

WHY GROWING UP IS HARD TO DO:

**INSTITUTIONAL CHALLENGES FOR INTERNET GOVERNANCE IN
THE “QUARTER-LIFE CRISIS” OF THE DIGITAL REVOLUTION**

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3. Enhancing the Democratic Process

Participatory governance can address many of the areas of concern about effective regulation. It can enhance public awareness, transparency, and independence of the regulatory structure by drawing members of the public and leaders of the public interest community into the process. Participatory governance also brings additional resources to enforcement, resources that are volunteered by the public in the form of participation, although the structure needs to provide additional resources for technical expertise.

The idea is to deepen democratic participation by building civil society institutions that fill the gap left by the traditional institutions of the polity. This idea has strong roots in democratic thinking in two highly developed aspects of democratic theory – the contemporary view of the public sphere and the traditional view of the press. I believe there are generally strong parallels between the two. The unique role of the press as a civil society, public sphere institution that provides oversight over the polity and the economy has similarities to the role I envision for participatory governance. The above citations from the White Paper on representative democracy made this point directly. Elections are the primary form of participation in representative democracy that is no longer deemed sufficient for more knowledgeable, engaged publics. The press provides a primary oversight function.¹

Democracy theorists and institution builders have believed for a quarter of a millennium that the press plays a central role in democracy by fulfilling two functions. The most prominent in their thinking was the role of the fourth estate to monitor and report on the other estates in society,² as shown in Table VII-3. However, in their prolific production of pamphlets they practiced the Fifth Estate function of mobilizing the populace to political action. The challenge with respect to participatory governance is to design structures that allow the Fifth Estate to compensate for the declining oversight functions of the state. Table VII-3 identifies the key functions of the press, which is defined as

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1. NORTH, *supra* note 15, at 54-55.

2. *Fourth Estate*, WIKIPEDIA, http://en.wikipedia.org/wiki/Fourth_Estate (last modified Sept. 17, 2012, 19:44) (“The Fourth Estate (or *fourth estate*) is a societal or political force or institution whose influence is not consistently or officially recognized. “Fourth Estate” most commonly refers to the news media; especially print journalism or “The Press”. Thomas Carlyle attributed the origin of the term to Edmund Burke, who used it in a parliamentary debate in 1787 on the opening up of Press reporting of the House of Commons of Great Britain. Earlier writers have applied the term to lawyers, to the British queens consort (acting as a free agent, independent of the king), and to the proletariat. The term makes implicit reference to the earlier division of the three Estates of the Realm. In current use the term is applied to the Press, with the earliest use in this sense described by Thomas Carlyle in his book *On Heroes and Hero Worship*: “Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.” In Burke’s 1787 coining he would have been making reference to the traditional three estates of Parliament: The Lords Spiritual, the Lords Temporal and the Commons. If, indeed, Burke did make the statement Carlyle attributes to him, the remark may have been in the back of Carlyle’s mind when he wrote in his *French Revolution* (1837) that “A Fourth Estate, of Able Editors, springs up; increases and multiplies, irrepressible, incalculable.” In this context, the other three estates are those of the French States-General: the church, the nobility and the townsmen. Carlyle, however, may have mistaken his attribution . . .”).

non-governmental oversight. It plays both mediated (Fourth Estate) and direct (Fifth Estate) roles.³

Role	Relationship to the Public	Function	Complex Democracy's Ideal Media
Fourth Estate	Mediated	Monitorial	The Checking function Independent of both government and private economic power Grounded in the pluralism of the life world Nurture non-market structures to capture positive externalities
Fifth Estate	Direct	Participatory	Participatory Democracy's Ideal Media Pluralist: Distribute politically and culturally salient media in an egalitarian manner Supports interest group formation Mobilize interests Convey public opinion to policymakers Communal: promote agreement on common good Inclusive Thoughtfully discursive Self-Reflective Inform public about itself Contest dominant opinion Criterion to measure government responsiveness

Source: C. Edwin Baker, *Media Markets and Democracy* (2003), Chapter 6.

TABLE VII-3: JOURNALISM AS A PARADIGM FOR NON-GOVERNMENTAL OVERSIGHT⁴

I refer to the Fifth Estate for ease of reference and because the concept is being applied to the impact of the Internet on the contemporary communications and media landscape. It captures the essence of the direct participatory role of the public. Dutton describes the Fifth Estate⁵ as follows:

More generally, the networks comprising the Fifth Estate have two key distinctive and important characteristics: 1. The ability to support institutions and individuals to enhance their 'communicative power' . . . by affording individuals opportunities to network within and beyond various institutional arenas. 2. The provision of capabilities that enable the creation of networks of individuals which have a public, social benefit (e.g. through social networking Web sites).⁶

The analogy between the press and participatory governance can be strengthened by locating these two institutions within the public sphere.⁷ The public sphere mediates between the private sphere (which

3. C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 149, 151 (2002). ("Complex democracy seeks a political process that promotes both fair partisan bargaining and discourses aimed at agreement.") (also asserting the press should be pluralist, providing individuals and organized groups with information that indicates when their interests are at stake and help mobilize people to participate and promote their divergent interests, making policymakers aware of the content and strength of people's demands. The press should promote agreement on a society-wide common good, by being inclusive and promoting thoughtful discourse, not merely being factually informative, and supporting reflection and value or policy choice. The press should promote self-reflection, informing the public about itself, so that those who disagree with the dominant opinion can contest it and provide criteria to measure government responsiveness.).

4. *Id.* at 129-53.

5. My use of the term "5th estate" has similarities and differences with the use Dutton makes of the term. Dutton, *infra* note 129. I agree that the emergence of the 5th estate stems for the dramatic expansion of access to information and the ability to communicate across institutional and geographic boundaries. I disagree with the suggestion that the 5th estate can supplant the 4th estate without building structures that are intended to accomplish that purpose. Interestingly, the only other reference to the explicit use of the term 5th estate that Dutton makes is to a web site that adopted the name. The web site described itself as serious and satirical commentary and appears to be defunct (with no entry after July 2009). This example underscores the two characteristics of the 5th estate that distinguish it from the 4th estate. It is largely commentary and its durability over time at the level of individual organizations is suspect. Others have argued that the 5th estate is necessary to monitor the 4th estate. Ironically, if the 4th estate were doing a better job, the need for and role of the 5th estate in this regard would be reduced, but its broader role in democratic discourse would continue.

6. William H. Dutton, *The Fifth Estate Emerging Through the Network of Networks*, 27 PROMETHEUS 1, 3 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1167502.

7. Here I paraphrase the formulation offered in Wikipedia. Wikipedia is a perfect example of how the public sphere has expanded

comprises civil society in the narrower sense, the realm of commodity exchange and of social labor) and the Sphere of Public Authority, which deals with the state. The public sphere crosses over both these realms. Through the vehicle of public opinion it puts the state in touch with the needs of society. This area is a site for the production and circulation of discourses, which can be critical of the state. These distinctions between state apparatuses, economic markets, and democratic associations are essential to democratic theory. The study of the public sphere centers on the idea of participatory democracy and how public opinion becomes political action.

Figure VII-3 depicts a map of the media in a public sphere that has become much more complex and the make-up of the media much more diverse. The Figure is drawn to emphasize the fact that the growth has been in those areas of the media that are best suited to Fifth Estate functions. The challenge is to harness the Fifth Estate energy to accomplish the Fourth Estate oversight functions.

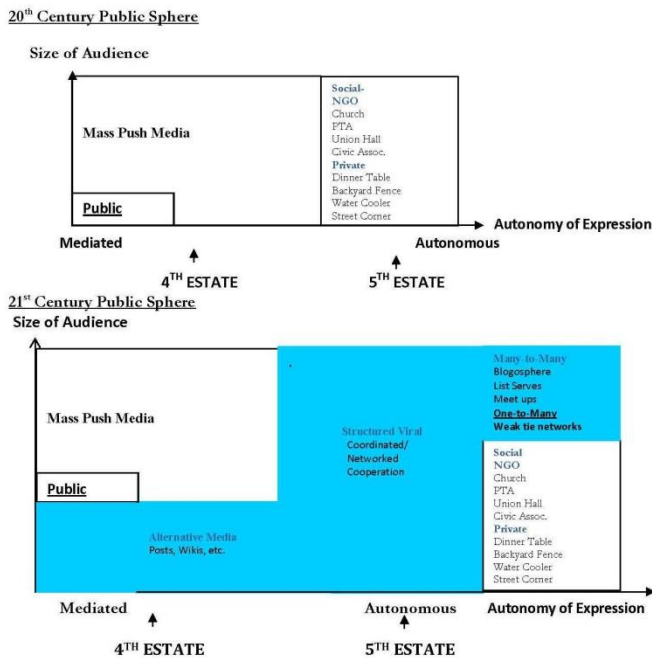


FIGURE VII -3: INCREASING DIVERSITY IN THE EXPANDING DIGITAL PUBLIC SPHERE

The Fifth Estate function is distinct from the Fourth Estate function, although it is generally hoped that monitoring society and informing the public will get them to act, but mobilizing is a different type of activity and the ability of Fourth Estate activity to mobilize people in the 20th century is debatable. The ability of unmediated viral communications to create strong collective action in the digital age has been widely noted.⁸ Unmediated communications predominates in cyberspace because the medium is naturally suited to do this. There is a lively debate about whether the commercial mass media accomplished its function in the 20th century when commercialism overwhelmed journalism.⁹ The goal of participatory

through the creation of new forms of mass communications. See *Public Sphere*, WIKIPEDIA, http://en.wikipedia.org/wiki/Public_sphere (last modified Sep. 5, 2012, 21:11).

8. See, e.g., CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS*, 2009; REBECCA MACKINNON, *CONSENT OF THE GOVERNED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM*, 2012.

9. BAKER, *supra* note 131, at 184, 187, 191 (The critique of 20th century journalism stems in large measure from the fact that its functions became obscured by its transformation into a commercial mass media enterprise.) (“[C]omplex democracy fears that the

governance is to expand the role of public sphere institutions as the state role shrinks. In the analogy to the press, I propose that participatory regulation can play a Fourth Estate function and infuse it with Fifth Estate energy.

CONCLUSION

Because the Internet and the digital networks on which it rides have become central institutions in societal and global communications and commerce, they can be described as “affected with a public interest.”¹⁰ The concept of public obligations falling on private enterprises is as old as capitalism itself.¹¹ While this term might strike fear into the hearts of some Internet stakeholders, because it evokes the specter of the utility-style common carrier regulation of the 20th century, the concept has a much longer and richer history that encompasses many forms of regulation that are much less intrusive. While common carrier, public utility regulation was applied to certain large infrastructure industries over the course of the 20th century, many activities deemed to be affected with the public interest have been governed by criminal¹² and common law¹³ (e.g., restaurants and other public places), prudential regulation (e.g., banks and insurance companies), or subject to self-regulation (e.g., professions like medicine and law).

On the one hand, it can be argued that in the 500-year history of the treatment of the public interest in capitalist society, command and control regulation is the exception, not the rule. On the other hand, it can also be argued that in the 500-year history of capitalism, the means of communications and transportation of commerce have always been regulated and have been required to shoulder unique responsibilities.

Thus the history of the concept of “affected with a public interest” argues for a careful consideration, not whether the Internet should shoulder new responsibilities, but how the obligations that the digital revolution must shoulder can be implemented in a way to preserve its dynamic nature. There is no reason to believe that one-size will fit all. In fact, the challenges have different causes and interact with the Internet ecology in different ways. Therefore, different institutional structures are likely to be better suited to meet specific challenges.

watchdog will be muzzled, whether by government or private power. . . . [M]onopolization or corrupted segmentation will suppress or disfigure media pluralism,” because “[m]arket-determined segmentation predictably disfavors, for example, media focusing on political ideology, non-market-valued ethnic and cultural divisions, economically poorer groups When properly performing its various democratic functions, the media generates significant positive externalities – that is, benefits to people other than the immediate consumer of the product. The economic meaning . . . is that . . . free markets will under-produce these quality products.”).

10. *Business Affected with a Public Interest*, THEFREEDICTIONARY.COM, available at <http://legal-dictionary.thefreedictionary.com/Business+Affected+With+a+Public+Interest> (last visited Sept. 12, 2012) (“A commercial venture or an occupation that has become subject to governmental regulation by virtue of its offering essential services or products to the community at large. A business affected with a public interest is subject to regulation by the Police Power of the state to protect and to promote the General Welfare of the community which it serves. Such a designation does not arise from the fact that the business is large, or that the public receives a benefit or enjoyment from its operation. The enterprise, as a result of its integral participation in the life of the community or by the privilege it has been granted by the state to serve the needs of the public, is regulated more strictly by the state than other businesses. What constitutes a business affected with a public interest varies from state to state. Three classes of businesses have been traditionally regarded as affected with a public interest: (1) those carried on pursuant to a public grant or privilege imposing a duty of making available essential services demanded by the public, such as common carriers and Public Utilities; (2) occupations considered from the earliest times in common law to be exceptional, such as the operation of inns or cabs; and (3) businesses that although not public at their inception have become such by devoting their activities to a public use, such as insurance companies and banks. A business affected with a public interest remains the property of its owner, but the community is considered to have such a stake in its operation that it becomes subject to public regulation to the extent of that interest.”).

11. See James Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 254 (2002).

12. *Criminal Law*, WIKIPEDIA, http://en.wikipedia.org/wiki/Criminal_Law (last visited Sept. 11, 2012).

13. *Common Law*, WIKIPEDIA, http://en.wikipedia.org/wiki/Common_law (last modified Oct. 1, 2012, 17:15); *Civil Law (Common Law)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Civil_law_\(common_law\)](http://en.wikipedia.org/wiki/Civil_law_(common_law)) (last modified Oct. 1, 2012, 20:57).