Legal Traditionalism, Creative Destruction, and the Role of Media Law in the Intergenerational Social Contract

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Abstract: The intergenerational social contract contains what David Luban has called a “preservation” clause and an “innovation” clause. Virtually every question involving that contract must grapple with the tension between these two competing clauses. When Edmund Burke wrote of the “great primeval contract of eternal society,” he was speaking primarily of the “preservation” clause. When Joseph Schumpeter argued that capitalism contains within itself the revolutionary process of “creative destruction,” he was implicitly speaking of the “innovation” clause. In this article, I use media law cases to illustrate the tension between Burke and Schumpeter and the way in which law at times preserves established media institutions and at times furthers media innovation, both in service of the intergenerational social contract.