers.

This question of state neutrality as a constraint on media law and policy arises with the establishment of the democratic rationale for media regulation and free speech jurisprudence. Unlike the market-based utilitarian rationale, the democratic justification for media regulation offers a value theory about different types of media content.[104] As the socio-historical analysis of the previous Part reveals, this democratic reason suggests an *ideal* perception of the social relations between the media, individuals, and society. As noted above, this unitary approach to the public interest in the context of media regulation is defined by a normative theory or broad ideology about what the public *needs*, absent any sensitivity to popular wants.[105]

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to its doing so; (2) The state should not aim to promote the good unless there is a societal consensus in support of its doing so; (3) The state should not justify what it does by appealing to conceptions of the good that are subject to reasonable disagreement." *See* Steven Wall, *Perfectionism in Moral and Political Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHIL. 8 (E. Zalta ed., 2017).

[104] Of course, Preference Maximization is a value theory. It considers the maximization of preferences as the ultimate and sole value to be pursued (for critical discussion, see: THOMAS SCANLON, WHAT WE OWE TO EACH OTHER 118–23 (1998)). With that, the democratic rational for media regulation offers a more comprehensive value-theory. According to the democratic rationale for media regulation, the broad impact of a specific media on society and the fact that some elements of media content might be viewed as 'merit' goods (those goods that society, operating through the government, deems to be especially important or that those in power feel individuals should be encouraged to consume) often served as primary justifications for positive content duties. (FEINTUCK & VARNEY, *supra* note 15, at 117).

[105] With regard to media law and policy, the literature identifies the rationale for media regulation in the 20th century as guided by the unitary theory, and thus described as "frequently authoritarian, paternalistic or ideoligically contestable character. " MCQUAIL-1992, *supra* note 19, at 23–25.

The fundamental aim of the democracy-based justification for media regulation and free speech—ensuring that a diverse, high-quality range of media be made available to all citizens—incorporates both Rawlsian political liberalism and liberal perfectionism. The ideal by which citizens should enjoy some degree of equality of access to critical social goods stands at the core of Rawlsian political liberalism.[106] However, the democracy-based justification the right to free speech and of media regulation takes it one step further: since not all media products (or human expression) constitute materials that can be identified as a prerequisite of citizenship, the state must adopt content-based policies.[107]

In political theory, the views that a liberal-democratic state may promote an objective account of the good, thus rejecting state neutrality as a constraint, are known as *perfectionist liberalism*.[108] Thus, it is possible to identify the difficulty of this dominant approach, as it stems not only from its paternalism (about an individual's wellbeing) but rather from its nature as *perfectionist*

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[106] *See* FISS, *supra* note 76 and accompanying text.

[107] For this perfectionist-elitist notion of the democracy-based theory of free speech and media regulation, see, e.g., LEE C. BOLLINGER, IMAGES OF A FREE PRESS 138–41 (1991) (prioritizing the value of education for citizenship over the pleasure of entertainment); Sunstein, *supra* note 34, at 528 (describing broadcast television—or 'the media'—as supplying low-quality content aimed at the popular tastes of the uneducated); FEINTUCK & VARNEY, *supra* note 15, at 17–18 (from the democratic perspective on free speech and media regulation, entertaining media content is less valuable, and thus, less worthy of constitutional protection—than informational or educating media content). *See also*, Jack M. Balkin*, Cultural Democracy and The First Amendment*, 10 NW. U. L. REV. 1, 1055, 1088 (2016) (describing the democratic-progressive theory of free speech as granting diminished constitutional protection to artistic or entertaining contents, since those are perceived as lacking social value or real contribution to the democratic process of self-governance).

[108] "Speaking generally, perfectionist writers advance an objective account of the good and then develop an account of ethics and/or politics that is informed by this account of the good. Different perfectionist writers propose different accounts of the good and arrive at different ethical and political conclusions. But all perfectionists defend an account of the good that is objective in the sense that it identifies states of affairs, activities, and/or relationships as good in themselves and not good in virtue of the fact that they are desired or enjoyed by human beings." Wall, *supra* note 103. For the meaning of perfectionism regarding media law and policy, see Section II.1.

liberalism (about society's well-being), which rejects the principle of state neutrality as a constraint on the use of state power.[109]

Thus, since political perfectionism denies the principle of state neutrality as a constraint on permissible or legitimate state action,[110] it raises a moral and practical problem for free speech jurisprudence and judicial review doctrines that are based on the liberal principle of state neutrality.[111] The inherent concern is that liberal perfectionism is insufficiently sensitive to the harm of coercion and the values of liberty and individual autonomy.[112] In the context of communication policy and speech regulation in general, it causes doctrinal problems since the perfectionist aspect of the distributive/democracy-based justification rejects the use of free speech *rights* in favor of free speech *values and interest*.

Through this lens, we can now see that the unifying problem of free speech jurisprudence and political theory is that the idea of state neutrality does not correspond with an affirmative or allocative use of state power. This concluding argument of the

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[109] For the contemporary theoretical debate about the similarities and differences between liberal perfectionism and paternalism, compare Wall, *supra* note 103 (arguing that not every kind of state perfectionism are paternalistic, due to the noncoercive constrain of perfectionist liberalism), with JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2011) (arguing that liberal perfectionism is almost entirely unable to escape the charge of paternalism).

[110] The perfectionist nature of the democracy-based theory of free speech is mostly associated with its founding father's famous assertion that "what is essential is not that everyone shall speak, but that everything worth saying shall be said." *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (2000).

[111] For a moral-legal proposition that rejects perfectionism, claiming the state should be neutral to rival understanding of the good, see Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 43 (S. Hampshire ed., 1978); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); JOHN RAWLS, POLITICAL LIBERALISM (1993).

[112] Of course, even when acknowledging the harms of coercion and the value of liberty regulation can be legitimate. For example, liberal perfectionism which recognizes political autonomy as the foundation of any further liberty and lack of coercion, might argue that advancing liberty must be done through a guarantee that all can effectively participate in politics. With that, in the context of media law and policy both policy makers and judicial review fail to acknowledge the harms of regulation to the public interest, rather than its harms to the regulated individual. For a discussion of the hidden tradeoffs of liberty, equality and diversity in the context of media regulation, see *infra* Section III.C.

current Section is mostly descriptive, as it does not "take sides" in the clash between political liberalism and liberal perfectionism, which are both reasonably acceptable. Instead, the analysis that this Section posits suggest that we should understand the familiar tensions of liberty/equality, consumer/citizen, and individualism/collectivism, vis-à-vis media law and policy, as different framings of the same divide.

When regulation rejects the state neutrality principle by defining preferred content that should be protected in the name of the public interest, it must adopt some degree of liberal perfectionism in prescribing the "good life" that the regulation seeks to bring into existence. The unifying problem then comprises the concern that the democratic-distributive justifications for free speech and media regulation may be insufficiently sensitive to the potential social harm of governmental control over the media, and to the counter-majoritarian reasoning of the right to free speech.

In response to those theoretical and practical challenges, the next Part suggests a consensual framework for evaluating the political and constitutional legitimacy of media law and policy while bridging the ideological-moral gap between the libertarian and distributive poles of the liberal-democratic spectrum.

III. CONSENSUAL CONDITIONS FOR JUDICIAL REVIEW OVER ANY MEDIA REGULATION

In recent literature, scholars are united in observing that reasoning about speech regulation in our age of information must develop finer methods of First Amendment review.[113] As the previous Part illustrated, this is especially true in the context of "old" and "new" media regulation. Both the market-based and

[113] *See, e.g.*, Goodman, *supra* note 58, at 1250–61 ("[A] more flexible and context-sensitive approach to media policy review promises to be more hospitable to the full ranges of speech interest implicated by government interventions in media markets"); Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization,* 65 EMORY L. J. 495, 530 (2015) (arguing that current First Amendment doctrine, which adopts a categorical method of evaluation is inadequate for analyzing the complex problems involved in constitutional jurisprudence).

democracy-based approaches may accept speech regulation in the name of the public interest. They are both united in the consequentialist-instrumental perceptions of free speech and media policy. However, they are highly divided about the conditions or method to evaluate the legitimacy of speech regulation in the name of the public interest.

This Part offers both policymakers and jurists three guiding principles for reasoning about the constitutional permissibility of regulating "old" and "new" media alike. Section III.A suggests how judicial review can avoid the ideological choice between the competing theories of justice by adopting the concept of political legitimacy. The next two Sections further develop the consensual conditions for such legitimacy: rationality (in Section III.B) and proportionality (in Section III.C).

A. Bridging the Ideological Divide: From Justice to Political Legitimacy

Alongside the foundational differences between the competing rationales of media regulation, it is essential to bear in mind that utilitarianism and Rawlsian liberalism are not necessarily rivals.[114] In fact, both utilitarianism and Rawlsian political liberalism emphasize the importance of freedom of expression as a political principle and as a constitutional right.[115]

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[114] For example, the regulation of primary goods such as water or electricity can be justified both by utilitarianism and political liberalism. The former approach would justify the use of regulatory power by a cost/benefit analysis of the alternatives and suggest that it would be much more efficient that the state manage these natural monopolies. This approach would stress the moral duty of the state to equally supply its citizens equally with primary goods, which they have a right to that is not (entirely) dependent on the ability to pay. *See* David Brink, *Mill's Moral and Political Philosophy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (E. Zalta ed., 2018).

[115] For the importance of ensuring fundamental rights, and especially the right to free speech within utilitarian philosophy, *see* Schejter & Yemini, *supra* note 9, at 143 (explaining that the root of the "marketplace of ideas" concept traces back to Mill's utilitarian philosophy, as does the concept of social responsibility of the press). For the Rawlsian support of the right to free speech as a 'primary good', *see* RAWLS, *supra* note 111, at 358.

With that, the potential solutions to contemporary dilemmas, such as the legitimacy of net-neutrality rules, of content regulation on digital platforms, and of the protected status of media corporations, are still highly contested on the political-ideological sphere.[116] As the previous Part showed, these conflicts and tensions between the utility-based and rights-based approaches to the legitimacy of speech regulation might not be neatly resolved, since they offer competing and reasonable stands (or ideologies) about the relative importance of individual liberty and collective needs of society.[117]

To help resolve the ideological divide between the competing theories of justice with regard to media law and policy, this Part suggests that judicial review over speech-related regulation should evaluate the *political legitimacy* of the regulatory act (is the state act constitutionally permissible?), rather than choose between competing notions of *justice* (what is the right thing for the state to do?).

In political theory, the common definition of "political legitimacy" is a virtue of political institutions and of laws and policies, which refers to some benchmark of acceptability or justification of coercive political power.[118] This normative concept of political legitimacy is often equated with justice, since justice and legitimacy commonly draw on the same set of political values.[119] Thus, the main problem that a conception of legitimacy

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116 *See* Schejter & Yemini, *supra* note 9, at 141–46 (addressing the legitimacy of net-neutrality rules as contested between utilitarian and distributive theories of justice); *see also* Kessler & Pozen, *supra* note 95, at 1987 (addressing the legitimacy of regulating social media platforms as contested between libertarian and egalitarian ideologies).

117 *See supra* Part II.

118 Peter Fabienne, *Political Legitimacy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2017 ed.), https://plato.stanford.edu/entries/legitimacy/ (last visited Nov. 29, 2018) [https://perma.cc/5YP3-US9H]; Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFFAIRS 2 (2004).

119 Rawls considers political legitimacy and justice to be related—but not identical—as they occupy different moral domains; thus, legitimacy makes weaker demands than justice. RAWLS-1993, *supra* note 111, at 225. This interpretation of Rawls is based on Wall. *See generally* Wall, *supra* note 103.

aims to solve is how to distinguish the rightful use of political power from unjust coercion.

The problem of distinguishing the rightful use of political power from mere coercion is precisely the instrumental function of public law and of judicial review. Hence, whether we equate political legitimacy with justice or see it as a different form of morality, we can use the concept of political legitimacy as a justification of political authority.[120] Through this framework, we can think of public law and judicial review as instruments for securing the political legitimacy of various state actions. When we ask if a specific rule or regulation is constitutionally permissible, we actually inquire into its political legitimacy. In this respect, judicial review over state actions utilizes doctrinal tests for evaluating the political legitimacy (i.e., the constitutionality) of the state's use of its coercive powers and supplies different remedies in case use of state power is found to be illegitimate.

Adopting this instrumental concept of political legitimacy enables us to bridge political morality and public law—where the latter is our legal instrument for evaluating and enforcing the political legitimacy of governmental actions. In both political theory and public law, this criterion of legitimacy is negative: it offers an account of when effective authority ceases to be legitimate.[121]

Therefore, both policymakers and judicial review should use the normative concept of political legitimacy as a consensual framework for evaluating the coercive political authority that is exercised on the various forms of media in the twenty-first century, such as regulatory institutions and regulatory rules (set by either

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[120] Joseph Raz links legitimacy to the justification of political authority by arguing that political authority is just a special case of the more general concept of authority. For this interpretation of Raz, see Fabienne, *supra* note 118. Alternately, the relations between legitimacy and the creation of authority may be understood as follows: the attempt to rule without legitimacy is an attempt to exercise coercive power, not authority. Such a view is associated with Jean-Jacques Rousseau, who defines legitimacy as justification for the state's exercise of coercive power and as creating an obligation to obey. *See* JEAN JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (1988) (1762).

[121] Fabienne, *supra* note 118.

legislation or administrative actions). Hence, an understanding of the consensual liberal-democratic conditions for political legitimacy is necessary for evaluating the existing regulatory practices affecting various media (including broadcast, cable, and satellite television) and structuring public policy about yet-unregulated media (such as Netflix, Google, and Facebook).

In addressing the contemporary problems of free speech jurisprudence discussed in Part II, the next Sections of this Part identify and develop the two consensual conditions for legitimacy, be they justified on the basis of securing individual liberty and autonomy, or on the basis of pursuing collective-social interests and needs: (a) rationality (the demand for social facts) and (b) proportionality (between the core values of both media regulation and free speech jurisprudence: individual liberty, equality, and diversity).[122]

B. Rationality: Reviewing the Factual Arguments of Both Utilitarian and Democracy-Based Justifications of Media Regulation

1. Different Regulatory Rules Require Different Justifications

Until the beginning of the twentieth century, the conflict between the state and free speech was manifested in suppression and prohibitions of the mass-media; throughout the twentieth century, it was reshaped into permission and then a prescription.[123] Due to the many possible uses of state powers with regard to mass communicative technologies, this Section argues that suppressions of and prohibitions on the media and their content rely on a different rationale than regulatory duties of prescription. Hence, the principle of rationality demands that each regulatory duty must be evaluated by its own reasoning.

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122 *See generally* Schejter & Yemini, *supra* note 9.

123 *See* MCQUAIL-1992, *supra* note 19, at 9 (tracing the conflict between state authority and media freedom through the early stages of suppression and prohibition (regarding the press), to permission, and then prescription (regarding regulation of audio-visual services)).

To understand the different justifications that different media regulation rationales require, it is helpful to sketch a general taxonomy of the typical practices of state coercive power in the context of media regulation, alongside the distinct reasons that legitimize those typical regulatory duties:

TABLE 1. TYPICAL REGULATORY DUTIES AND THEIR JUSTIFICATION

	Regulatory Duty	**Grounds for justification**	**Regulatory objectives**	**Political morality or values served**
Structural / Content-Neutral Regulation	License regime	Scarcity, collective action problem	Efficient use of the electromagnetic spectrum for broadcast	Utilitarianism
	Universal service	Media services as primary goods (or utilities)	More egalitarian distribution of critical resources	Political/progressive liberalism (equality)
Negative Content Duties (suppression /prohibition)	Limiting Indecencies or graphic violence	The harm and precautionary principles (assuming that exposure to this content affects attitudes and behavior)	Negating the intrusive power of the media over their viewers as captive audiences	Classical liberalism (individual liberty and autonomy)
	Limiting 'fake news'	The harm and precautionary principles	Negating the harms of disinformation to political-democratic participation	"Democratic Harm Principle" (protecting public discourse)
Positive Content Duties (prescription)	The fairness doctrine	The importance of media to collective self-government	Equal access and participation in an uninhibited, robust, and accessible public debate on public issues	Political/progressive liberalism (equality) The value of pluralism/diversity
	Subsidies and positive content duties (local culture, educational or high-genres)	The importance of media *diversity* for individual and collective flourishing	Promoting diversity or quality of media outputs.[124]	The values of pluralism and moral perfectionism[125]

[124] For the importance of diversity as a post-liberal addition to the values of liberty and equality, see *infra* Part III.C.1.

[125] As elaborated in the previous Part, the term of 'perfectionism' in moral and legal philosophy is usually contrasted with utilitarianism or political liberalism, since perfectionist liberalism rejects the principle of state neutrality as the basic constraint over the use of state power. *See supra* Part II.

This table does not offer a full description of the many uses of state power in relation to the media or speech regulation in general. Nevertheless, it allows us to identify the specific rationale(s) for justifying typical uses of state power with regard to the media.

When the state uses its powers for prohibition or suppression of speech or speakers (negative content duties), a consensual standard exists for evaluating its political or constitutional legitimacy: the harm principle from classical liberalism.[126] Such duties (as a violation of free speech rights) are usually founded on the state's responsibility to protect the well-being of individuals or society from potential harms.[127] In the realm of media law and policy, this kind of content regulation is highly prone to legitimacy problems by rationality. As a matter of principle, no significant dispute exists over the moral legitimacy of such rules, since avoiding harms is undoubtedly a legitimate goal of regulation (as something that the public wants and needs).[128] Thus, the political and constitutional legitimacy of negative content duties is mostly a factual question, rather than a normative one: what are the probability and the scale of harm expected absent any regulation?

However, when the state uses its coercive powers in an affirmative or prescriptive matter (for example, adopting positive content duties or subsidizing preferred content), the matter becomes more complicated and less consensual. Application of positive content duties (which coerce the media to produce and deliver "preferred content") should be assessed as an affirmative or perfectionist act, which usually rejects the liberal principle of state neutrality. Although that kind of regulatory duties is not categorically wrong, both policymakers and judicial review must acknowledge the internal reservation of this political perspective: perfectionist liberalism considers the use of the state's coercive power to be illegitimate (compared to non-coercive measures, such

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126 This standard compares the benefits and risks of the 'harmful' speech with the benefits and harms of the governmental suppression.

127 *See infra* Part II.C.

128 *See* Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91. SO. CAL. L. REV. 195, 197 (2018).

as subsidies or public broadcast).[129] Moreover, positive content duties are often motivated not only by the desire to expand any valuable way of life but also by the assumption that particular media content is better or more desirable to society than others are.[130]

Based on this argument, it is possible to draw some guiding principles for evaluating the political legitimacy of state power that is used for distributive or perfectionist components of the public interest in the media:

(a) Within the framework of liberal perfectionism, coercion is considered the inferior option for pursing perfectionist ends.[131] Thus, the use of direct content regulation needs to be justified over other means for allocative regulation, such as subsidies or public service media. (b) Since perfectionist liberalism departs from the constitutional framework of individual rights and their possible violation, we cannot judge the legitimacy of perfectionist use of state power (such as positive content duties) without developing new analytical tools. When it comes to evaluating the legitimacy of the suppressive or restrictive regulatory duties over media and content, the good old harm principle serves as a consensual standard. However, in evaluating the permissive or prescriptive use of state power to regulate media and content, we need to define its own intrinsic reason and conditions for legitimacy, without resorting to ideological dispositions about the relative importance of liberty and equality. That is the power of the rationality condition, which can be applied contextually to the rationales of

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[129] *See supra* note 131. For the distinction between coercive and non-coercive means of media regulation, see Sunstein, *supra* note 34, at 505.

[130] A prime example in theory and practice of media regulation and free speech jurisprudence, is that political speech (such as the printed and electronic press) is considered of higher social value (hence, more protected against regulation), compared to fictional or irrational entertainment of popular culture. For the reluctance of the democratic theory to grant popular culture and mass media with the same constitutional protection of the press, see *supra* note 107 and accompanying text.

[131] *See* THOMAS HURKA, PERFECTIONISM 157 (1993); *see also* Wall, *supra* note 103 ("Most perfectionist writers accept that sometimes the state can permissibly use coercion to promote the good. Still, coercion is in general a clumsy device for pursuing perfectionist ends.").

various regulatory duties. Only after identifying the specific rationale that justifies given regulatory duties, the review process can proceed to examine the substantial part of the rationality condition—facts and evidence—since different justification requires different facts to assert legitimacy.

2. Every Regulation Requires Facts

In any version of liberalism, a foundational condition for the political legitimacy of using the state's coercive power is the rationality requirement: the use (or absence) of regulatory powers must be supported by social facts, in contrast to pure-moral arguments (and as opposed to sovereign arbitrariness).[132] The importance of social facts for evaluating the legitimacy of state power is also a fundamental notion of legal realism.[133] Thus, both rights-based and welfare approaches to constitutional rights agree that public policy and legal rules must rely on facts and data (that social sciences supply), since regulating speech on the basis of mere ideology is suspected as politically immoral or instrumentally flawed.

The kind of social facts that are essential for evaluating the political or constitutional legitimacy of specific media law and policy depends on the factual premises of the particular reason that underlies the reviewed regulatory duty. The most relevant sources of data and facts in the context of media regulation are the social sciences and media studies. Over the last decades, scientific research produced over 10,000 theoretical and empirical studies about the various effects, of various media, on various audiences.[134] By utilizing research methods of the social sciences

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[132] Both classical liberalism and perfectionist versions of liberalism support this position. *See* Joseph Raz, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 210 (1995) ("All law is source-based . . . . A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.").

[133] *See* Rosco Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 510–13 (1911) (jurists must take account of the "social facts" to which various legal institutions apply and evaluate "the actual social effects of legal institutions and doctrines").

[134] *See* Potter, *supra* note 54, at 12.

(experiments, observations, surveys, statistical analysis, and content analysis), the discipline of media studies supplies essential data and facts about the power and influence of the media.

The importance of facts in policy making or in the process of judicial review may seem trivial; and indeed, it should. However, the century-long experience in media regulation and its judicial review demonstrates an ongoing tendency to base the regulatory reasoning on unfounded beliefs or assumptions about the media and their audiences.[135]

In the case of prohibiting or suppressing regulation, the factual insights that contemporary social sciences (and media studies in particular) supply undermines many common assumptions about the media's unique power to harm individuals and society. For example, studies showing that the media have a limited effect on the attitudes or behavior of their audience[136] might rule out the political and constitutional legitimacy of media law and policy based on the harm principle, by suggesting that no compelling interest exists to regulate to so-called "harmful" content or medium.[137]

It is not possible to describe the full scope of facts revealed by the contemporary research on media effect. That said, a focus on most recent literature uncovers that traditional assumptions about the media's omnipotent power to influence their audiences are

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[135] *See* MCQUAIL-2010, *supra* note 17, at 564; *see also* POTTER, *supra* note 54, at xv (describing the public discussion about harmful media effects as based on "unfounded beliefs rather than on sold knowledge").

[136] For examples, see *infra* Table 2.

[137] The special importance of social facts as a condition for political and constitutional legitimacy is exemplified by the 'substantial evidence requirement' of free speech jurisprudence. If the government interest is sufficiently important in the abstract, the government still "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994). For the importance and flaws of the substantial evidence requirement regarding new forms of mass media (since the core claims of proponents and opponents are difficult to test systematically against historical empirical evidences*), see* Schejter & Yemini, *supra* note 9, at 168.

highly contested.[138] In fact, recent literature that adopts meta-analysis of the aggregated empirical data about the effects of various types of media use supplies important social facts about the media's relatively weak "harmful" effects.[139] Most of the common assumptions about the harmful power of the media lack a sufficient rational basis, as the causality between media consumption and harmful effects is relatively weak.[140] These findings, along with other contemporary meta-analysis research, demonstrate that, although the media's impact may be significant, it is not very substantial, since the variance accounted for by media exposure is quite small.[141] Moreover, these recent findings show that the media's pro-social effects are significantly higher than their harmful effects.[142]

These examples of relevant empirical social facts, which should guide the rationality condition for political legitimacy, add to the broader insights of contemporary media studies, by which the public and governmental perception of risk with regard to the media is mostly a "moral panic" based on little evidence of the media's actual harmful effects.[143] As contemporary literature suggests:

> Despite hopeful as well as fearful scenarios, the passing of decades does not seem to have changed the tendency of public opinion both the blame the media and to demand that they do more to solve

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[138] NORMAN L. MEDOFF & BARBARA K. KAYE, ELECTRONIC MEDIA: THEN, NOW, AND LATER 1404 (3d ed. 2016); ELIZABETH PERSE & JENNIFER LABME, MEDIA EFFECTS AND SOCIETY (2017).

[139] Patti Valkenburg et al., *Media Effects: Theory and Research*, 67 ANN. REV. OF PSYCHOL. 315, 318 (2016).

[140] *Id.* Of thirty-four behaviors studied in nineteen analyses, just three showed moderate or greater correlations between media exposure and negative outcomes. *Id.*

[141] *See* PERSE & LAMBE, *supra* note 138, at 8.

[142] *See* Valkenburg, *supra* note 139, at 318; PERSE & LAMBE, *supra* note 138, at 8.

[143] The term 'moral panic' was originally applied to a sudden expression of *irrational* mass anxiety and social concern about crime, disorder, or social breakdown. As McQuail explains, both the televised medium of the 20th century and new form of media (such as the internet or computer games) generates moral panic at alleged harm to their users. *See* MCQUAIL-2010, *supra* note 17, at 564.

> society's ill. There are successive instances of alarm relating to the media, whenever an insoluble or inexplicable social problem arises. The most constant element has been a negative perception of the media—especially the inclination to link media portrayals of crime, sex and violence with the seeming increase in social and moral disorder. These waves of alarm have been called 'moral panics', partly because they are based on little evidence either of media cause or actual effect.[144]

This brief review of the empirical and sociological sources of data and social facts does not lead to the conclusion that all harm-based justifications for media regulation are irrational or flawed. Rather, the argument of this Section about the critical contribution of social facts to the condition of rationality is that the century-long experience with media regulation teaches us a valuable lesson about the public and governmental evaluation biases regarding the risks and benefits of emerging communicative technologies. The sociological insights about the media and its regulation show that both government and public opinion tend to view the media as a problem or scapegoat for deep social ills,[145] thereby creating fertile grounds for unique suppressive regulation over the media.

Hence, the condition of rationality (as the demand to base policies and regulations on social facts) has a critical function in media regulation due to the century-long experience with regulating, which demonstrates a consistent tendency to overvalue the risks from new communicative technologies—as a primary

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144 *See* MCQUAIL 2010, *supra* note 17, at 55. *See also* POTTER, *supra* note 54, at xv (describing the public discussion about harmful media effects as based on "unfounded beliefs rather than on sold knowledge").

145 For the most recent literature in this context, see PERSE & LAMBE, *supra* note 138, at 7 ("Although some politicians are motivated to promote public interest and media responsibility, others see media as convenient and easily understood scapegoats for social problems. Although there certainly are reasons to be concerned about the level of violence in our society, it is clearly simplistic and misleading to hold that violent themes in popular music, movies, comics book or television might be the major cause for delinquency and the violent crime rate.").

justification for governmental regulation of it, in the name of the public interest.[146] Present regulations of mass-communicative technologies (such as IPTV, Netflix, YouTube, and Facebook) can avoid past mistakes, namely the tendency to base public policy or legal reasoning on unfounded beliefs about the unique harmful power of the media. Moreover, even if the shared beliefs about television's power to influence viewers against their will had sufficient rational basis, this does not seem to be the case with regard to the new media of the twenty-first century.[147]

In conclusion, the argument of this Section is not about the factual question about the scope and extent of the risk that the media pose to individuals or society. The argument here concerns the methods to evaluate the legitimacy of specific regulatory duties by demanding substantive evidence for the necessity of using the state's coercive powers in the name of the public interest. In this context, rationality—as a consensual condition of political and constitutional legitimacy—of state power requires a two-step analysis: (1) identifying the specific justification which supports the reviewed regulatory duty and (2) confronting the underlying factual assumptions of the relevant justification with relevant social facts about the subjects of regulation: the media and their audiences.

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[146] For literature identifying the governmental tendency to frame new communication technologies as dangerous to society, since those new ways of communication have unique potential to disrupt the established power relations in society, see HAROLD INNIS, EMPIRE AND COMMUNICATION (1950); BRIAN WINSTON, MISUNDERSTANDING MEDIA (1986). For the general argument about the human biases in assessing the expected harm of speech or information, see Bambauer & Bambauer, *supra* note 93, at 366–78.

[147] New media are considered weaker in their ability to persuade or inform the public, due to the selectivity of the view as a user. *See*, *e.g.*, MCQUAIL-2010, *supra* note 17, at 545 (in the age of new media, "[t]here is no longer any unitary 'message system' to which people are routinely and consistently exposed, leading to stereotypes or consensual values. Individuals are no longer restricted by their immediate social group and the physical availability of a few media channels, controlled by authorities and other agencies"). *See* Peter Bajomi-Lazar, *Audience Resistance: Reasons to Relax Content Regulation*, *in* MEDIA FREEDOM AND PLURALISM 175 (Beata Klimkeiwicz ed., 2010) (in the political economy of online content, the media no longer dictate public taste and opinions, but rather are affected by it—due to the selectivity powers of their audiences).

Indeed, consensus exists that social facts must inform policy-making. However, the century-long experience with media regulation teaches us that judicial review of emerging communicative technologies' regulation should adopt a healthy sense of skepticism about the necessity of such regulation. In contrast to the existing legal discussion, this call for suspicion does not stem from a conservative or libertarian position, favoring individual liberty over equality and distributive considerations, but from ideology-neutral instrumental considerations: first, it is impossible to ignore the natural tendency of both governmental and private power-brokers to resist social changes that inherently threaten their status. Thus, since speech (and especially mass-speech platforms) comprises an engine of change, skepticism is needed with regard to both the suppressive and prescriptive regulation of media or their content in the name of the liberal harm principle. Second, the demand for skepticism and social facts about the necessity of media regulation stems from the non-legal findings, which indicate the government's consistent bias to overestimate the risks and underestimate the social value of the media and their outputs.

Based on those instrumental considerations, the general argument of this Section about the condition of rationality is that legal reasoning about the legitimacy of media regulation must be undertaken contextually, by identifying the various factual assumptions of the various justifications. This contextual examination must be conducted in light of the social facts emerging from the relevant non-legal fields of knowledge, which provide a necessary tool for assessing the rationality of state intervention. Simply put, even if regulation might be a necessary friend of free speech, judicial review must examine the *necessity* of regulation as a factual matter, by relying on facts and data that contemporary social sciences supply.

C. Proportionality: The Hidden Trade-offs Between Liberty, Equality, and Diversity in Media Regulation

In political and legal discourse, the principle of proportionality is used as a criterion of fairness and justice, or as a logical method

intended to assist in discerning the correct balance between individual rights and collective needs.[148] In the constitutional domain, the principle of proportionality stems from the notion that constitutional rights are not absolutes, since they can be violated if there is a good enough reason for doing so, namely for the protection of other individual rights or to achieve collective social needs (or the wellbeing of society).[149]

This Section frames the concept of proportionality as a consensual condition for political legitimacy in the context of media regulation and its judicial review. In this context, proportionality can be framed as the demand for accommodation of competing rights, interests, or values that are associated with the media and its regulation.[150] Unlike common free speech jurisprudence, which focuses on proportionality between individual rights and public interest, I suggest here that the proportionality of specific regulatory duties should be evaluated with sensitivity to the conflicts and tensions between the core values of media law and policy: liberty, equality, and diversity. Within this framework, the ties and frictions between the values of liberty and equality are well-known as the liberal divide between utilitarian and distributive theories of justice. Alongside the familiar ties and frictions between liberty and equality, both positive and normative theories of the mass media identify *diversity* as a distinct social value or a regulatory end.

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[148] *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

[149] For the role of the proportionality principle within a non-absolute perception of constitutional rights, see AHARON BARAK, PROPORTIONALITY (2012). For a discussion of the relationship between absolute rights and the principle of proportionality, see Gregoire Webber, *Proportionality and Absolute rights*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki Jackson and Mark Tushnet eds., 2016).

[150] The American Supreme Court consistently rejects the concept of "balancing" in the context of judicial review. *See* Tsesis, *supra* note 113. With that, the categorical approach which the Court adopts for resolving First Amendment cases does adhere to the principle of proportionality (as considering the social benefits and costs of regulation), which is embedded in the doctrines of overbreadth and the least restrictive mean requirement. For identifying the various elements of proportionality in American constitutional law, see generally Jackson, *supra* note 148.

1. The Consensual Value of Diversity as a Mean and as an End

In the literature from media studies and mass communication theory, diversity is considered an independent factor by which the performance of the media is evaluated, alongside liberty and equality.[151] The intrinsic value of diversity in media law and policy (or as a third component of the public interest, alongside liberty and equality) is not just as a means to achieve what the public wants, but also as an essential component of what a democratic society needs. Thus, diversity stands very close to freedom and equality as a key concept in any discussion of media law and policy (and as a key value of free speech as a democratic principle and a constitutional right).[152]

Alternatively, the value of diversity in media outlets and outputs can be described as non-intrinsic, but rather interrelated to various aspects of liberty or equality. As McQuail suggests, the main public benefits expected from diversity (as a means or as an end) are paving the way for a social and cultural change; providing a check on the misuse of freedom; enabling minorities to maintain their existence in a larger society; limiting social conflicts by increasing the chances of understanding between potentially opposed groups and interest; and maximizing the benefits of the

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[151] *See, e.g.*, FEINTUCK & VARNEY, *supra* note 15, at 59 ("Diversity (both political and cultural) is a considered as a separate, free-standing rationale for media regulation"); MCQUAIL-2010, *supra* note 17, at 192–98 (framing diversity as an independent principle of media structure and performance, alongside freedom and equality, and describing the benefits of diversity to society as paving the way for social and cultural change).

[152] *See* FEINTUCK & VARNEY, *supra* note 15, at 82 ("Both 'paternalists', who seek a 'properly informed' public, and libertarians who emphasis choice, share an objective of diversity in media output. The common ground is that diversity is desirable, the difference is in response to the question 'why?' [. . .] If diversity in media output is universally valued, and if it cannot necessarily be guaranteed without regulation, then media regulation targeted at diversity appears to be justified"); *Id.* at 112 (within the democratic justification for media regulation, "the plurality of the media is pursued not as an end in itself, but as a means of furthering effective choice, as a prerequisite of meaningful citizenship"). *See also* Goodman *supra* note 58, at 1230 (noting that the Supreme Court characterized diverse speech as "a principal instrumental goal, rather than merely an underlying value, of the First Amendment").

free marketplace of ideas.[153] In any case, both the utilitarian market-based approach and the democracy-based approach to media regulation share the objective of diversity in the media output (in order to satisfy consumer's diverse preferences or to ensure vibrant and robust public discourse). Thus, the value of diversity is highly consensual, though at times diversity of outputs can be countered by other contradictory objectives.[154]

2. The Need to Proportionately Accommodate Liberty, Equality, and Diversity

As the discussion in Part II demonstrated, the foundational divide between the competing reasons for media regulation revolves around the relative value of individual liberty and collective needs. Within this framework, judicial review of regulatory duties is usually constructed as a balance between the costs of regulation (infringements of the media's constitutional rights) and its gains for the greater good or the public interest.[155]

The argument in this Section suggests that this common framework of proportionality fails to recognize the hidden social costs of media regulation, which might promote one aspect of the public interest while simultaneously harming another aspect of the public interest (and not just the media's constitutional rights). By adding the independent value of diversity to the binary framework of liberty vs. equality, we can expose the hidden constitutional costs of typical media regulation. As illustrated in Table 2, those hidden costs are the inherent tradeoff between the consensual components of the public interest in the media.

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153 *See* MCQUAIL -2010, *supra* note 17, at 197.

154 For acknowledging diverse speech as a principle instrumental goal of the First Amendment in the Supreme Court Decisions regarding broadcast and cable media, see Goodman, *supra* note 58, at 1230.

155 *See* Goodman, *supra* note 58, at 1254 ("when there are competing First Amendment interests on both sides of the equation, the key question becomes one of proper fit between speech benefits and burdens").

TABLE 2: MUTUAL TRADEOFFS BETWEEN LIBERTY, EQUALITY, AND DIVERSITY

The public-interest value that regulation promotes	**The hidden cost of regulation vis-à-vis other public-interest values**
Liberty (The public interest in protecting media freedom from governmental/majoritarian coercion)	**Equality** (of access and representation) or **Diversity** (of sources and content)
Equality (of access and representation)	**Liberty** (The public interest in protecting media freedom from governmental/majoritarian coercion) or **Diversity** (of sources and content)
Diversity (of sources and content)	**Liberty** (the public interest to keep the media free from governmental/majoritarian coercion) or **Equality** (of access and representation)

The inherent tradeoffs between liberty and equality are well known to political theory and free speech jurisprudence.[156] With that, the present discussion exposes the hidden constitutional costs of media regulation within the public interest framework.

[156] *See, e.g.*, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

a) When the state uses its coercive powers over the media to pursue equality and diversity, then liberty must be compromised.

As elaborated in the previous section, both the market-based and democracy-based perceptions of the public interest with regard to commercial media assume that "full liberty" (i.e., no regulation) results in undesirable consequences to the diversity of media outlets and outputs. Thus, limiting the liberty of the media—for the sake of either correcting market failures or promoting the democratic values of equality and diversity—triggers the well-known conflict with individual negative liberty.

The hidden constitutional costs of media regulation can be described by examining the other combinations:

b) When the state uses its coercive powers over the media to pursue liberty and equality, then diversity must be compromised (as is the case with free/broadcast-like media) / When the state uses its coercive powers over the media to pursue liberty and diversity, then equality must be compromised (as is the case with premium pay-based media).

The liberal cost of pursuing both egalitarian values and diversity of media outputs is often hidden from both the utilitarian-economic and rights-based perspectives. It can be exemplified by comparing subscription-based media (i.e., cables, Netflix, and magazines) and "free" media services (i.e., broadcast television, YouTube, and free newspapers). "Free" media services, which do not exclude people from their outputs, greatly promote the egalitarian component of the public interest. However, "free" mass-media services are limited in their ability to supply quality or a diversity of media outputs in comparison to pay-based media. Respectably, the practical lesson from the century-long regulation of commercial media is that regulatory policy seeking to promote

free media services diminishes the amount, diversity, or quality of media products. [157]

As an answer to this often-hidden tension between the values of equality and diversity in the context of media law and policy, the proportionality requirement must be further developed in order to acknowledge these often-hidden tradeoffs. The argument here is instrumental, rather than normative, as it does not weigh in on the relative importance or priority of the social values that justice demands. Rather, it argues that decision-making about the constitutional legitimacy of specific regulation must weigh the unavoidable trade-offs between the competing values that guide media regulation and free speech jurisprudence.

The discussion above illustrates that there is a high degree of reciprocity between the multiple values that comprise the public interest in the media. However, despite the interrelations between freedom, equality, and diversity—as the core values of the public interest in media law and policy—these values are often mutually exclusive: *state promotion of any two such values usually comes at the expense of the third*. This understanding is critical for current theory and doctrine, as they focus only on comparing the expected benefits of regulation to the public interest with its burden on the rights and interests of regulated media.

This understanding of the hidden trade-offs between the various components of the public interest is not just theoretical. Within current First Amendment doctrine, judicial review evaluates the constitutional legitimacy of speech regulation by the

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[157] The economic explanation to this tradeoff is based on the nature of 'free' media services as public goods (characterized by non-rival use and the inability to exclude) and as commercial products with near-zero marginal costs (whose first-copy cost is very high). *See* Cristopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579 (2003). A recent example can be found in the decisions of online premium content outlets to adopt a pay-based business model, to insure the diversity or quality, which 'free' media services are limited in their ability to supply. *See* Ricardo Bilton, *Learning from the New Yorker, Wired's new paywall aims to build a more "stable financial future,"* NIEMANLAB (Jan. 2, 2018), http://www.niemanlab.org/2018/02/learning-from-the-new-yorker-wireds-new-paywall-aims-to-build-a-more-stable-financial-future [https://perma.cc/D7HR-36EA].

"narrowly-tailored" or "the least restrictive means" tests of strict scrutiny, which are in fact measures for evaluating proportionality of government regulation.[158] With that, First Amendment doctrine favors rights over values (and negative liberties over positive ones).[159] Thus, in evaluating the constitutional legitimacy of any media law or policy (or in balancing free speech values), judicial review and its doctrine should consider the full constitutional costs of media regulation: media regulation not only compromises the speech rights of the commercial media outlets (as the direct subjects of regulation), but might also compromise the various, often-competing components of the public interest in the media.[160]

Adopting this framework of proportionality for acknowledging the full scope of the regulatory burden between various components of the public interests would benefit both market-based and democracy-based sides of the liberal spectrum. Whether we seek to better inform our cost/benefit analysis or find the just balance between individual rights and the collective interest, we must expand our view of the regulatory burden, which is usually focused on the regulated media. Considering the plurality of aims and social values which compose "the public interest" in regulating the various new forms of digital media, decision-making about its legitimacy must be well-informed about its consequences on various aspects of society's well-being. Due to the consequentialist nature of both market-based and democracy-based methods of

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158 *See* Jackson, *supra* note 148, at 3096.

159 *See* Goodman, *supra* note 58, at 1218. The notable exception to this judicial reasoning is Justice Breyer's balancing approach, which rejects the categorical treatment of public-interest regulation of commercial media as presumptively constitutional or unconstitutional. *See*, *e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

160 Evidence of this approach in First Amendment jurisprudence can be seen in Justice Breyer's balancing method of review, as "the beginnings of a more pragmatic and contextualized review of laws that implicate speech interests on both sides." *See* Goodman, *supra* note 58, at 1252–56 (referring to Justice Breyer's concurring opinion in United States v. Alvarez, 132 S. Ct. 2537 (2010), in which he argued for "proportionality review" in contrast to the existing doctrine of categorical reasoning). For other recent cases in which the Court engaged in balancing without resorting to categorical analysis, see *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *Snyder v. Phelps*, 562 U.S. 443 (2011).

reasoning about legitimacy, accurate accounting of the potential gains and losses of regulation on both individual liberty and collective needs of society must be done. This framework of proportionality or balancing is not ad hoc decision-making, but rather a value-plural, fact-based method to appropriately balance the expected gains and losses of present and future regulations of communication and information services.

CONCLUSION

Over the last century, market-based and democracy-based rationales have fought each other about the sources and constraints of government interventions in media markets. At present, as was the case in the previous century, the rapid changes in communication technologies present new challenges for First Amendment jurisprudence and media regulation. This Article focuses on the instrumental functions of public law and judicial review for securing the political legitimacy of the many possible uses of state power in regulating the media. At its core, the discussion here focuses on the question of legitimacy, common to political theory and constitutional law: how should the rightful use of political power be distinguished from illegitimate coercion? That question is of much importance now, as it was with regard to the old media, as both market-based and distributive/democracy-based rationales for speech regulation acknowledge that they concern not only the rights of speakers, but also the collective interest (or values) of a democratic and free society.

Since the various rationales and objectives for regulatory interventions seem contradictory and inconsistent, the most important lesson from the century-long experience of media regulation is that evaluation of specific policies or regulations requires clarity as to the values and principles that should guide public policy and its judicial review. The ambiguity (or competing perceptions) of "the public interest" as a political or legal concept is unacceptable in the context of media regulation and free speech. Absent the setting of clear objectives, the existence of a reasonable divide about the underlying *raison d'etre* of media regulation

makes its legitimacy challenging to assess. Hence, treating media regulation as presumptively constitutional or unconstitutional lacks the sufficient sensitivity in contextualizing litigants' various interests and the impacts of regulation on the well-being of individuals and society at large.

Through the lens of political theory, we can understand how current debates over (both old and new) media regulation are divided on an ideological sphere between the egalitarian and libertarian ends of the liberal spectrum (or over the relative importance of liberty and equality in a liberal democracy). By acknowledging those divides in the theory and the practice of media regulation, this Article exposes the problems free speech jurisprudence and judicial review in evaluating the legitimacy or permissibility of specific regulations.

In response, this Article proposes a fact-based, context-sensitive framework for examining the constitutional legitimacy or permissibility of media regulation. It aims to enrich the legal discourse on freedom of speech by offering sociological and empirical perspectives on the media regulation, while also contributing to the broader issue of the regulation of public discourse and judicial review of such governmental actions. Building on the insights of political theory and the social sciences, the inter-disciplinary approach exemplified in this paper supplies a value-plural, fact-based method to appropriately balance the expected gains and losses of present and future regulations of communication and information services.

Altogether, this Article strives to offer a refined understanding of media regulation as a social phenomenon and a subject for judicial review. The theoretical and practical discussion here supplies the judge, the regulator, and the citizen with tools to understand and evaluate the legitimacy or desirability of various regulatory practices—present and future—through a structured, fact-based method. Moreover, it exposes the essence of media regulation as a socio-cultural arrangement that carries social costs, which are sometimes hidden from political or judicial view.