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ELECTORAL INTEGRITY: MEDIA, DEMOCRACY, AND THE VALUE OF SELF-RESTRAINT

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“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹

I. INTRODUCTION

Election night of the 2000 campaign for President of the United States produced what can only be described as high drama.² The contest between Governor George W. Bush and Vice President Al Gore resulted in the closest presidential race in the nation’s history.³ The contest’s resolution ultimately rested with the Florida electorate—a constituency enveloped in an atmosphere of extraordinary political tension.⁴ Questionable ballots and

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1. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

2. See Bob Greene, *The Most Impressive Things Are the Ones Strategists Can’t Shape*, CHI. TRIB., Dec. 18, 2000, at 1 (indicating that individuals worldwide anticipated the results of the Bush-Gore contest).

3. William Raspberry, *At the Church of the Democratic Party*, WASH. POST, Dec. 18, 2000, at A27 (setting out election statistics).

4. See Jo Becker, *Legislature Gears Up to Intervene in Race: Democrats Vow Court Fight over Electors*, WASH. POST, Nov. 30, 2000, at A23 (describing possible avenue for selection of Florida elec-

irregular vote tallies led to a seeming voters' malaise.⁵ Perhaps most disturbing were the media's fluctuating projections of the winner of Florida's pivotal electoral votes.⁶ These erroneous reports fueled voter confusion and heightened public anxiety over the campaign's ultimate result.⁷

The United States Supreme Court's surprising entry into the fray added an intriguing chapter to this saga. The Court's perplexing decision in *Bush v. Gore*⁸ not only terminated a Florida Supreme Court mandated recount of state ballots but seemingly provided a de facto election victory for Bush.⁹

Bush v. Gore has spawned predictable debate regarding the decision's propriety and jurisprudential integrity.¹⁰ Despite the Supreme Court's attempt to limit the opinion's applicability and scope, the case's impact on subsequent litigation continues unabated.¹¹ The controversial decision will likely inspire insightful academic commentary, yet the *Bush v. Gore* decision cannot be the sole analytical focus of the academy. The media's erroneous voter projections in the Florida race and the arguable effect of those errors on the electoral process remain equally contentious factors in the election debacle.

tors).

5. Dana Milbank, *Tragicomedy of Errors Fuels Volusia Recount*, WASH. POST, Nov. 12, 2000, at A22 (setting out irregularities in one Florida county).

6. Laurence H. Tribe, *Erog v. Hsub and its Disguises: Freeing Bush v. Gore from its Halls of Mirrors*, 115 HARV. L. REV. 170, 180-81 (2001) (noting the media's embarrassingly vacillating reports of Florida results in the 2000 election).

7. See Edward Walsh & Howard Kurtz, *Battleground State: Florida; Glitch in Tally Throws Contest Into Turmoil*, WASH. POST, Nov. 8, 2000, at A31; see also *infra* notes 21-28 and accompanying text (providing details of the events of election night 2000).

8. 531 U.S. 98 (2000) (deciding that the Florida Supreme Court's mandated recount of votes must be stayed pending a determination of whether the state's procedures conformed with Constitutional strictures of equal protection and that the time to conduct a constitutionally valid recount had lapsed).

9. Compare Charles Krauthammer, *Defenders of the Law . . .*, WASH. POST, Dec. 15, 2000, at A41 with Neil Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35 (illustrating two conflicting views of the Supreme Court's involvement in Bush-Gore contest). Note that media organizations continued the recount subsequent to the Supreme Court's decision in *Bush v. Gore*. According to a *Miami Herald* sponsored recount, Bush would have won those votes cast in Miami Dade County. See generally MARTIN MERZER ET AL., MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE (2001). Other sources reported charges that voting irregularities effectively denied segments of the Florida constituency, i.e., African Americans and other minorities, the right to vote. See *Latest Findings by U.S. Commission on Civil Rights Regarding Florida's Voting Problems* (National Public Radio broadcast, Mar. 9, 2001).

10. Analysis of the *Bush v. Gore* decision and its application of Fourteenth Amendment equal protection analysis to state voting procedures will continue to be profuse and contentious. See Einer Elhauge, *The Lesson of Florida 2000*, 110 POL'Y REV. 15 (Dec. 2001-Jan. 2002) (providing an indirect critique of the Supreme Court's resolution of the vote controversy in *Bush v. Gore* in stating that remedies imposed when "we know which candidate will benefit from any given resolution, is a recipe for disaster"); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1450-51 (2001) (noting as a prelude to general criticism of the *Bush v. Gore* decision that if blanket acceptance of a Supreme Court decision is synonymous with legitimacy, then the *Bush v. Gore* decision will not cause the Court to lose its "legitimacy or political capital"); but see Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadline and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 2 (opining that the Supreme Court's decision in *Bush v. Gore* was correct); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

11. See Jeffrey Ghannam, *Election Fallout*, 87 A.B.A. J. 93 (Apr. 2001).

The media's rush to scoop the winner of Florida's electoral votes, and the presidential campaign for that matter, led to erroneous projections that allegedly affected voter turnout and choices.¹² Vociferously harsh criticism of the media ensued.¹³ The industry's seeming abridgement of journalistic ethics¹⁴ and encroachment on democratic processes prompted governmental efforts to curb the media's impact.¹⁵ These efforts, however, often consisted of coercive tactics of dubious utility and constitutional validity.¹⁶

The brouhaha over the media's alleged impact on the 2000 presidential election raises a critical query: what strategies, if any, should decisionmakers employ to minimize the media's influence on elections? This query assumes greater relevance and urgency given the forthcoming presidential campaign in 2004.

My admittedly modest Article addresses this question through the examination of theoretical principles that define the media's role in a complex democratic society. A true democracy respects both personal liberties and those interests of the body politic.¹⁷ The media's legitimacy and utility hinge upon fulfillment of these democratic principles. In effect, the interests

12. See *infra* notes 21-55 and accompanying text (describing in detail the media's proclivity for error in projections of election results).

13. See Jonathan Z. Larsen, *Forty Years on a Roller Coaster*, COLUM. JOURNALISM REV., Nov./Dec. 2001, at 40 (providing a historical account of criticisms of newspapers, magazines, and television networks' coverage of major political events, including polling projections in the Bush-Gore contest); Marc Sandalow, *Devil's in the Details in Election Reform/Politicians Agree on Flaws*, S.F. CHRON., Aug. 1, 2001, at A2 (noting former President Jimmy Carter's criticisms of the networks' erroneous calls in the Bush-Gore contest in Florida and his belief that withholding polling information from voters in later time zones could enhance voter participation).

14. Various news organizations and many voluntary associations for journalists have endorsed ethical codes designed, *inter alia*, to seek the truth and ensure accuracy and fairness in reports of news events. For example, see Gannett Newspaper Division, "Principles of Ethical Conduct for Newsrooms" (1999); Associated Press Managing Editors, "Code of Ethics" (1995); Radio-Television News Directors, "Code of Ethics" (1987); American Society of Newspaper editors, "ASNE Statement of Principles" (1975); E.W. Scrupps Company, "Statement of Policy on Ethics and Professional Conduct;" and the Society of Professional Journalists' (SPJ) "Code of Ethics" (1996); which, roughly summarized, implore journalists to: (1) seek the truth and report it; (2) minimize harm to victims and similarly-situated third parties; (3) act independently to avoid conflicts of interest; and (4) remain accountable to readers or viewers. For more on the journalists' codes of ethics, see generally JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* (3d ed. 1999); see also Lou Hodges, *Rationale for the Proposed Code, and Other Concerns*, at <http://www.headlineclub.org/forum/ethics/rationale.html> (last visited July 31, 2003).

15. See *infra* notes 293-336 and accompanying text (providing details and analysis of governmental responses to erroneous projections by the media).

16. See *infra* notes 293-336 (describing efforts to curb the media's adverse impact on voter conduct).

17. I employ the term "body politic" as a euphemistic phrase that generally refers to the collective grouping of individuals in a democratic society. See CHARLES TAYLOR, *SOURCES OF THE SELF* 19-23 (1992) (stating that the body politic consists of individuals and communities which define the horizon within which the public good is discerned); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 898 (1999) (defining the body politic as "institutions of jurisdiction"); see generally A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960) (generally opining that First Amendment jurisprudence has shifted from the individual's right to self expression to an interest "inhering in the body politic"). For more regarding the interrelation between collective and individualized interests, see *infra* notes 131-45 and accompanying text (explaining a theory of democracy that recognizes the symbiosis between individual liberties and the interests of the body politic).

of society at-large are intertwined with the interests of individuals, both real and corporate.

A robust press, which is a libertarian manifestation, focuses public attention on the conduct of elected officials and generalized workings of government. This vital monitoring function theoretically secures *both* individual autonomy and the body politic's functionality. The actions of an unabashed free press can, however, mutate to frenzy, which connotes the industry's consuming quest for sensational news. This phenomenon potentially distorts the media's monitoring function and contributes to such misinformation as the erroneous Florida election results in the 2000 Bush-Gore contest.

Yet the media's penchant for frenzy¹⁸ and the possible manifestations from that phenomenon do not justify restraints on expressive freedom. This Article challenges the notion that the reporting missteps in 2000 compel imposition of restrictive safeguards on the media. Several premises support this view. From a theoretical perspective, the tenuous nexus between erroneous projections and electoral integrity should discourage the use of interventionist remedies. Even if employed, these remedies tend to run counter to democratic norms of personal autonomy and, thus, would have dubious constitutional legitimacy.

Perhaps the most compelling reason to avoid interventionist remedies lies within the natural corrective forces of the competitive market. Achievement of an expansive audience which contributes to favorable ratings depends largely upon the media's credibility. Consumers seeking reliable news gravitate toward trustworthy sources. Diminished credibility, which many major networks experienced after erroneous projections in the Bush-Gore contest, potentially reduces viewership and threatens audience loyalty. As a consequence, the competitive drive for an audience, the size of which relates directly to credibility, should naturally prompt the media to reform its reporting behavior.

Without external enforcement however, self-imposed reforms can, of course, be dubiously effective. I, nonetheless, posit that the media's consuming quest for a sizable audience credibility provides natural, market-based incentive for realistic industry self-restraint. Any effort designed to temper the media's purported negative impacts must respect the industry's expressive rights. Inherently integrated in those rights is the media's continual quest for attention-grabbing news and the frenzied behavior that inevitably ensues. Thus, any strategy to minimize the media's perceived negative impact on elections should employ tactics that exploit the industry's thirst for news. This basic strategy includes such proactive alternatives as reliance on voluntary self-restraint, the regulation of election mechanics, and dissemination of internally generated data that counters erroneous polling reports.

18. See *infra* notes 20, 78-103 and accompanying text (defining "media frenzy" and its importance in the comprehension of the media's motivations and resultant conduct).

Discussion of erroneous election reports and their possible effects on electoral processes commences with a review of context. Part II of the Article describes the media's affinity for exit polling, the history of erroneous projections in races other than the Bush-Gore contest, and divergent views regarding the effect of erroneous projections on voter conduct. Analysis of the media's proclivity for erroneous reports first requires some basic understanding of democracy and its conceptual underpinnings.

Liberty and autonomy, often associated with any democracy, can actually foster problems associated with media misinformation. Part III provides an explanation of these principles and their interrelation with the interests of the body politic. A pluralistic conceptualization of democracy fosters individual autonomy which, in turn, advances expressive freedom. Democratic theory and the pragmatic reality of First Amendment jurisprudence substantiates the disutility of governmental restrictions on the media's coverage of election results. Part III also notes the present dominance of an autonomy-based theory of democracy. The resulting inelasticity of the First Amendment paradigm and judicial adherence to a negative theory ensures the failure of most restrictions on the media's expressive rights. This analysis supports implementation of less restrictive, reformative strategies such as self-restraint.

Part IV of the Article evaluates various remedies that can ameliorate the effects of erroneous projections, with a notable preference for reliance on media self-restraint. Empirical support for this preference consists of a report of my experience and observations as a specially invited guest of the Cable News Network (CNN) on the night of the 2002 midterm election returns. My direct witness of CNN's (and, to a more limited extent, other networks') cautious deliberations on when to call contests on the November 5, 2002 election night confirms the reality and efficacy of the media's self-restraint. Other less restrictive yet permissible strategies discussed in Part IV feed into the media's proclivity for news. These strategies include proactive dissemination of reliable information to the media and procedural changes in voting mechanics. Despite their pragmatic limitations, these tactics constitute viable means to address perceptual problems associated with the media's impact on the electoral process.

Expressive freedom, which legitimates the media's quest for sensational news such as presidential elections, assures a certain inevitability of reporting errors. This sobering reality remains an unavoidable and tolerable operative of the industry's essential function within a democracy. Yet self-restraint and similar non-restrictive mechanisms, which are also manifestations of autonomy, potentially check the behavior that leads to erroneous reports. Governmental decisionmakers should recognize these foundational premises if they contemplate remedial action. Tactics that restrain expression must give way to more inventive methodologies—those that achieve a viable balance between individualized liberties and the collective interests of the body politic. Such a strategy should not only ensure electoral integrity but also preserve the media's unique role in a complex democracy.

II. THE CONTEXT OF ELECTION COVERAGE—FRENZY, ERROR, AND ALLEGED EFFECTS

A. *The Bush-Gore Election Night Scenario*

The study of any societal construct, whether it be an instrumentality such as media or a behavioral structure such as rule of law, requires an examination of its context.¹⁹ This postulate becomes the focal point of my central thesis: that certain elections, particularly presidential elections which have potentially vast political consequences, naturally garner considerable public attention. The sensational nature of high profile election campaigns often transforms media coverage into frenzy, a phenomenon that contributes to distorted or erroneous news reports.²⁰ As the following chronology demonstrates, the media's schizophrenic-like coverage of the Bush-Gore results on election night documents the industry's propensity for frenzy.

On Tuesday, November 7, 2000, at 7:50 p.m. EST, the major networks declared Al Gore winner of the critical state of Florida in the presidential race. This announcement came three hours and ten minutes before polls closed in western states and approximately an hour before poll closures in portions of the Florida panhandle.²¹ At 9:55 p.m. that same evening, the networks retracted their projections of a Gore victory, admitting that the data on which they based their previous report had been faulty.²² Fox News,

19. Many scholars acknowledge the importance of context as a critical component in legal analysis or deconstruction. See, e.g., WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 278-300 (1973) (denoting Llewellyn's embrace of context in the analysis of statutory law); David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 159-60 (1988); John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 267 (2000) (noting Karl Llewellyn's appreciation of the importance of context in the scope and application of commercial law); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 375-77 (1990); Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. OF RACE & L. 1, 5 (1998) (positing a realist view of contract law and the importance of context as an evaluative criterion of contractual rules); Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 264 (1999) (explaining Wigmore's recognition of the importance of law in social context); Carole Silver, *Adventures in Comparative Legal Studies: Studying Singapore*, 51 J. LEGAL EDUC. 75, 89 (2001) (noting the importance of studying law in its context, particularly in comparative or international courses or curriculum); see generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). For commentary on the relevance of context in contemporary media law, see David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel*, 23 U. ARK. LITTLE ROCK L. REV. 201, 201 (2000) (observing the influence of the 24-hour news cycle, the context of which prompts journalists "to publish first and verify later").

20. LARRY SABATO, *FEEDING FRENZY* 6 (1991) (stating that "feeding frenzy" relates to the press's obsession with more trivial aspects of a public interest matter, leading the press to focus on "gossip rather than governance" and "titillation rather than scrutiny").

21. Susan E. Seager & Laura R. Handman, *Congress, the Networks, and Exit Polls*, 18 COMM. L. 1, 31 (Winter 2001).

22. Elizabeth Jensen, *Decision 2000 / America Waits ABC News Acts to Avoid Election Gaffes*, L.A. TIMES, Nov. 23, 2000, at A27 (citing "bad exit poll information" as a contributing cause to ABC's erroneous projections on election night 2000); *News Group Admits Poll Errors / Probe Also Reveals Use of Risky Techniques*, NEWSDAY, Dec. 24, 2000, at A07 (noting that the Voter News Service's technique employed to assess polling information was suspect and led to questionable data on which the networks

followed in rapid succession by the other networks, later announced George W. Bush winner of Florida's electoral votes and the United States presidency.²³ Before dawn the next day, all major networks declared the Florida contest "too close to call."²⁴

Some believed that the media's initial reports of results in the Florida contest created the illusion of a Gore victory. This miscue allegedly chilled Republican voter desire in parts of Florida and states situated in later time zones. Others opined that reports of a Gore victory contributed to losses by Republican candidates in key Congressional races.²⁵ Some polling experts scoffed at the notion that exit poll reports could trigger significantly lower voter turnout. Others, however, found the media's erroneous projections in Florida irresponsible since a voting margin of less than one-quarter of one percent between the candidates defied any credible projection.²⁶ The statistical dead heat prompted the Florida Secretary of State's announcement of a recount as required by state law.²⁷

The Bush-Gore election saga on November 7, 2000 prompted speculation that the media's erroneous reports hampered the electoral process.²⁸ As described in more detail below, the media's dubious history of erroneous reports in election contests lent credence to this view.

B. Media's Half-Century History of Erroneous Projections

Erroneous electoral projections by the media are not new phenomena. In fact, such reporting gaffes have a noteworthy history.

NBC mistakenly declared challenger Tom Dewey the winner over incumbent President Harry Truman in their 1948 presidential contest.²⁹ The accuracy, speed, and breadth of dissemination related directly and propor-

relied at their peril).

23. Jensen, *supra* note 22.

24. Martha T. Moore, *TV, Newspaper Get Big One Wrong: Vote Projections Err One Way, Then the Other*, USA TODAY, Nov. 9, 2000, at 14A.

25. See, e.g., Letter from W.J. "Billy" Tauzin, Member of Congress, to Michael Eisner, CEO of The Walt Disney Co. (Nov. 9, 2000). Representative Tauzin sent copies of this letter to the chiefs of NBC, ABC, CBS, Fox, Associated Press, and CNN.

26. Seager & Handman, *supra* note 21, at 31.

27. See generally Bush v. Gore, 531 U.S. 98 (2000). A subsequent recount by news organizations revealed that George W. Bush would have won the Florida electoral votes and, of course, the presidency. See E.J. DIONNE JR. & WILLIAM KRISTOL, BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (2001); Dennis Cauchon, *Special Report: Newspapers' Recount Shows Bush Prevailed in Florida Vote*, USA TODAY, Apr. 4, 2001, at A1; Joel Englehardt, *Newspapers Failed to Find Clear Victor*; Martin Merzer, *Review Shows Ballots Say Bush*, MIAMI HERALD, Apr. 4, 2001, at A1; *Miami Herald Review Declares Both Bush, Gore as Winner*, MILWAUKEE J. SENTINEL, Apr. 8, 2001, at A8; John Podhoretz, *Bush Still Wins: The Supreme Court Was Right*, N.Y. POST, Apr. 6, 2001, at 29.

28. See, e.g., Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1360-61 (2001) (providing the narratives of two voters who, on their way to the polls, decided not to vote because they had heard media reports that Gore carried Florida and were "convinced that [their] vote[s] would be meaningless") (alterations in original).

29. MARTIN PLISSNER, THE CONTROL ROOM: HOW TELEVISION CALLS THE SHOTS IN PRESIDENTIAL ELECTIONS 69 (1999).

tionally to advancements in informational technology.³⁰ Four years later, both CBS and NBC employed computer technology which contributed to the accurate election night report that Dwight D. Eisenhower defeated Adlai Stevenson for the presidency.³¹ In succeeding years, the networks spent millions of dollars for polling equipment and expertise. This investment would have led to speedier and presumably accurate election reports. In early 1964, CBS pollster Lou Harris made first use of an exit poll, which enabled CBS to announce Barry Goldwater as the winner of the Republican nomination for president.³²

This historical account of exit polling revealed the media's twofold objective: (1) become the first source to declare the winner of an electoral contest and (2) stimulate substantial public interest, which commensurately increases viewership or readership. CBS initially asserted that its use of polling machines and statistics served only to *estimate* the winner of the 1964 presidential race.³³ On election night, however, the network's use of that data went beyond mere estimates. At 9:04 p.m. EST, CBS news anchor Walter Cronkite announced that Lyndon Johnson was the President-elect.³⁴ Only twenty percent of the national popular vote had been counted when Mr. Cronkite made his announcement.³⁵

Despite erroneous projections in contests during the 1960s and 1970s, the networks' election night practices did not spark major controversy until the 1980 presidential election.³⁶ Relying on exit poll information and other indicators, NBC announced at 8:15 p.m. EST that Republican challenger Ronald Reagan had already won twenty-two states.³⁷ Those predicted victories provided Mr. Reagan with 270 electoral votes—enough to defeat the incumbent President Jimmy Carter.³⁸ At the time of NBC's announcement, however, voting polls in at least twenty-three states remained open for another two hours and forty-five minutes.³⁹ ABC and CBS then hastily followed NBC with pronouncements of Reagan as the upset winner.⁴⁰ At approximately 9:45 p.m. EST, one hour and fifteen minutes before the polls

30. Jennifer D. Choe, *Interactive Multimedia: A New Technology Tests the Limits of Copyright Law*, 46 RUTGERS L. REV. 929, 930-32 (1994) (discussing advancements in communication and multimedia technologies, effects of these technological advancements, and problems these advancements raise in copyright law).

31. PLISSNER, *supra* note 29, at 70.

32. *Id.* at 81-82.

33. Seager & Handman, *supra* note 21, at 30.

34. PLISSNER, *supra* note 29, at 77.

35. *Id.* The election became a landslide for Johnson; therefore, the networks' early projections were never in doubt and could not have had an appreciable impact on the outcome. *Id.*

36. Seager & Handman, *supra* note 21, at 30.

37. Clyde Spillenger, *Early Election Projections, Restrictions on Exit Polling, and the First Amendment*, 3 YALE L. & POL'Y REV. 210, 212 (1984).

38. *Id.* (stating that, at 8:15 p.m. election night 1980, NBC could predict from exit polls that Reagan would garner the 270 electoral votes needed to win the presidency); *see also* Stephen M. Leonardo, *Restricting the Broadcast of Election-Day Projections: A Justifiable Protection of the Right to Vote*, 9 U. DAYTON L. REV. 297, 297 (1984) (stating the same).

39. *See* PLISSNER, *supra* note 29, at 84.

40. Seager & Handman, *supra* note 21, at 30.

closed in California and other western states, President Carter delivered his concession speech.⁴¹

Criticism of the networks' rush to announce the contest's winner immediately ensued.⁴² Democrats seemed to voice the most vehement complaints.⁴³ Premature news of a Reagan victory allegedly discouraged Democratic voter turnout in the West.⁴⁴ Some asserted that the networks' announcement contributed to incumbent losses in several key Congressional contests.⁴⁵ Virtually all critics echoed a common theme: the media's zeal for speedy projections had a deleterious impact on the electoral process.⁴⁶

Over time, the media's dependence on exit polls became prohibitively expensive.⁴⁷ The need to cut costs prompted major networks such as ABC, NBC, CBS, and CNN to pool their resources to support one shared exit poll data service.⁴⁸ Voter News Service ("VNS"), the networks' shared data service, conducted and extrapolated polling data and actual election day returns.⁴⁹ Individual networks continued to announce election results independently.⁵⁰ They based their announcements, however, on pooled data analyzed by their own consultants.⁵¹ This practice preserved competition, thereby challenging the networks to become the first to declare an election victor.⁵²

Pooled resources and shared data failed to silence critics.⁵³ Instead of enhanced accuracy, the system contributed to a seeming recklessness that led to vacillating election reports on November 7, 2000.⁵⁴ The media's conduct that evening focused considerable attention on the industry's tendency for erroneous projections.⁵⁵ The dilemma's complexity included not only media's propensity to err but also the possible effect of those errors on voter conduct.

41. *Id.* Reagan ultimately won the 1980 presidential campaign with 489 electoral votes. Carl M. Cannon, *Goose Bumps and Omens*, NAT'L J., Jan. 12, 2001, available at 2001 WL 7181557.

42. Seager & Handman, *supra* note 21, at 30.

43. *Id.*

44. *Id.*

45. *Id.*

46. See Leonardo, *supra* note 38, at 297.

47. For the 1989-1992 election cycle, the projected election unit budget for CBS alone was \$21 million. Seager & Handman, *supra* note 21, at 30; see also PLISSNER, *supra* note 29, at 86-87.

48. Seager & Handman, *supra* note 21, at 30 ("Eventually, Associated Press and Fox joined the consortium.").

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See *id.* at 30-31.

54. See *id.*; see also *supra* notes 21-28 and accompanying text (noting the circumstances and events of election night, November 7, 2000). VNS's dubious reliability was dramatically exposed on the night of the 2002 mid-term election returns. See *infra* notes 353-56 and accompanying text (explaining VNS's virtual collapse on election night 2002).

55. See *supra* note 13 and accompanying text (delineating subsequent criticisms of the media's conduct during election night 2000).

C. *The Alleged Impact of Reporting Errors on Voter Conduct*

Despite the cacophony of criticism associated with the media's erroneous projections, few empirical studies demonstrate a clear nexus between election night reports and voter conduct.⁵⁶ In several studies the areas exposed to the early projections while polls remained open experienced a two to three percent decline in voter participation.⁵⁷ A study of Oregon voters in the November 1984 presidential election found little perceptible impact of network projections on voter participation.⁵⁸ Of the 639 people who did not vote, fewer than three percent stated that early projections by the networks influenced their decision whether to cast a ballot.⁵⁹ Other analysts reported that network projections failed to affect voter turnout but influenced voter preferences.⁶⁰ The information supporting these conclusions is, however, anecdotal in nature.⁶¹

On the other hand, certain data demonstrated the effect of the media's projections on the perceptions of those who intended to vote but had not done so prior to dissemination of election projections.⁶² Early projections from exit polling seemingly convinced voters in later time zones that their participation in the process was meaningless or unnecessary.⁶³ Some critics claimed that projections cause voters in states with open polls to either forego voting completely or change their preferences based on broadcast exit poll results.⁶⁴ Anecdotal evidence gleaned subsequent to the November 7, 2000 election night reports supports this conclusion. An anonymous voter in Florida reported that he cancelled plans to vote in the Bush-Gore contest after hearing the network projection that Gore would carry the state.⁶⁵ Pri-

56. Seager & Handman, *supra* note 21, at 31.

57. See *Election Day Practices and Election Projections: Hearings Before the Task Force on Elections of the Comm. on House Administration and the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong. 151-56 (1982) [hereinafter *Election Day Hearings*].

58. Seager & Handman, *supra* note 21, at 31.

59. *Id.*; see also Fred Rothenberg, *Source Says Networks Agree to End Exit-Poll Characterizations*, ASSOCIATED PRESS, Jan. 17, 1985.

60. Anthony M. Barlow, Comment, *Restricting Election Day Exit Polling: Freedom of Expression v. the Right to Vote*, 58 U. CIN. L. REV. 1003, 1006 (1990). Voter preferences based on false or misleading information has an impact on the integrity of the electoral process. See Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1928-29 (1985).

61. Seager & Handman, *supra* note 21, at 31. Martin Plissner, former political director of CBS News, said that "[n]o verifiable example has ever turned up" of any Western voter abandoning an intent to vote because of the early announcement that Carter had lost the 1980 presidential race. PLISSNER, *supra* note 29, at 84.

62. Leonardo, *supra* note 38, at 299-300.

63. *Id.*; see generally Barlow, *supra* note 60, at 1004; Mary A. Doty, Comment, *Clearing CBS, Inc. v. Smith from the Path to the Polls: A Proposal to Legitimize States' Interests in Restricting Exit Polls*, 74 IOWA L. REV. 737 (1989); Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1928-29 (1985); Wallace Turner, *How the West was Made to Feel that its Votes Would Not Count*, N.Y. TIMES, Nov. 6, 1980, at A32.

64. See Spillenger, *supra* note 37, at 213.

65. Seager & Handman, *supra* note 21, at 31. In response, an election official allegedly stated that the voter's conclusion was "a perfect excuse for that lazy slob." *Id.* (quoting Associated Press, *Group Sues over Gore Projections*, WASH. POST, Nov. 14, 2000, available at 2000 WL 29041075). See also

marily, this anecdotal and perceptual basis for the media's impact on voters, particularly those in later time zones in the West, primarily triggered the government's pursuit for a regulatory cure.⁶⁶

Proof of the palpable impact of erroneous projections on the electoral process, however, is elusive at best. The equivocal results of studies and the lack of definitive evidence of the media's influence do not, however, end the debate. The effect of the media's projections on voter conduct seems somewhat intuitive.⁶⁷ Furthermore, the potential impact from media errors in key contests such as Bush-Gore, coupled with perception that those errors influence voters, potentially compromise the public faith in the democratic process.⁶⁸ As explained more cogently below, the totality of this pathology has its genesis in the demands of a competitive free market.

D. *The Probability of Error—The Quest for Ratings*

In a perfect world, a free press ensures the body politic's legitimacy through its monitoring function.⁶⁹ A superficial view of the Press Clause implies that the right to disseminate informs the public of governmental action and serves to check legislative and executive decisionmakers.⁷⁰ During political campaigns, media reports theoretically inform the public of prevalent campaign issues and the generalized function of the electoral process.⁷¹ The unabashed flow of information contributes to a society's democratic legitimacy and ultimately fosters individual autonomy.⁷²

supra note 28 and accompanying text (providing narratives of voters who decided not to vote after hearing reports of a Gore victory in Florida).

66. For related commentary regarding governmental tactics designed to minimize the effects of projections on voters in Western time zones, see *infra* notes 311-16 and accompanying text (providing details of actions to curb the effects of early projections on voters in later time zones).

67. For more regarding the intuitive impact of the television medium, particularly on the behavior of court participants, see *Estes v. Texas*, 381 U.S. 532, 550 (1965). See generally Blake D. Morant, *Resolving the Dilemma of the Televised Fair Trial: Social Facilitation and the Intuitive Effects of Television*, 8 VA. J. SOC. POL'Y & L. 329 (2001).

68. See Barlow, *supra* note 60, at 1006.

69. Lyrrisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 231 (1998) (recognizing that the media "monitor[s] the performance of the official branches of government" and, thus, becomes the "Fourth Estate" of government).

70. *Id.*

71. For more regarding the media's monitoring function, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 562 (espousing the press as a monitor of government, thereby allowing members of the body politic to pursue private goals and objectives). For commentary relevant to the ability of the press to educate the public through coverage of criminal proceedings, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). See also Susan E. Harding, Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827, 846-47 (1996); Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1539-41 (1996); Dolores K. Sloviter, *If Courts Are Open, Must Cameras Follow?*, 26 HOFSTRA L. REV. 873, 877 (1998); Nadine Strossen, Transcript, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, 26 U. TOL. L. REV. 647, 654 (1995).

72. See *infra* notes 105-07 and accompanying text (discussing the media's First Amendment right under the Press Clause to disseminate information). For more regarding the media as a check on government, see *infra* Part III of this Article.

The world, however, is far from perfect.⁷³ Free market dynamics encourage media sources to scurry for reports of sensational events that ensure a larger audience.⁷⁴ This context creates fertile ground for misinformation.⁷⁵ The natural competitive forces of a free market compel dissemination of sensational stories and controversies.⁷⁶ Significance, relevancy, and to some extent, accuracy, seemingly become minor considerations for publication.⁷⁷ The media's rush for information often leads to frenzy, a phenomenon that describes the media's craving for news designed to increase viewership or readership.⁷⁸ Frenzy obscures the media's educative motive which is subjugated by the drive for profits that a large audience delivers.⁷⁹

Presidential elections are, by their very nature, sensational events. Mere entry into a contest for the presidency transforms candidates into public figures with larger-than-life personas.⁸⁰ During a campaign, parties and candidates seem to court the press, particularly broadcast media, to maximize contact with a large pool of potential voters. Curiosity generated by the candidates' notoriety, together with the breadth of societal consequences from a presidential election's outcome, ensures extraordinary public interest.⁸¹ Election night becomes a potential ratings bonanza for network broadcasters.⁸² The probability of an enormous viewing audience likely encouraged coverage of the Bush-Gore election night results by major networks as ABC, CBS, CNN, NBC, and PBS.⁸³

73. See Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM. & ENT. L.J. 453, 455-56 (1996) (noting that context, particularly as it intersects with legal rules, confirms that "the world is not perfect").

74. See SABATO, *supra* note 20, at 56 (stating that ratings and circulation "increasingly matter").

75. See *id.* at 3 (observing that most Americans no longer believe that the press gets the facts straight).

76. See *id.* at 56-59 (describing the media's competitive pressures).

77. See *id.* at 23-24 (describing news frenzies' threat to press credibility).

78. See *id.* at 6 (stating that "feeding frenzy" relates to the press's obsession with more trivial aspects of a public interest matter, leading the press to focus on "gossip rather than governance" and "titillation rather than scrutiny"); see also *infra* notes 80-103 and accompanying text (providing the characteristics of the high-profile case).

79. See SABATO, *supra* note 20, at 200 (describing the adverse effects of increased competition on the press).

80. Pursuant to traditional jurisprudential notions, a public figure generally is one who has significant fame or notoriety or, in a more limited scope, has thrust herself into the "'vortex' of the controversy" or involuntarily placed herself in the media limelight by chance or against her will. See *generally* *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986). The concept of public figure usually arises in the tort of defamation, the elements of which include injury to reputation caused by published misrepresentations that place an individual in a bad light. RESTATEMENT (SECOND) OF TORTS § 558 (1977); see also WILLIAM A. PROSSER & W. PAGE KEETON, *TORTS* 773 (5th ed. 1984). With regard to the high-profile feature of "public figure," I borrow loosely from the federal common law definitions to indicate that individuals with notoriety, independent of the legal matter in which they are involved, can be the primary factor that attracts public and media attention.

81. See SABATO, *supra* note 20, at 84 (describing the searing heat of the presidential spotlight).

82. See *Election Day Hearings*, *supra* note 57, at 1311 (recognizing the connection between networks' early projections and their competitive interests in higher ratings).

83. See Virginia Carroll et al., *The Media in the Eye of an Electoral Storm*, NORTHWESTERN UNIVERSITY CONFERENCE REPORT, ELECTION 2000: THE ROLE OF MEDIA, Jan. 11-12, 2001, at 19.

The quest for sensational news and high viewership prompts the media's focal shift from social policies to election outcome.⁸⁴ Issues that formed the substantive basis for campaigns become more superfluous.⁸⁵ Exit polling and the dissemination of polling results, thus, gain center stage.⁸⁶ Experts who analyze any available information become central figures on a night tactically designed to increase ratings.⁸⁷ This ethos motivates broadcast networks to project a campaign's winner, regardless of whether all votes in the contest have been counted.⁸⁸

Various hot-button issues in the 2000 presidential election heightened the event's sensational quality. Butterfly ballots, predictions related to the overseas military vote, and partisan squabbling in Palm Beach, Florida piqued viewer interest.⁸⁹ Of course, sensationalism bred more sensationalism. Coverage of the Florida election included an unsubstantiated yet titillating exposé of an alleged affair between Katherine Harris, Florida's Secretary of State, and Governor Jeb Bush, brother of the Republican hopeful for the presidency.⁹⁰

Bush-Gore election night coverage did include informative, less sensational stories as well. The media reported on possible voting fraud related to absentee ballots and vague voter eligibility requirements in Chicago.⁹¹ Another noteworthy story focused on Florida state trooper road blocks that intimidated African-American voters and the failure to turn in registration cards completed by students at Florida A&M University, a historically black institution.⁹² News analysts discussed the electoral college's function, including the votes needed to prevail, identity of the electors, and historic advantages of this system over a straight popular vote.⁹³ Retrospectives on previous close presidential contests such as Jefferson-Adams, Hayes-Tilden, and Kennedy-Nixon added a historical dimension to certain coverage. Some polling reports included the candidates' showing in specific voting districts and states. Candidates' avowed political ideologies, as compared to their voting records while in previous elected office, provided some substantive content to broadcast commentary. Analysts examined the candidates' appeal

84. See SABATO, *supra* note 20, at 29 (observing that as the news business grew, its focus shifted from opinion to securing profits).

85. See *id.* at 200-01.

86. Seager & Handman, *supra* note 21, at 30 (noting that networks' most obvious use for exit polls was to predict winners in elections).

87. See *id.* (noting that exit poll information became the subject of academics and pollsters who looked to the data for information on why people voted).

88. See Carroll et al., *supra* note 83, at 20-21.

89. See Heather Brewer, *Snap Judgments*, BUS. L. TODAY, Mar.-Apr. 2001, at 4 (denoting the "nonstop news coverage of dimpled chads and butterfly ballots"); Patricia Conley et al., *Choosing the American President: Does the Electoral College Remain Secureable?*, NORTHWESTERN UNIVERSITY CONFERENCE REPORT, ELECTION 2000: THE ROLE OF MEDIA, at 18.

90. Carroll et al., *supra* note 83, at 22.

91. *Id.* at 22-23.

92. *Id.*

93. For example, see ABC, CBS, and CNN live news coverage of the 2000 campaign for the Presidency of the United States of America, Nov. 7, 2000.

to voters of particular races, ethnicities, religions, and employment backgrounds. Despite their more substantive nature, these reports seemed more filler than featured reporting.

Practical considerations related to profit and financial gain undergird the media's focus on sensational news. Minimization of production costs and the attraction of large audiences that provide high ratings have driven the broadcast industry's programming agenda. Over the past fifteen to twenty years, networks have increased the number of reality-based and news magazine-type programming. Networks likely gravitate toward these programs because of their lower production cost and increased audience appeal. In an effort calculated to attract viewers, more titillating and sensational stories have become *de riguer* in many of these news magazines.

This drive for ratings and profit seems a natural incentive for the media's coverage of election results.⁹⁴ Declaring the winner of a close, critical contest naturally attracts public interest which, in turn, increases ratings. The first to make such an announcement is more likely to reap the reward of a large audience. An urgency to declare a winner inevitably ensues, and the probability of erroneous projections increases. Misinformation contributes to public confusion and potentially influences voter behavior. These latter manifestations lead to predictable criticisms such as those lodged after the media's performance during the Bush-Gore election night.⁹⁵

The pathology of network competition often manifests more subtle effects. Anchorpersons and newsreaders, acutely aware of the need to appease a vast audience, can become obsessed with performance quality.⁹⁶ Appearance and overplay apparently trump effective journalistic content. Perhaps the magnitude of election night coverage contributed to Tim Russert's repeated use of the ubiquitous white board, Dan Rather's numerous similes, or Chris Matthews's high decibel banter. Social psychological principles might explain this conduct to some extent. The theory of self-presentation generally relates to an individual's awareness of scrutiny by a vast audience and the self-imposed objective to appease that audience.⁹⁷ This cognitive rationalization prompts behavior designed to achieve audience recognition and

94. See Carroll et al., *supra* note 83, at 21 (commenting that the networks' rush to declare a winner in the Bush-Gore contest and resultant errors in reporting were due in large measure to the quest for high ratings).

95. See *supra* notes 62-65 and accompanying text (providing general opinions on the effect of the networks' erroneous projections of the winner of Florida's electoral votes in the Bush-Gore context).

96. Social psychologists refer to this tendency to appeal to an audience as self-presentation, a theory of social facilitation. This theory postulates that the actor's innate need to maintain a positive public or self-image impacts the performance of her tasks. See Charles F. Bond, Jr., *Social Facilitation*, *ENCYCLOPEDIA OF PSYCHOLOGY* 339 (2000) [hereinafter Bond, *Social Facilitation*]. Impairment related to possible embarrassment from acts performed before an audience becomes a critical variable. *Id.*; Charles F. Bond, Jr., *Social Facilitation: A Self-Presentational View*, 42 *J. PERSONALITY & SOC. PSYCHOL.* 1042, 1042 (1982) [hereinafter Bond, *Self-Presentational View*] (noting that the self-presentational theory attributes facilitation to the performer's active regulation of a public image and impairment from embarrassment following a loss of public esteem).

97. See Bond, *Social Facilitation*, *supra* note 96.

approval.⁹⁸ Presentment strategies prompted by the election night's significance were not confined to newsreaders. ABC's use of a multi-tiered, attention-grabbing set appeared unusually garish when compared to the sets of its regular newscasts.⁹⁹

Criticism based solely on the media's propensity for frenzy and ratings seems somewhat specious, however. Democratic principles of autonomy and freedom naturally support and, in fact, fuel the media's competitive nature.¹⁰⁰ Despite arguments grounded in journalistic responsibility,¹⁰¹ the media in a democratic society should have sufficient latitude to report unabashedly without fear of restraint.¹⁰² The social utility of a robust press, which theoretically informs constituencies of governmental functions, buttresses this premise.¹⁰³ As explained in more detail below, these core democratic principles beg a certain tolerance for the media's behavior which, at times, leads to erroneous reports.

III. THE CONSTRUCTS OF MEDIA—DEMOCRACY, PRESS FUNCTION, AND NORMATIVE JURISPRUDENCE

A. *The Various Theories of Democracy—Toward a Pluralistic Form of Democracy*

A critique of the media's alleged impact on societal processes such as elections requires an examination of the industry's function within a modern democratic society.¹⁰⁴ Certain libertarian principles become focal points in this exercise. Any true democracy presupposes a society made up of individuals who universally enjoy some semblance of "life, liberty, and the pursuit of happiness."¹⁰⁵ Within the construct of liberty is the First Amend-

98. Bond, *Self-Presentational View*, *supra* note 96, at 1042.

99. For more regarding the influence of significant media events on the performance of those before a television camera, see generally Morant, *supra* note 67.

100. See *infra* notes 104-35 and accompanying text (explaining personal autonomy as a critical component of democracy).

101. See *supra* note 14 and accompanying text (citing to the various journalistic codes of ethics).

102. See C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107, 1114-33 (2001) (examining the role of a free press in a free society and the personal and societal implications of restraints on publicized trial participants as well as on the news-gathering process). For more regarding the prior restraint doctrine, see *infra* notes 162-64 and accompanying text.

103. See *supra* notes 68-71 and *infra* notes 153, 363 and accompanying text (theorizing the media's role as a check on governmental authority and its general educative function).

104. See C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 317 (1998) [hereinafter Baker, *Media that Citizens Need*] (opining that comprehension of the problems generated by the media demands an analysis of the nexus between democracy and free press).

105. See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 716 (2001) (noting that Aristotle's concept of democracy was one in which all citizens are "to rule and be ruled in turn") (citations omitted). The author posits that representative governments developed by the Western cultures owe nothing to this early form of democracy but, instead, can be seen as a form of mixed government. *Id.* at 718-21. See also *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (opining that under a democracy, even fundamental rights [such as life, liberty, and the pursuit of happiness] may be restricted to protect a state from destruction, or serious political, economical, or moral injury); Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 150-51 (1994) (noting that the Western concept of democracy, based on an

ment's guarantee of free speech and press which represents a fundamental construct in the broad conceptualization of democracy.¹⁰⁶ Individual entitlement to expressive liberty fosters and empowers the media. This autonomy-based view of liberty grants the media broad discretion in the selection of information it disseminates. This strict libertarian view captures the essence of Professor Ronald Dworkin's thesis that an individual's expressive liberty factors as a normative construct of any democratic society.¹⁰⁷ Liberty also includes the classical, Aristotelian philosophy of an informed and educated citizenry and the appreciation for a balance of individual goals and desires.¹⁰⁸ If personal, expressive autonomy is a paramount concern, then it must be shielded from governmental restriction—the cornerstone credo of a negative theory of free speech.¹⁰⁹

electoral system in which the people can elect and periodically remove the leaders, creates an environment conducive to the notion of the rights of the individual and a balance of power between the government and the governed).

106. The First Amendment of the U.S. Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. "Press," as it is stated in the Constitution, constitutes a relatively generic term that encompasses a variety of media forms. In this Article, I primarily use the term "media" to signify those sources in the genre of press that assemble polling results and disseminate election projections. This class of press primarily encompasses broadcast media which were the primary disseminators of erroneous projections in the Bush-Gore contest and hastily announced winners of the Johnson-Goldwater and Reagan-Carter contests in 1964 and 1980, respectively. *See supra* notes 32-46 and accompanying text (providing details relevant to the media's coverage of the Johnson-Goldwater and Reagan-Carter campaigns). My employment of the term "media" is not meant to suggest that forms other than broadcast, i.e., print, should be discounted in the analysis. In fact, history has demonstrated print media's manifestation of the pathology of erroneous projections. *See supra* note 29 and accompanying text (noting the erroneous projection of Thomas Dewey as the winner of the Truman-Dewey contest in 1948). Nonetheless, broadcast media's technologically advanced speed of transmission and ubiquitous nature make it the primary object of this Article. My caveat here also recognizes two important credos. First, media are not fungible, with each medium of communication constituting a "law unto itself." *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Second, the First Amendment paradigm applies differently to various forms of media. *See generally* *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

107. *See* RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (1996) (recognizing the value of autonomy as a fundamental value of the First Amendment, with freedom of expression as a furtherance of individual will). Other scholars provide insight into the bounds of libertarianism as it applies to free expression. Summarily stated, libertarianism assumes an absolutist view which, as Professor Harry Kalven, Jr. writes, requires that speech must be protected "for all, [or] we will have it for none." *See* Victor C. Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RTS. L. REV. 1, 15 (2001). *But see* LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 57 (1986) (opining that libertarian theory's weakness is the protection it affords those who seek to destroy the values of free speech of others); *see also* Richard Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 71-75 (1992). For distinctions between libertarian and democratic theories of speech, *see* OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996).

108. WOLFGANG VON LEYDEN, *ARISTOTLE ON EQUALITY AND JUSTICE* 81, 82-83 (1985) (noting Aristotle's view that democracy includes the "moral training and habit-formation for the development of a citizen's sense of law-abidance" and for a just application of the principle of "equality" and "character formation" which leads to an "equalization of desires").

109. For more regarding the negative theory of the First Amendment, *see infra* notes 166-80 and accompanying text. Justice Stephen Breyer, during an address at the New York University Law School, recently commented on the bounds of this libertarian notion of free speech. Justice Breyer posits that the Constitution seeks a democratic government as well as the individual's negative freedom from governmental restraint. He believes that when facing questions of constitutional concern, the Court should heed

To define democracy solely in terms of autonomy seems disingenuous since autonomous individuals exercise their rights within the collective unit of a society.¹¹⁰ That reality, coupled with the media's role as monitor of democratic processes such as elections, compels the development of a more precise theory of democracy.¹¹¹ Of course, theories that de-emphasize autonomy abound,¹¹² and endorsement of any one theory as the true normative construct would be highly debatable. A cursory review of these theories with an eye toward their commonalities should, nonetheless, assist in the discovery of precepts that are generally relevant to the media.

One theory that de-emphasizes individual autonomy focuses on the security of democratic processes through the universal participation by members of society. Commonly referred to as civic republicanism,¹¹³ this theory places significant emphasis on the security of democratic processes through an egalitarian notion of expressive liberty. In effect, true democracy requires that all constituent groups enjoy meaningful participation in the processes of the body politic. Professor Owen Fiss, a prominent civic republican, posits that preservation of societal self-governance should be the consummate goal of any democracy.¹¹⁴ Personal autonomy becomes ancillary

this underlying purpose of the Constitution and promote an active and constant participation in collective power. See generally The Honorable Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

110. For more on "society," see *infra* note 141 and accompanying text.

111. Baker, *Media that Citizens Need*, *supra* note 104, at 318. Professor C. Edwin Baker, whose profound scholarship in this area I accord full attribution, provides persuasive commentary regarding the need to define "free press" in terms of the role or purpose of that freedom within a democratic society. Professor Baker begins this inquiry with a pivotal question which I paraphrased in the text of the Article: If the Press Clause were designed to ensure democracy, then how should we interpret the clause? *Id.* That inquiry, together with my subsequent description of the democracy's features, provides the theoretical foundation for the discussion of the media's appropriate role in society.

112. Professor Baker identifies four theories of democracy: elite (centralized theme of governmental legitimacy); liberal pluralism (characterized by deference to individual equality and autonomy); republican (focuses on the common good and citizens' concern for the welfare of others); and complex democracy (borrows elements from both the liberal democratic and republican principles, thus noting individuals' search for common ground and fostering of the common good, while also advancing their own individual or group interests). *Id.* at 318-39.

113. See Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 L. & HIST. REV. 1, 7 (1994) (describing "civic republicanism" as a positive liberty that empowers a community through the fostering of public good); see also MICHAEL A. GILLESPIE & MICHAEL LIENESCH, RATIFYING THE CONSTITUTION 85 (1989); Hope M. Babcock, *Democracy's Discontent in a Complex World: Can Avalanches, Sandpiles, and Finches Optimize Michael Sandel's Civic Republican Community?*, 85 GEO. L.J. 2085, 2091 (1997) (critiquing Michael Sandel's civic republican model, which envisions a community where citizens work toward common good in a seemingly contrary setting where the community exercises control over those citizens); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 638-39 (2001) (noting republicanism's fostering of forum deliberation); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 596-97 (2001) (espousing that civic republicanism requires present desires to be fluid to accept the ideas from open debate, which should be inclusive of alternate perspectives); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 2001 (2000) (noting republicanism's feature of "interlocking relationships," and the state's neutrality in its conceptualization of the "common good").

114. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) [hereinafter Fiss, *Free Speech*].

to the body politic's need for collective self-determination.¹¹⁵ Fiss also believes that the free market, with its tendency for unequal wealth distribution, skews balanced dialogue on matters of public interest.¹¹⁶ Those of greater wealth tend to dictate or dominate debate, thus leading to the lack of informed choices in political matters.¹¹⁷ Given its nexus to the inequality of public expression or debate, autonomy preservation becomes valuable only to the extent that it furthers collective self-governance for all body politic members, regardless of their socioeconomic status.¹¹⁸ The inequality of expression fostered by the free market compels Fiss to embrace limited government regulation of democratic processes (even when such regulation impacts speech) in order to ensure an egalitarian public debate.¹¹⁹

Closely aligned with Fiss is Professor Cass Sunstein, whose brand of civic republicanism focuses on deliberative democracy.¹²⁰ Similar in spirit to Fiss, Sunstein believes that true expressive liberty signifies that all members of the body politic have access to the media and, thus, participate *meaningfully* in public discourse.¹²¹ Overemphasis of autonomy preservation potentially distorts public debate¹²² and contributes to the proliferation of sensational journalism.¹²³ This latter point correlates precisely with my

115. *Id.* at 1408-11, 1425 (noting the occasional need for speech restrictions in an effort to further public discourse).

116. *Id.*

117. See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) [hereinafter Fiss, *Why the State?*] (arguing against an overemphasis on autonomy and noting that such an emphasis leads to the domination of debate by those who control the economic and political "power structure" in society); see also Fiss, *Free Speech*, *supra* note 114, at 1410.

118. See Fiss, *Free Speech*, *supra* note 114, at 1409-10.

119. *Id.* at 1412; see generally OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996) [hereinafter FISS, LIBERALISM DIVIDED] (espousing the need to interpret the First Amendment to accommodate contemporary social change). Fiss has maintained that media regulation may be necessary to preserve broadcast medium as a public forum. See OWEN M. FISS, THE IRONY OF FREE SPEECH 52-78 (1996); FISS, LIBERALISM DIVIDED, *supra*, at 168-83. Fiss's desire of a focal shift from autonomy to more balanced public discourse represents a public debate approach to First Amendment jurisprudence. See Fiss, *Why the State?*, *supra* note 117, at 786 (espousing that decisionmakers should judge action by the impact on the richness of public debate rather than interference with autonomy). Other scholars have more or less echoed this theme. See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) [hereinafter SUNSTEIN, DEMOCRACY]; C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 366-72 (1997); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795-98 (1981); Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 373 (1993).

120. See generally CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) [hereinafter SUNSTEIN, PARTIAL CONSTITUTION] (advancing liberal republicanism or deliberative democracy which requires legislatures to become more activist to protect individual rights); see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republican Revival*] (demonstrating a nexus between republicanism and deliberative democracy); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (advocating that the judiciary utilize republicanism to evaluate political processes and outcomes).

121. Sunstein, *Republican Revival*, *supra* note 120, at 1548-49, 1570 (describing politics as "deliberative," with an emphasis upon "collective debate").

122. Cass R. Sunstein, *Naked Preference and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (noting that deliberative democracy eschews resource distributions based solely on "raw political power").

123. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 73 (2000) (stating that "many recent observers have embraced the traditional American aspiration to 'deliberative democracy,' an ideal that is designed to combine popular responsiveness with a high degree of

description of media frenzy, which can lead to the media's gravitation toward the sensational.¹²⁴ As a consequence, true democracy, as it relates to expressive freedom, requires the optimization of communicative utility for all members of the body politic. This latter goal enriches democratic processes since broader communicative utility furthers the involvement of more diverse constituencies.¹²⁵ The furtherance of this utilitarian goal requires some measure of governmental interventionism, the goal of which should be the ultimate diversification of public debate.¹²⁶

Summarily stated, Fiss and Sunstein advocate a de-emphasis of autonomy and heightened awareness of balanced, meaningful political debate.¹²⁷ Their collective viewpoints seem vividly reflected in the opinions of such landmark (yet now dated) First Amendment cases as *New York Times v. Sullivan*¹²⁸ and *Red Lion Broad. Co. v. F.C.C.*¹²⁹

Of course, some have criticized Fiss and Sunstein's conceptualization of civic republicanism which minimizes autonomy as the foundation of expressive liberty.¹³⁰ While sympathetic to their view, I gravitate toward a more pragmatic and essentialist foundation of expressive liberty.¹³¹ The

reflection and exchange among people with competing views"); see also DELIBERATIVE DEMOCRACY (James Bowman & William Rehg eds., 1998); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 128-64 (1996); JURGEN HABERMAS, BETWEEN FACTS AND NORMS 287-328 (William Rehg translation, Polity Press 1996).

124. See generally *supra* Part II of this Article (defining media frenzy and its manifestation in contemporary journalism).

125. See SUNSTEIN, DEMOCRACY, *supra* note 119 at xix, 93 (stating emphatically that "autonomy, guaranteed as it is by law, may itself be an abridgement of the free speech right. . . . My special concern is that the First Amendment [can be interpreted in such a manner as] to undermine democracy").

126. See *id.* at 83; cf. FISS, LIBERALISM DIVIDED, *supra* note 119 (de-emphasizing autonomy with an eye toward enhancement of the "quality of public debate" and the informational needs of the public).

127. See *supra* notes 113-26 and accompanying text (noting Fiss and Sunstein's embrace of limited interventionism to further more balanced public discourse). For probative commentary regarding civic republicanism so embraced by Fiss and Sunstein, see generally Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991); see also Richard H. Fallon, Jr., *Post on Public Discourse Under the First Amendment*, 103 HARV. L. REV. 1738, 1741 (1990); Robert C. Post, *The Perils of Conceptualism: A Response to Professor Fallon*, 103 HARV. L. REV. 1744, 1746-47 (1990).

128. 376 U.S. 254 (1964).

129. 395 U.S. 367 (1969).

130. Christopher S. Yoo, *Digital Television and the Future of Broadcast Regulation*, Address at Washington and Lee University Faculty Workshop (Feb. 18, 2002); see also GEORGE A. KEYWORTH II ET AL., THE TELECOM REVOLUTION: AN AMERICAN OPPORTUNITY 31-36, 52-68 (1995) (proposing abolition of FCC); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2102 (1997); Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1955-1971*, 51 DEPAUL L. REV. 359, 367 (2001) (critiquing civic republicanism which espouses consensus and universalism yet does not "do away with" or have adequate mechanisms that address conflict).

131. Feminist theorists have historically defined essentialism as "a belief in true essence—that which is most irreducible, unchanging, and therefore constitutive of a given person or thing." DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE 2 (1989); Jane Wong, *The Anti-Essentialism v. Essentialism Debate*, 5 WM. & MARY J. WOMEN & L. 273, 274-75 (1999) (noting essentialism as characteristics that are of the essence and therefore "unchangeable"); see also ELIZABETH GROSZ, SEXUAL DIFFERENCE AND THE PROBLEM OF ESSENTIALISM IN THE ESSENTIAL DIFFERENCE 84 (1994); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in*

theory I embrace appears more compatible with that of Professor C. Edwin Baker. Baker's view of autonomy emphasizes each individual's right to influence and engage others.¹³² He believes that embedded in democracy is the respect for the autonomy of others. Consequently, no individual's autonomous rights take precedent over another's.¹³³ This more Kantian perspective ties the legitimacy of democracy to its furtherance of a reciprocal respect for the expressive autonomy of others.¹³⁴

In my view, democratic societies, while safeguarding individual liberties, should also provide incentives that encourage mutual respect for the autonomous rights of others, foster the diversity of voices in public debate, and preserve the interests of the body politic.¹³⁵ This more pluralistic form of democracy recognizes the value and interdependence of individual interests grounded in personal autonomy and collective interest manifested in such democratic institutions as elections. Any attempt to balance these competing interests can become Herculean given their foundational differences.

Libertarian notions such as speech and press tend to dominate the balance of individual and collective rights. Such domination is likely due to the express provision of these rights in the Constitution which signifies their importance and sanctity.¹³⁶ Expressive freedom fosters personal autonomy,

Feminist Legal Theory, 42 STAN. L. REV. 581 (1990); Camille A. Nelson, *(En)Raged or (En)Gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007, 1067 n.311 (2002); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). The term, however, has broader implications, particularly when one attempts to isolate the essence of legal rules or theories. Essentialism in the non-feminist context includes Ronald Dworkin's definition of characteristics of rights as abstracts defined in constitutional interpretation that includes history, text, and philosophy. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 928 (1999).

132. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1989) [hereinafter BAKER, HUMAN LIBERTY] (stating that "respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values"); C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002).

133. BAKER, HUMAN LIBERTY, *supra* note 132, at 48-49; see also THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

134. Others seem to endorse Baker's dignitary view of autonomy. See DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 97-98, 165-78 (1986) (recognizing the "right to conscience" as a foundational element of the First Amendment and generally noting the need for mutual respect for individual voices in a society); see also JOHN RAWLS, POLITICAL LIBERALISM xxiv-xxvii (1993); see generally BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

135. The theory of democracy I adopt in this Article borrows from Professor Baker's preferred complex democracy. Individual autonomy and preservation of the common good are interdependent concepts that must be simultaneously fostered in varying measure depending upon context. For a more detailed explanation of complex democracy, see BAKER, MEDIA, MARKETS, AND DEMOCRACY, *supra* note 132, at 143-44. The author posits a more realistic theory of "complex democracy" which draws on elements of both liberal pluralist and republican democracy. "It assumes that a participatory democracy would and should encompass arenas where both individuals and groups look for and create common ground, that is, common goods, but where they also advance their own individual and group values and interests." *Id.* at 144.

136. The Bill of Rights, viz. the First and Sixth Amendments, restricts governmental action against individuals. See LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 8, n.8 (3d ed. 2000); see also *infra* notes 166-80 and accompanying text (describing expressive liberties in the United States as inelastic).

¹³⁷ and applies to all persons, both natural and corporate.¹³⁸ A truly democratic society must respect the individual's need for autonomy and, commensurately, expressive liberties—speech and press—which are manifestations of autonomous conduct.¹³⁹ The media enjoys expressive rights, albeit with limitations defined by context.¹⁴⁰

Yet, individual autonomy and its preservation represent only one facet of a democratic society. The term “society” connotes a common body made up of individuals who must coalesce to further individualized goals.¹⁴¹ This composite of individuals, who make up the body politic,¹⁴² exerts authority through a legislative sovereign composed of popularly elected representatives.¹⁴³ The sovereign implements laws and takes actions designed to preserve societal well-being,¹⁴⁴ while preserving individual liberties. Members of the body politic generally check the success of the legislative balance of collective and individual interests through valid periodic elections.¹⁴⁵

The electoral process thus represents the body politic's collective tool that ensures responsive governance.¹⁴⁶ Valid elections lead to a representa-

137. See Baker, *Media that Citizens Need*, *supra* note 104, at 320 (stating that “liberal pluralism” recognizes “intractable diversity” with conflicting values, ideas, and interests as normative).

138. Media sources, as corporate entities, enjoy expressive freedoms guaranteed by the First Amendment. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990) (finding that corporations, like persons, have the right to free expression under the Constitution); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995) (noting expressive liberty as an originally conceived right of humankind with institutional speech as an abstraction from that of the individual); see generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 514 (2001).

139. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 444 (2002) (expressing that media of any form, i.e., information, entertainment, or news, enjoys the right to expressive freedom, with the perennial question being whether rights of broadcast and other media forms are as extensive as those enjoyed by the press or print media); see also PETE E. KANE, MURDER, COURTS, AND THE PRESS: ISSUES IN FREE PRESS / FAIR TRIAL 68 (1986) (noting that a recent history of criminal trials has shown that judges are more aware of express and implicit rights under the First and Sixth Amendments).

140. One context in which the media's expressive rights may be tempered is that of a criminal trial. Access rights in that milieu often depend upon the form of media seeking access, i.e., broadcast versus print, and the impact on the defendant's right to a fair trial. See *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (noting that different media forms required different scrutiny as decisionmakers balance media access rights with a defendant's need for due process).

141. See Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 167 (1988) (noting a society as “a system of power founded in entrenched divergencies of interest”) (quoting GIDDENS, *STUDIES IN SOCIAL AND POLITICAL THEORY* 347 (1977)); see also *supra* note 110 and accompanying text (arguing that autonomous individuals exercise their freedoms within the framework of a society).

142. For a more complete definition of “body politic,” see *supra* note 17 and accompanying text.

143. The Constitution states that “[a]ll legislative Powers . . . shall be vested in a Congress of the United States.” U.S. CONST. art. I, § 1; see also *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) (emphasizing that federal law “is generally made . . . by the people through their elected representatives in Congress”); *Field v. Clark*, 143 U.S. 649, 694 (1892) (stressing that Congress, as a body composed of elected representatives, has the power to make laws that are applicable to the general populace).

144. “Societal well-being” correlates to Professor Baker's concept of the common good, which is a dominant feature of the republican theory of democracy and an element of Baker's preferred complex democracy theory. See Baker, *Media that Citizens Need*, *supra* note 104, at 331-36.

145. See *id.* at 319-24 (providing Baker's view that the elite theory of democracy emphasizes the check on government through democratic elections).

146. See *id.*; see also Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*,

tive body that theoretically promotes the shared aims of the body politic and its constituent groups. Regular elections check this representative sovereign, which must govern in a manner that preserves the body politic and concomitantly respects individual liberties. The vote is more than a mechanical act. It becomes an expressive mechanism that provides the individual a voice in governance.¹⁴⁷ The collective votes of a constituency define the body politic's goals which, in turn, become guideposts for the legislative sovereign.¹⁴⁸

The expressive significance of an individual's vote underscores the importance of electoral process to the body politic. The latter's influence, authority, and ultimate legitimacy hinges on the collective will of an informed electorate. Electoral integrity, therefore, becomes critical to a legitimate democracy.¹⁴⁹ This essentiality of elections explains, to some extent, the furor created by the media's reporting gaffes on election night 2000. The election of the president, an individual who must further individualized and collective goals of a United States constituency, constitutes a significant political event in the American democracy. Imbued with power as head of the executive branch of government,¹⁵⁰ the president exercises significant authority over the individualized and collective interests of the body politic.¹⁵¹ The power of such an important elected official as President of the United States underscores the need for a prudently informed electorate. Errors in the media's coverage of electoral information runs counter to this societal goal. Imperfect information potentially influences voter decision-making and contributes to the election of individuals who are not truly representative of the voting constituency.

Individual liberties and sustenance of the body politic are naturally intertwined. Neither can flourish without the other.¹⁵² The body politic's in-

75 CHI.-KENT L. REV. 493, 509 (2000) (espousing that democratic norms include such factors as maximization of political participation, preservation of electoral integrity, prevention of fraud and corruption, and fostering an informed electorate).

147. For more regarding the importance of campaigns and elections in the maintenance and fostering of free speech and political participation, see generally Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217 (1999).

148. *Id.*; see also *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting) (stating the First Amendment's foundational purpose to protect political speech is essential to a representative democracy).

149. See Rosenblum, *supra* note 146, at 509.

150. The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

151. See *Clinton v. Jones*, 520 U.S. 681, 698 (1997) (stating that the presidency occupies a "unique position in the constitutional scheme") (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)); Mark J. Rozell, *Restoring Balance to the Debate Over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 605 (2000) (noting that the "Framers placed the President at the head of the executive branch to provide for unity, responsibility, and accountability"); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (stating that the President's executive power, "together with the Take Care Clause, . . . create[s] a hierarchical, unified executive department").

152. See THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4-7, 8-11, 14-15 (1966) (noting that personal autonomy and meaningful participation in democratic processes are core speech values); FREDERICK SCHAUER, *FREEDOM OF SPEECH: A PHILOSOPHICAL ENQUIRY* 35-46,

terests in such issues as fair elections become symbiotic with individual liberty interests such as free speech and press. The interdependence of these interests compels—at least attempts—to balance individual and collective interests. At times, however, symbiosis between expressive rights and collective governance becomes an unstable mix. Problems seemingly arise when the body politic's interest in electoral integrity clashes with the media's more individualized expressive interests.¹⁵³ As was demonstrated on election night 2000, the media's interest to report sensational news, irrespective of its accuracy or effect, potentially affects electoral integrity. Erroneous reports of polling results that influence voter conduct threaten the authenticity of an election¹⁵⁴ and have historically prompted some form of legislative response.¹⁵⁵

Effective balancing of the occasional tension between individual and collective interests, however, becomes a precarious exercise: how does one preserve expressive liberties on one hand and ensure electoral integrity on the other? A governmental agenda focused solely on collective societal interests may quash individual initiative and diminish productivity and efficiency.¹⁵⁶ Conversely, overemphasis of individual interests can result in group disparities that threaten social order.¹⁵⁷ It would seem, then, that a

60-72, 85-86 (1982) (finding, generally, the codependency of individuality (autonomy) and democracy (the latter pertaining to interests critical to preservation of the body politic)); *see generally* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983) (advancing a more pluralistic approach that recognizes both personal autonomy and preservation of democratic processes as mutually essential components).

153. No clash exists, of course, if the media's reports of election data enhances the voters' participatory process through dissemination of objective information. *See supra* notes 71-72 and accompanying text (denoting the media's function to inform the public on the operations of government).

154. *See supra* notes 13, 22, 28, 57 and accompanying text (detailing the criticism of the media's erroneous poll reports in the 2000 Bush-Gore campaign).

155. Seager & Handman, *supra* note 21, at 29; *see also infra* notes 293-311 and accompanying text (describing legislative actions taken in the wake of controversial elections).

156. *See* David Campbell, *Breach and Penalty as Contractual Norm and Contractual Anomie*, 2001 WIS. L. REV. 681, 691 (recognizing that communism's collapse during the modern post-war era was attributable to its limitations as a "shortage economy" incapable of adapting to changing circumstances); The Honorable Sandra Day O'Connor, *The Life of the Law: Principles of Logic and Experience from the United States*, 1996 WIS. L. REV. 1, 5 (finding that communism's failure was due, in part, to the public's view of alternatives through print and broadcast media); Stephen J. Solarz, *The Collapse of Communism and the Future of the Korean Peninsula*, 19 FORDHAM INT'L L.J. 25, 29 (1995) (noting the demands from members of the public exposed to ideas communicated by external media sources as reasons for the collapse of communism in East Germany and Poland); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1754 (1992) (attributing communism's failure to the state's control over production and distribution and its inability (or unwillingness) to accommodate individual choice).

157. *See* LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 149 (1999) (stating the Supreme Court's position in *Dennis v. United States* that individualized action in preparation for revolution can produce anarchy); CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 220 (1995) (opining that unabashed self-regulation can lead to anarchy); Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 183 (2001) (recognizing that the somewhat natural tenancy for personal advancement over other fellow societal members "leads to conflict, anarchy, and ultimately reduces the possibilities for personal advancement"); *but see* James B. Staab, *The Tenth Amendment and Justice Scalia's Split Personality*, 16 J.L. & POL. 231, 265 (2000) (noting Hamilton's view that too little power for government (and its leaders) is as troublesome as too much power, with the former contributing to anarchy and possibly despotism).

democracy which depends upon the preservation of both individual expressive rights and genuine elections, requires decisionmakers to adopt an approach that furthers the interests of the body politic while simultaneously promoting a mutual respect for individual autonomy. This more pluralistic form of democracy further recognizes that the prosperity of the individual and the body politic depends upon the appropriate balance of their respective interests.

Pluralistic democracy, however, presents a difficult challenge for decisionmakers. Governmental strategies which secure the body politic's interest in electoral integrity must commensurately tread lightly on expressive liberties. As explained more cogently below, this latter caveat has resulted in judicial deference to individual autonomy, which is expressly protected by the Constitution, with a comparatively diminished emphasis on collective interests in electoral integrity.

B. The Inelasticity of the First Amendment Paradigm and the Elusiveness of Democratic Pluralism

As noted in the previous section of this Article, a pluralistic theory of democracy confirms the intersectionality of the body politic's interest in stable collective governance and the need to foster mutual respect for the autonomous rights of all citizens. Achievement of democratic pluralism, however, becomes somewhat elusive given the seeming jurisprudential sanctity of expressive rights. Thus, deliberate temperance of the media's right to dissemination of news for the sake of the body politic's need for electoral integrity becomes a virtual futile goal.

First Amendment guarantees of expressive freedom inevitably tilt the balance of collective interests and individual autonomy toward the latter. The modern judiciary's dogmatically broad construction of expressive rights as guaranteed in the Constitution reinforces this fact. This more sacrosanct treatment of free speech, which is a tacit component of a negative theory of liberty, contributes to the inelasticity of expressive liberties.¹⁵⁸ Expressive freedom becomes virtually inviolable under this rationale. Doctrinal inflexibility leaves any seeming restriction on speech or press vulnerable to legal attack.

This more rigid construction of expressive liberties in the United States contrasts sharply with the United Kingdom's more elastic conceptualizations, which allow limited restrictions on the media's expressive rights in order to preserve electoral integrity.¹⁵⁹ Expressive rights in the United States

158. See *infra* notes 166-80 and accompanying text (noting the courts' employment of a negative theory of First Amendment jurisprudence).

159. For more detailed explanation of media regulation in Great Britain, specifically via licensing schemes, see ERIC BARENDT, *BROADCASTING LAW: A COMPARATIVE STUDY* 87 n.61 (1993); see also Broadcasting Act, 1990, c. 42, sched. 8(2)(a) (Eng.) (providing limitations on use of television or radio to broadcast political advertisements, except for those ads issued by "qualifying parties" during an election period); Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard*

and other countries that similarly provide constitutional protection for expressive autonomy become normative extractions rather than common law principles subject to a sovereign's interpretation.¹⁶⁰ Judicial decisionmakers in the United States exhibit little tolerance for governmental interference.¹⁶¹ Few viable restrictions on expressive rights in the United States survive legal scrutiny.¹⁶²

Thus, free press, as a fundamental construct of democracy,¹⁶³ becomes inelastic as it intersects with certain communal interests such as electoral

Really Necessary? A Comparative Perspective, 53 LA. L. REV. 1153, 1156 (1993) (providing a comparative analysis of the law of defamation and related First Amendment jurisprudence in the United Kingdom and the United States); see generally Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT'L & COMP. L. 5 (2001). But see The European Convention for Human Rights, which provides more blanket protection for speech and will likely change the United Kingdom's common law relevant to free expression. See generally MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS (1995). The Human Rights Act 1998, adopted by the United Kingdom on November 9, 1998, contains several provisions which seem to limit the sovereign's interference with expressive freedom and other human rights. Section 1 and Schedule 1 of the Act provide that Convention Articles will "have effect" in English law. See Articles 2-12 and 14 of the Convention, Articles 1-3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, as interpreted with Articles 16-18 of the Convention. Moreover, section 2 of the Act requires British courts or tribunals to take into account the decisions of the European Court of Human Rights—a body which has historically interpreted human rights more broadly. Sections 3 and 4 of the Act more strongly signal the sovereign's increased difficulty to constrain expressive freedoms. Section 3 requires judicial decisionmakers to, "[s]o far as it is possible to do so," interpret primary legislation and subordinate legislation "in a way which is compatible with the Convention rights." Section 4 goes on to require that if a court finds such legislation to be "incompatible with a Convention right, . . . it may make a declaration of that incompatibility." While the complete effect of these provisions remains unclear due to their recent adoption, it seems clear that the Act, with its incorporation of the Convention on Human Rights, clouds sovereign's authority to constrain dissemination by the press. For a primer on The Human Rights Act 1998 and the European Convention, see generally CLAYTON & TOMLINSON, THE LAW OF HUMAN RIGHTS (2000), FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES (2d ed. 2002), and GROSZ ET AL., HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION (2000). For an explanation of the Human Rights Act 1998's horizontal application in the United Kingdom, see Nicholas Bamforth, *The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies*, 58 CAMBRIDGE L.J. 159 (1999), and Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497, 540-41 (2001).

160. See David A.J. Richards, *Constitutional Legitimacy, The Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779, 779 (1999); see generally ERIC BARENDT, FREEDOM OF SPEECH (1985) (providing a comprehensive examination of the United Kingdom's laws governing free expression).

161. See *infra* notes 166-80 and accompanying text (describing in detail the negative theory of the First Amendment in the United States and noting the courts' general antipathy for governmental restrictions on expressive rights).

162. As the jurisprudential history of the First Amendment strongly documents, the nature and form of speech will likely dictate the extent of its constitutional protection. See *New York v. Ferber*, 458 U.S. 747, 762-63 (1982) (finding that child pornography has little expressive value and is not protected under the Constitution); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (finding that commercial speech merits only a "limited measure of protection"); *Miller v. California*, 413 U.S. 15, 23 (1973) (deciding that obscene material constitutes unprotected speech); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting unprotected speech as that which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). For more discussion regarding the various categories of unprotected speech, see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 800-01 (1997), and DANIEL A. FARBER, THE FIRST AMENDMENT 14 (1998) (delineating incitement to violence, fighting words, libel, obscenity, and commercial speech as either unprotected or marginally protected speech).

163. See *supra* notes 104-57 and accompanying text (detailing the various theories of democracy).

integrity. In the absence of some extraordinary or compelling interest of the state,¹⁶⁴ the inelasticity of expressive rights would doom any seemingly restrictive scheme on the media, regardless of the legitimacy of motive.¹⁶⁵

1. Inelasticity Manifested Through a Negative Theory of Expressive Rights

The elasticity of expressive freedoms, together with skepticism of governmental attempts to control dissemination, stems principally from judicial adherence to a negative theory of expressive liberty.¹⁶⁶ This theory focuses more upon a fear of governmental intrusion on expressive rights rather than the normative benefits that free speech provides for the individual.¹⁶⁷ Speech value and its furtherance of universal autonomy become minor if not neglected factors in this analysis.¹⁶⁸ Thus, democratic pluralism becomes tangential if not elusive. A negative approach to the First Amendment's guarantee of free speech treats most governmental interference with that right as an anathema. Intrusion on expressive freedom conflicts with fundamental notions of liberty. Instead of more abstract analysis related to speech as a stimulus of autonomy, negative theorists delve into pragmatic issues associated with abuse of power. Intense aversion to hypothetical risks associated with the exercise of that power becomes a decisionmaker's consuming analytical thrust.¹⁶⁹

By contrast, a more positive, libertarian theory centers more upon an individual's self-determined right to express herself "to the extent he or she can claim to be his or her own [governor]."¹⁷⁰ Thus, an individual's expressive choices primarily depend upon her own cognitive assessments of duty and responsibility rather than a sovereign's exercise of authority.¹⁷¹ The value of speech as the facilitator of autonomous conduct becomes an analytical benchmark. Concentration on speech value promotes self-

164. See *Burson v. Freeman*, 504 U.S. 191, 206-11 (1992) (noting the state's compelling interest to preserve electoral integrity). For a more in-depth discussion of *Burson*, see *infra* notes 219-72 and accompanying text.

165. See *infra* Parts III.B. and C., and IV.A. of this Article, which discuss the doctrine of prior restraint, the few cases in which the courts have reviewed governmental actions designed to secure voting polls, and the inherent vulnerability of such interventionist mechanisms.

166. See Linda Ross Meyer, *Unruly Rights*, 22 *CARDOZO L. REV.* 1, 49 n.199 (2000) (stating that "some First Amendment law looks more like 'negative liberty' than practices of respect . . . Public discourse itself relies to a great extent on norms of reasoned debate and civility").

167. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 120, at 209 (explaining that the First Amendment acts as a negative liberty to free individuals from governmental intrusions of their free speech rights); see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. REV.* 354, 438 (1999) (describing negative liberty's version of the First Amendment as concerned that government refrain from preventing speech or punishing people for speaking).

168. See Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 *IOWA L. REV.* 51, 86 (1994) (observing that a negative concept of liberty recognizes an individual's freedom only to the extent that "no person or entity interferes with his or her activity").

169. *Id.* at 89.

170. *Id.* at 86.

171. *Id.*

determination, a direct manifestation of personal autonomy. It also serves to foster democratic pluralism since it promotes a focal shift toward the preservation, if not furtherance, of expressive autonomy. This lofty conceptualization of expression has an appeal to many notable First Amendment scholars.¹⁷²

Contrary to scholars who eschew a negative approach to expressive liberties,¹⁷³ the judiciary seemed to embrace it. The now classic justification for this premise is *R.A.V. v. City of St. Paul*,¹⁷⁴ where the Supreme Court considered the constitutionality of the City of St. Paul's hate speech ordinance. The Court invalidated the ordinance in an opinion focused on the possible abuse of governmental authority. Fear that the ordinance's overly broad nature afforded officials too much discretion dominated the Court's analysis.¹⁷⁵ The opinion was virtually devoid of any discussion of hate speech as it related to the promotion of autonomous conduct, a critical component of positive theory. It also ignored considerations of expressive conduct as a facilitator of meaningful participatory debate.¹⁷⁶

A negative, theoretical approach to free speech explains, to a limited extent, the judiciary's general antipathy toward governmental mechanisms designed to preserve electoral integrity. While legislative restrictions on media projections ensure fair elections, an admittedly valid societal goal,¹⁷⁷ they do so at the expense of the media's expressive freedom.¹⁷⁸ News reports, regardless of their sensational quality, utility, or effect on collective interests like elections, garner significant constitutional protection.¹⁷⁹ As the case law explained below demonstrates, governmental attempts to temper expression for sake of electoral fairness suffer under the judiciary's more negative conceptualization of First Amendment jurisprudence.¹⁸⁰

172. *Id.* at 87 (noting First Amendment scholars who promote a positive theory of free speech and, when confronted with the question whether certain speech merits protection, ask, "Why is the freedom of speech so valuable as to require special judicial protection?").

173. *Id.*

174. 505 U.S. 377 (1992).

175. *Id.*

176. *Id.* For another example of the Supreme Court's proclivity for a more negative theory of the First Amendment, see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). See also Werhan, *supra* note 168, at 91 (citing the *R.A.V. v. City of St. Paul* decision as a manifestation of the Court's adoption of the negative theory of expressive rights).

177. See *supra* notes 135, 144 and accompanying text (describing Professor Baker's liberal democratic theory of democracy, which emphasizes preservation of the common good).

178. See *Burson v. Freeman*, 504 U.S. 191, 208-11 (1992) (recognizing the government's compelling interest to preserve electoral integrity); see also *infra* notes 219-72 and accompanying text (providing analysis of *Burson* as a jurisprudentially weak endorsement of governmental restrictions designed to secure voting polls).

179. See *supra* note 162 and accompanying text (explaining the limited constitutionality of certain categories of speech). Note, also, that dissemination of some matters such as defamatory reports merit little, if any, constitutional protection.

180. See *infra* notes 181-272 and accompanying text (providing greater analysis and commentary regarding the case law relevant to the governmental mechanisms designed to police the electoral process).

2. *From Pentagon Papers to Burson v. Freeman—Expressive Autonomy's Seeming Supremacy Over Concerns Related to Electoral Integrity*

Perhaps the most significant and effective manifestation of the judiciary's negative approach to expressive liberty lies within the strict confines of the prior restraint doctrine.¹⁸¹ Under the doctrine's basic premises, governmental schemes that restrict expressive activity before dissemination are presumptively unconstitutional.¹⁸² The prior restraint doctrine permits the use of restrictive means in only the rarest of circumstances.¹⁸³

The prior restraint doctrine constitutes a formidable obstacle to governmental attempts to protect collective interest at the expense of expressive liberty. A graphic example of this point is the Supreme Court's decision in *New York Times Co. v. United States*,¹⁸⁴ commonly referred to as the *Pentagon Papers* decision. During the waning years of the Vietnam conflict, the government sought to prevent public release of classified documents descriptive of military strategy. Maintenance of national security comprised the justification for the documents' restriction. The Court invalidated the government's action, despite the assertion that publication of classified information about the Vietnam War would threaten national security.¹⁸⁵ Restriction on the dissemination of information on matters of public import failed as a minimalist approach to a legitimate goal. As the Court observed, "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea can support even the issuance of an interim restraining order."¹⁸⁶

The *Pentagon Papers* decision looms ominously over any governmental attempt to control dissemination for the sake of the common good. Proof of a nexus between the publication sought to be restrained and its potential harm to governmental interests becomes an almost insurmountable burden.

181. Seager & Handman, *supra* note 21, at 31.

182. Federal case law is replete with decisions deriding the government's use of prior restraints of protected speech. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (stating emphatically that "[a]ny system of prior restraint . . . 'comes to [the] Court bearing a heavy presumption against its constitutional validity'"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. New Hampshire*, 312 U.S. 569, 574-75 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). For more detailed discussion of the prior restraint doctrine, see LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-34, at 1039 (2d ed. 1988) (espousing the First Amendment's primary purpose as a protector against the government's prior restraints), and Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 6-14 (2000) (explaining the Court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931), and other pivotal cases as "prior restraint rhetoric").

183. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.").

184. 403 U.S. 713 (1971) (per curiam).

185. Seager & Handman, *supra* note 21, at 31.

186. *N.Y. Times Co. v. United States*, 403 U.S. at 726-27 (Brennan, J., concurring).

As the Court's "direct[] and immediate[] cause[s]" language suggests, attenuated cause and effect assertions would not justify expressive restraint.¹⁸⁷ Proof of some palpable harm from publication becomes the mandate.

The *Pentagon Papers* decision also suggests that thinly-veiled rationales designed to preserve electoral fairness would fail as justification for restrictive schemes.¹⁸⁸ Thus, even an hour delay in the media's dissemination of election results would likely offend constitutional norms since the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."¹⁸⁹ Generalized paternalistic motives are simply too speculative to support overt restrictions on expressive liberties.¹⁹⁰ This finding likely results from the Court's inherent suspicion of governmental restrictions.

At the vortex of the judiciary's suspicion of governmental interventionism lie paradigmatic constitutional issues associated with expressive liberties. Political debate and dissemination of information that potentially educates the body politic become important residual goals.¹⁹¹ The theoretical importance of the media as facilitator of these goals and the industry's essentiality in a democracy underscore the judiciary's suspicion of restraints on poll access.¹⁹² Yet the counterpoint to the media's role in a democratic society remains the possible adverse impact of the industry's exercise of its expressive rights on such collective interest as fair elections.¹⁹³ Herein lies the challenge presented by democratic pluralism. How does society ensure both mutually respected autonomy and societal institutions such as elections when those two interests are in conflict? Courts have not adequately resolved the possible clash of expressive rights and electoral integrity. They have, instead, defaulted to the protection of individual autonomy, with more minor sanctioning of minimalist measures that ensure fair elections.¹⁹⁴

Some states have taken affirmative steps to secure elections from the hazards of premature projections. Several legislatures have enacted statutory

187. *Id.*

188. Seager & Handman, *supra* note 21, at 31.

189. Elrod v. Burns, 427 U.S. 347, 373 (1976).

190. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (suggesting urgent military necessity as one of the few compelling interests that justifies a governmental prior restraint); see also Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 930 (1991) (explaining that the government's interest "must be extremely compelling" to survive judicial scrutiny of prior restraints); Michael D. Fricklas, Note, *Executive Order 12,356: The First Amendment Rights of Government Grantees*, 64 B.U. L. REV. 447, 509 (1984) (discussing generally the government's need for a compelling interest to justify imposition of prior restraints).

191. See *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1213-14 (N.D. Ga. 1988) (noting the media's right pursuant to the First Amendment of the Constitution to provide information relevant to the attitudes and beliefs of the voting public).

192. See *supra* notes 133-57 and accompanying text (discussing a theory of democracy which acknowledges the balancing of autonomy and common good as a critical feature of a functional, democratic society).

193. See *supra* notes 25-28 and accompanying text (detailing the problems associated with the media's projection of election results).

194. See *infra* notes 197-218 and accompanying text (discussing the *Munro* case).

schemes that regulate the physical environment of polling places.¹⁹⁵ Most of these statutes create media-free zones or boundaries adjacent to the polls.¹⁹⁶ The few cases which have considered the constitutionality of these proscriptions confirm the judiciary's aversion to these restrictive schemes.

The one significant federal case which addressed the question of exit polling restrictions is *Daily Herald Co. v. Munro*.¹⁹⁷ At issue in *Munro* was a Washington state statute that prohibited anyone from conducting "any exit poll or public opinion poll with voters" within 300 feet of a polling place.¹⁹⁸ A local newspaper, the *Daily Herald*, the *New York Times*, ABC, and CBS alleged that this restriction contravened their First Amendment right to gather and report election news.¹⁹⁹ The United States District Court declared the state's statute unconstitutional, noting that the media's exit polling procedures were systematic, reliable, and not inherently disruptive.²⁰⁰ Exit polling constituted highly protected speech that contributed to political discourse.²⁰¹ The court recognized that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates."²⁰²

The appellate court, signaling its tacit adoption of a negative theory of expression, further noted the protection of exit polling as a news-gathering function, stating that "the First Amendment protects the media's right to gather news."²⁰³ Central to the court's ruling was the pivotal finding that the 300 feet vicinity of polling places constituted a traditional public forum.²⁰⁴ Once polling areas were designated public fora, any content-based restrictions on speech in those areas had to pass strict scrutiny.²⁰⁵ Unless narrowly tailored to promote a compelling governmental interest, the statute was presumptively unconstitutional.²⁰⁶ The court acknowledged the significance of

195. For examples of statutory provisions that govern polling access, see CAL. ELEC. CODE § 18370 (West 2003); FLA. STAT. ANN. § 102.031(3)(a)-(b) (West 1985); GA. CODE ANN. § 21-2-414(a) (1993); HAW. REV. STAT. ANN. § 11-132 (1985); KY. REV. STAT. ANN. § 117.235(3) (Supp. 1993); MINN. STAT. ANN. § 204C.06(1)&(2) (West 1992); MO. ANN. STAT. § 115.637(18) (West Supp. 1994); MONT. CODE ANN. § 13-35-211(3) (1993); NEB. REV. STAT. § 32-1525 (1998); R.I. GEN. LAWS § 17-23-15 (Michie 1988); S.D. CODIFIED LAWS § 12-18-3 (Michie 1994); WASH. REV. CODE ANN. § 29.51.020(1) (West 1993); and WYO. STAT. ANN. § 22-26-114 (1977).

196. See, e.g., CAL. ELEC. CODE § 18370 (West 2003) (restricting data gathering within 100 feet of polls); HAW. REV. STAT. § 11-132 (1985) (limiting access to 1000 feet of polling areas); NEB. REV. STAT. § 32-1525 (1998) (restricting access to polling place's door within 20 feet and 100 feet from voting booths inside polling buildings); but see OKLA. STAT. ANN. tit. 26, § 7-108.1 (West 1991) (allowing exit polling within 300 feet of ballot boxes after prior notice to the secretary of the county election board at least one week before an election).

197. 838 F.2d 380 (9th Cir. 1988).

198. *Id.* at 382 (citing WASH. REV. CODE ANN. § 29.51.020(1)(e) (West 1988)).

199. Seager & Handman, *supra* note 21, at 32.

200. *Id.*

201. Barlow, *supra* note 60, at 1015-16.

202. *Munro*, 838 F.2d at 384 (alteration in original) (quoting *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982)).

203. *Id.*

204. *Id.* at 384-85; but see *infra* notes 232-70 and accompanying text (discussing the confusing state of the public forum doctrine).

205. *Munro*, 838 F.2d at 385.

206. *Id.* at 386.

the state's interest²⁰⁷ in maintaining order and decorum at the polls and "preserving the integrity of their electoral processes."²⁰⁸ Yet, as has been the historic habit of most federal courts, this more collective interest in electoral integrity is significantly outweighed by concerns related to restrictions on information access—a right related to expressive autonomy.²⁰⁹ The Washington legislature, in the court's view, failed to tailor its statute narrowly to advance these interests.²¹⁰ Less restrictive means, e.g., the requirement of separate entrances to polls or size reduction of the restrictive area, would have adequately advanced the state's ends.²¹¹ Thus, the Washington statute was overly broad since it prohibited nondisruptive exit polling.²¹²

Also noteworthy to the majority in *Munro* was the lower court's finding that the legislature's bid for decorum at the polls constituted a pretext. The true purpose of the ban was to prevent broadcast of early election returns—an action that arguably influenced voter turnout.²¹³ The court found that such a generalized interest failed to justify restrictions on speech.²¹⁴ Strict scrutiny analysis inevitably doomed the Washington statute. Its broad reach effectively blocked all the exit poll information including post-election newspaper stories and analyses by academics.²¹⁵ Thus, the statute's prescriptions did not employ the least restrictive means to accomplish the legis-

207. While the Court did not explicitly find that the state's interest was compelling, it did so implicitly. *See generally id.* at 382-89.

208. *Id.* at 385 (quoting *Brown v. Hartlage*, 456 U.S. 45, 52 (1982)).

209. *See In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982) (holding that a local rule forbidding jurors to speak to the press after completion of service except for good cause was unconstitutional as abridging the press's First Amendment right to gather news); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (holding the media group has standing to contest a participant-directed gag order because gag orders abridge the media's First Amendment right of access to information); *see also United States v. Harrelson*, 713 F.2d 1114, 1116 (5th Cir. 1983) ("[T]he First Amendment right to gather news is neither absolute nor does it provide journalists with special privileges denied other citizens; . . . it must yield to an accused's right to a fair trial. . . . In this connection, jurors, even after completing their service, are entitled to privacy and to protection against harassment."); Marc O. Litt, "Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, The First Amendment Right of the Media and the Privacy Right of Jurors, 25 COLUM. J.L. & SOC. PROBS. 371, 421 (1992) (arguing that "First Amendment rights to gather news and publish ought not to be disregarded without searching inquiry and compelling justifications"); Disa Sim, *The Right to Solitude in the United States and Singapore: A Call for a Fundamental Reordering*, 22 LOY. L.A. ENT. L. REV. 443, 452-53 (2002) (arguing that a citizen's "right to solitude must be balanced against the public's right to know and the media's First Amendment right to gather news").

210. *Seager & Handman*, *supra* note 21, at 32.

211. *Munro*, 838 F.2d at 384-85; *see also Note, Exit Polls*, *supra* note 60, at 1935.

212. *Munro*, 838 F.2d at 386; *cf. Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513-14 (11th Cir. 1985) (finding that restrictions against the procurement of signatures for a petition was overbroad).

213. *See generally Munro*, 838 F.2d 380.

214. *Id.* at 387.

215. *Id.* at 387-88. In his concurring opinion, Judge Stephen Reinhardt emphasized that it was the public dissemination of the exit poll information, not the individual discussions or news-gathering, that was the core First Amendment activity warranting the utmost protection. Because a "major purpose" of the First Amendment is "to protect the free discussion of governmental affairs" and ensure an "informed" public debate on politics, such a purpose would be "meaningless if the media were not allowed to obtain the information, including information of the type yielded by exit polls, on which such debate turns." Exit poll information must be protected because the data "provide[s] information not only on the outcome of the election but also on why people voted the way they did." *Id.* at 390.

lature's ends. In fact, the pre-existence of a less restrictive law seemingly strengthened the court's rebuke of this legislation.²¹⁶

Like the court in *Munro*, other judicial decisionmakers similarly invalidated laws that sought limitations on exit polling.²¹⁷ The principal concern remained the autonomous right of the media to gather news of political import,²¹⁸ thus, underscoring the judiciary's aversion to balancing individualized expressive rights that are expressly protected by the Constitution with the collective interest in fair elections.

Despite this seemingly entrenched judicial philosophy, there is a sign of change. The Supreme Court has more recently signaled limited tolerance for procedural restrictions that preserve order near polls but only in the pre-vote context. *Burson v. Freeman*²¹⁹ involved a Tennessee statute that limited campaign activity within 100 feet of any polling place entrance.²²⁰ The challenge to the statute included violation of a candidate's First Amendment right to communicate with voters.²²¹ The Tennessee Supreme Court found the statute to be a content-based restriction on speech that failed to meet the rudiments of strict scrutiny.²²²

Contrary to the Tennessee Supreme Court, Justice Blackmun, writing for the plurality, found that the facially content-based statute met the rigors of strict scrutiny. The state's compelling interest in remedying its history of voter intimidation and fraud outside polls legitimized the imposed restraint.²²³ The Court observed that "the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter."²²⁴

Blackmun attributed this unusual finding of a content-based regulation's constitutionality to the law's preservation of electoral integrity. Noting the electoral process's essentiality in a democratic society, Justice Kennedy

216. See WASH. REV. CODE ANN. § 29.51.020(1)(d) (West 1993).

217. See *CBS, Inc. v. Smith*, 681 F. Supp. 794, 802-803 (S.D. Fla. 1988) (invalidating FLA. STAT. ANN. § 102.031(3)9(a)-(b) (West Supp. 1988) given the media's right of access under the First Amendment); *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1210-1215 (N.D. Ga. 1988) (restricting enforcement of GA. CODE ANN. § 21-2-414(a) (1987) to 25 feet of polling place exits); *Journal Broad., Inc. v. Logsdon*, No. C-88-0147-L(A), 1988 U.S. Dist. LEXIS 16864, at *5 (W.D. Ky. Oct. 21, 1988) (holding that KY. REV. STAT. ANN. § 117.235(3) limiting of exit polling within 500 feet of polling places was unconstitutional); *CBS, Inc. v. Growe*, 15 Media L. Rep. 2275, 2278 (D. Minn. 1988) (finding MINN. STAT. ANN. § 204 C.06(1) (West Supp. 1988) overly broad since it proscribed exit polling within 100 feet of a voting area); *NBC, Inc. v. Colburg*, 699 F. Supp. 241, 242-43 (D. Mont. 1988) (striking down MONT. CODE ANN. § 13-35-211(3) (1988) because as a content-based restriction, it was not narrowly tailored to accomplish the state's compelling interest); *NBC, Inc. v. Karpan*, No. 88-0320-B (D. Wyo. Oct. 21, 1988) (invalidating Wyoming's statutory section that prohibited the media's access to polls); see also Seager & Handman, *supra* note 21, at 32.

218. See *CBS, Inc. v. Smith*, 681 F. Supp. 794, 803 (S.D. Fla. 1988) (striking down exit poll restriction because "newsgathering is a basic right protected by the First Amendment").

219. 504 U.S. 191 (1992).

220. *Id.* at 193.

221. *Id.* at 194.

222. *Id.* at 195.

223. *Id.* at 206-11.

224. *Id.* at 207-08.

echoed Blackmun's sentiments in his concurrence, stating that "[v]oting is one of the most fundamental and cherished liberties in our democratic system of government. The State is not using this justification to suppress legitimate expression."²²⁵

Whether the statute was narrowly tailored constituted the more convoluted analysis of the opinion. The plurality rejected the notion that a reduction in the restricted boundary to twenty-five feet would serve the state's compelling interest and, thus, prove the statute's overly broad nature. The Court summarily dismissed the relationship between boundary dimensions and the statute's furtherance of the state's compelling interest.²²⁶

Scalia's concurrence, which provided the opinion's deciding fifth vote, perhaps comprised the most polemic portion of the *Burson* decision. Scalia did not consider the proscribed area around the polls to be a traditional public forum.²²⁷ As a result, the legislature's restrictions survived the more relaxed review standard reserved for reasonable, viewpoint-neutral regulation.²²⁸

We should not, however, interpret *Burson* as a mollification of judicial antipathy toward governmental interventionism or a philosophical embrace of democratic pluralism's idealistic balance of individual autonomy with collective interest in elections. The *Burson* decision stands precariously on somewhat questionable reasoning. In a vigorous dissent, Justice Stevens criticized the plurality which, in his view, "blithely dispense[d] with the need for factual findings" of alleged voter intimidation and fraud.²²⁹ Stevens noted that the Florida Supreme Court and other lower federal courts had invalidated other state restrictions similar to those imposed in Tennessee. Like the officials in Tennessee, those who sought poll restrictions in other states failed to produce evidence of voter intimidation and, thus, failed to justify polling restrictions.²³⁰ As discussed in the next section of this Article, the tenuous reliability of the *Burson* decision rests primarily on Justice Scalia's finding that polling places are not public fora.

C. Limited Restrictions on Poll Access—*Burson* and Beyond

1. Scalia's Pivotal Concurrence in *Burson* and its Precarious Public Forum Analysis

The *Burson* decision might suggest the Supreme Court's limited acceptance of minimalist restrictions that preserve voting or similar collective interests. At the core of this point lies the analysis associated with restric-

225. *Id.* at 214.

226. *Id.* at 210.

227. *Id.* at 214-16; compare *supra* note 204 and accompanying text (noting the Ninth Circuit's finding that voting polls constituted public fora).

228. *Burson*, 504 U.S. at 214.

229. *Id.* at 222.

230. *Id.* at 222-23 (Stevens, J., dissenting).

tions on expression in certain areas of public access.²³¹ The judiciary's tolerance for restrictions that protect areas adjacent to abortion clinics seems analogous to reasoning related to restrictions designed to secure polling.²³²

In *Hill v. Colorado*,²³³ a closely divided Supreme Court upheld a Colorado law restricting activity adjacent to abortion clinics.²³⁴ The statute in question imposed criminal sanctions on those who, without consent, approached or attempted to communicate with any individual entering a healthcare facility.²³⁵ Because the content-neutral statute sought to protect clinic access, it constituted a valid time, place, and manner restriction.²³⁶

The dissent, however, contended that the Colorado statute was content-based and failed strict scrutiny analysis.²³⁷ Justice Kennedy stressed First Amendment protection for the "concept of immediacy, the idea that thoughts and pleas and petitions must not be lost with the passage of time."²³⁸ Anti-abortion speech, to be effective, must occur at the time the decision to abort becomes imminent.²³⁹

Entry into an abortion clinic and access to voting polls admittedly have only crude commonalities as penumbral constitutional rights. Since the objective of the restrictions in *Hill* is to ensure uninhibited access to clinics, the Court's holding seems more compatible with *Burson*, which approves only those restrictions that preserve decorum in the pre-vote context.²⁴⁰ If one can isolate the obvious distinctions, then the reasoning in *Hill* might have some relevance to poll access. The tenuous similarity between the

231. See *supra* notes 219-30 and accompanying text (providing the rudiments of the *Burson* decision).

232. Compare *Hill v. Colorado*, 530 U.S. 703, 732-35 (2000) (holding that a Colorado criminal statute prohibiting any person from knowingly approaching within eight feet of another person near a healthcare facility without their consent does not violate the First Amendment), and Tara K. Kelly, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in Madsen v. Women's Health Ctr.*, 68 S. CAL. L. REV. 427, 462 (1995) (discussing the constitutionality of buffer zones to permit access to abortion clinics and the need to restrict free speech where it interferes with the rights and safety of others expressing the equally valid constitutional right to an abortion), with Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991) (describing constitutional protection of free speech on public land and the diminishing role of the public forum due to the Supreme Court's narrowing definition of "public forum" and the increase in privately-owned American gathering places).

233. 530 U.S. 703 (2000).

234. Seager & Handman, *supra* note 21, at 35.

235. *Hill*, 530 U.S. at 725, 733.

236. See *id.* at 732-35. The Court also considered the patients' privacy interest—"the unwilling listener's interest in avoiding unwanted communication." *Id.* at 716.

237. Seager & Handman, *supra* note 21, at 35 ("Suggesting the 'deck seem[s] stacked,' Justice Scalia denounced the decision as replacing '[u]n'inhibited, robust and wide-open debate' with 'the power of the state to protect an unheard of 'right to be left alone' on the public streets.'") (alterations in original) (quoting *Hill*, 30 U.S. at 764-65 (Scalia, J., dissenting)).

238. *Hill*, 530 U.S. at 792 (Kennedy, J., dissenting).

239. *Id.*

240. See *supra* notes 219-30 and accompanying text (delineating the background of *Burson*, which permitted polling area restrictions that facilitated the electorate's access to those areas); see also *infra* notes 271-78 and accompanying text (analyzing the *Burson* decision and noting its confinement to the pre-vote context).

right to an abortion and the right to vote, nonetheless, diminishes the *Hill* decision's applicability.

Yet the discernable vulnerability of restrictions on voting poll access extends beyond the attenuated nexus with *Hill's* analysis of access to abortion clinics. A thorough review of *Burson* reveals analytically weak premises for restrictions on access to polling places. The plurality's conclusion that voting polls do not constitute public fora remains fundamentally suspect. Scalia's concurrence, and the deciding vote in *Burson*, which states that voting polls are not public fora,²⁴¹ places the *Burson* decision on exceedingly shaky ground and confirms the muddled state of the public forum doctrine.

In fact, some have deemed the Supreme Court's public forum doctrine as "notoriously confused."²⁴² In various opinions, the Court exacerbated the confused state of the public forum doctrine by blurring the distinctions between public and nonpublic fora. The Court has generally defined designated public and nonpublic fora by their limited access for either certain speakers or for specific subjects.²⁴³ For example, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,²⁴⁴ the Court stated that "a public forum may be created by government designation of a place or channel of communication for use by the public at-large for assembly and speech, for use by *certain speakers*, or for the discussion of *certain subjects*."²⁴⁵ Yet,

241. *Burson v. Freeman*, 504 U.S. 191, 213 (1992).

242. Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 131 (1998).

243. See *infra* notes 244-49 and accompanying text (contrasting language that the *Cornelius* and *Perry* courts used to define designated public and nonpublic forums). In essence, *Arkansas Educational Television Commission* has defined the forum both by the speaker—political candidates—and also by subject matter—political speech.

244. 473 U.S. 788 (1985).

245. *Id.* at 802 (emphasis added). In *Cornelius*, the Court considered whether the exclusion of legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC) violated the First Amendment. *Id.* at 790. The CFC was an annual fundraising drive in which volunteer federal employees distributed literature containing a description of each charity involved. *Id.* at 790-91. The *Cornelius* Court first found that the CFC was a form of solicitation protected by the First Amendment. *Id.* at 799. However, the Court cautioned, "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799-800. Under the forum analysis, the government can exclude speakers from a public forum only when the exclusion is narrowly drawn to serve a compelling state interest. *Id.* at 800. The government must also justify any exclusion from a designated public forum by a compelling state interest. *Id.* However, the government can limit access to a nonpublic forum with reasonable and viewpoint-neutral restrictions. *Id.* The Court began its forum analysis by defining the relevant forum "in terms of the access sought by the speaker," which in this case was the CFC, not the federal workplace. *Id.* at 801. The Court further clarified that of the three types of forums—traditional public forum, designated public forums, and nonpublic forums—a traditional public forum is one that has been dedicated to assembly and debate by long tradition or by government fiat. *Id.* at 802. In contrast, the government creates a designated public forum by intentionally opening a nontraditional forum "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* After examining the policy and practice of the government along with the history and nature of the CFC, the Court concluded that the CFC was a nonpublic forum. *Id.* at 804-06. The Court assessed the reasonableness of the exclusions from the forum in light of the purpose of the forum and the surrounding circumstances, concluding that the limitations on the CFC were reasonable. *Id.* at 809-11. Because the lower court had not previously addressed whether the exclusion was viewpoint-

several pages later, the *Cornelius* Court used nearly identical words to define a nonpublic forum, stating, "Control over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."²⁴⁶ Thus, both public and nonpublic fora can be limited by speaker identity and subject matter.

The same confusion surfaces in *Perry Education Ass'n v. Perry Local Educators' Ass'n*²⁴⁷ as well. The *Perry* Court inserted the following footnote in its definition of a designated or limited public forum: "A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."²⁴⁸ Yet it went on to say,

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.²⁴⁹

Thus, the crux of the forum inquiry, which epitomized Scalia's concurrence and the pivotal vote in *Burson*,²⁵⁰ remains the designation of an area,

neutral, the Court declined to rule on that issue and remanded the case. *Id.* at 811-13.

246. *Id.* at 806 (emphasis added).

247. 460 U.S. 37 (1983).

248. *Id.* at 46 n.7 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981), which dealt with student groups, and *City of Madison Joint Sch. Dist. v. Wis. Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976), which involved school board business). The Court in *Perry* considered whether denying a teachers' union access to internal teacher mailboxes violated the First Amendment. *Id.* at 39. The primary function of the mail system was to facilitate communication among teachers and administration; the school also had allowed access to various private organizations, including the union that was the teachers' exclusive bargaining representative but excluded the rival union under the bargaining contract. *Id.* at 39-40. The *Perry* court explained that the nature of public property determines the right of access and the standard by which an exclusion is evaluated. *Id.* at 44. First, when property has "by long tradition or by government fiat . . . been devoted to assembly and debate," the state may only enforce a content-based restriction if it is necessary to achieve a compelling state interest and narrowly drawn to that end. *Id.* at 45. Content-neutral time, place, and manner restrictions are permissible if narrowly tailored to serve a significant government interest and if ample alternative means of communication remain open. *Id.* Second, if government has opened property for public expression, the Constitution holds it to the same standards as in a traditional public forum. *Id.* at 45-46. For example, a forum may serve a limited purpose, such as facilitating speech by certain groups or about certain subjects. *Id.* at 46 n.7. Finally, if public property is not a traditional or designated public forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46. The *Perry* court decided that the mailboxes fell within the third category because the school district had not opened the mailboxes for use by the general public, and selective access did not transform the property into a public forum. *Id.* at 46-47. The Court found no viewpoint discrimination in the exclusion, pointing out that the right to make access decisions on the basis of subject matter and speaker identity is inherent in the nonpublic forum. *Id.* at 48-49. According to the *Perry* court, the school district's restriction was reasonable in light of the purpose served by the forum and in light of the substantial alternative channels of communication that remained open for the rival union. *Id.* at 49-53. Therefore, the Court concluded that the exclusive-access policy was constitutional. *Id.* at 55.

249. *Perry*, 460 U.S. at 49.

250. *Burson v. Freeman*, 504 U.S. 191, 213 (1992).

i.e., polling places, as either a public or nonpublic forum. Pivotal in this exercise is both the government's intent and the compatibility of the property with the relevant expressive activity.²⁵¹ The Court has often indicated that the government maintains a nonpublic forum when its purpose in allowing access is not to facilitate speech.²⁵² Some nonpublic forums may serve communicative purposes in limited instances, yet the government has not intentionally opened them for expressive activity.²⁵³ Allowing certain expressive activity does not indicate that an area is a public forum unless the government has demonstrated a specific intent to designate the area for public expression.²⁵⁴ Governmental intent, therefore, determines whether an area becomes a limited public forum or remains a nonpublic forum.²⁵⁵ In fact, the definition of a designated public forum explicitly covers property open for debate.²⁵⁶

One can see the Court's rather incoherent application of the public forum doctrine in several key cases. In its 1998 decision in *Arkansas Educational Television Commission v. Forbes*,²⁵⁷ the Supreme Court decided that a public television station constitutionally could exclude an independent candidate from a political debate as long as the exclusion was "a reasonable, viewpoint-neutral exercise of journalistic discretion."²⁵⁸ Legal commenta-

251. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119 (1977); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)) (asserting that the Court will not find public forum when clear evidence of contrary government intent exists or nature of property is inconsistent with expressive activity); *see also* *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (examining "forum's special attributes" and "characteristic nature and function of the particular forum involved") (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981)); *infra* Part IV.A (focusing on government intent); *infra* Part IV.B.1 (considering compatibility requirement).

252. *See* *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) ("The decision to create a public forum must . . . be made by intentionally opening a nontraditional forum for public discourse.") (internal quotations and citation omitted); *Kokinda*, 497 U.S. at 730 (asserting that the practice of allowing some speech activities on postal sidewalks did not necessarily indicate intent to dedicate postal premises to expressive activities); *Cornelius*, 473 U.S. at 805 (finding affirmative intent to create open forum).

253. *See* Edward J. Neveril, Comment, "Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery, 90 NW. U. L. REV. 1185, 1195 (1996) ("[A]lthough possibly open to public access, [nonpublic forums] are not dedicated to expressive activity.").

254. *Cornelius*, 473 U.S. at 805 ("The Government did not create the CFC for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes."); *see also* *Kokinda*, 497 U.S. at 730 ("[A] practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activities.").

255. *See* *Cornelius*, 473 U.S. at 805 ("[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.").

256. *See* *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." (quoting *Cornelius*, 473 U.S. at 802)). Limiting the debate to a part of the public does not take the debate out of the designated public forum context. *See* *Lee*, 505 U.S. at 678 (1992) (stating that designated public forum is "property that the State has opened for expressive activity by part or all of the public").

257. 523 U.S. 666 (1998).

258. *Id.* at 683.

tors had vigorously criticized the decision. Many sided with Justice Stevens's dissent in arguing that the government should require public broadcasters to use pre-established, narrow, objective criteria to choose candidates.²⁵⁹ Perhaps the fault of the *Forbes* Court lay less in creating the confusion than in perpetuating it.

In previous cases such as *International Society for Krishna Consciousness, Inc. v. Lee*,²⁶⁰ after defining a traditional public forum or a designated public forum, the Court considered the single category of "all remaining public property" subject to the standard of nonpublic forums.²⁶¹ No property qualifies as "not a forum at all"²⁶² because, according to *Cornelius*, "[t]he forum should be defined in terms of the access sought by the property."²⁶³ Therefore, if a party seeks access to government property for speech, the property is some sort of forum. Perhaps the *Forbes* Court simply was asserting that when the government has not opened an area for speech, the government property is not a forum at all; however, according to *Perry*, a nonpublic forum can serve either a communicative or a noncommunicative purpose.²⁶⁴ Or perhaps the Court simply meant that in certain instances the forum doctrine does not apply, yet the *Forbes* court previously had established that point in its opinion.²⁶⁵ Prior cases contrasted forums that were

259. See, e.g., *id.* at 694-95 (Stevens, J., dissenting) ("[C]onstitutional imperatives . . . command that access to political debates planned and managed by state-owned entities be governed by pre-established, objective criteria."); James B. Toohey, Note, *A Standard with No Moxie: The Supreme Court in Arkansas Educational Television Commission v. Forbes Allows Government Actors to Choose Candidates for Television Debates with Little Restriction*, 30 LOY. U. CHI. L.J. 765, 789 (1999) (asserting that guidelines that exclusions be reasonable and viewpoint-neutral are inadequate); Jennifer Wright-Brown, Note, *Finding Room for Independent Candidates in Light of Arkansas Educational Television Commission v. Forbes*, 7 COMM. L. CONSP. 137, 151 (1999) (predicting that without objective standards, public broadcasters will exercise unfettered discretion in choosing among candidates). Justice Stevens wrote that the central issue of the case was not whether the forum was public or nonpublic but rather whether *Arkansas Educational Television Commission* had sufficiently defined contours of forum. *Forbes*, 523 U.S. at 690 (Stevens, J., dissenting).

260. 505 U.S. 672 (1992).

261. *Id.* at 678-79 (explaining that limitations in the remaining category of public property must be reasonable and viewpoint neutral); see also *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (referring to tripartite framework of public forum doctrine); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (delineating three categories of public property). In *Lee*, the Supreme Court considered whether an airport terminal that a public authority operated was a public forum and whether the First Amendment allowed a regulation forbidding solicitation in the airport terminal. *Lee*, 505 U.S. at 674. The *ISKCON* Court stated that the forum-based approach classified government property into three categories: first, that which traditionally has been available for public expression; second, property that is a "designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public"; and third, "all remaining public property." *Id.* at 678-79. The Court concluded that the airport terminals were nonpublic forums and that the solicitation regulation was reasonable. *Id.* at 679.

262. *Forbes*, 523 U.S. at 667.

263. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (agreeing with respondents' argument that access sought delineated forum).

264. See *Perry*, 460 U.S. at 46 ("Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . [T]he State may reserve the forum for its intended purposes, *communicative or otherwise*, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view.") (emphasis added).

265. See *supra* Part III.C.1. (summarizing portion of *Forbes* opinion which stated that as a general

public—either traditional or designated—with those that were *nonpublic*. The *Forbes* court potentially realigned the debate around whether the property is a *forum* or a *nonforum*.

The totality of the confused state of public forum doctrine leaves Scalia's analysis in *Burson* on exceedingly tenuous ground, thus clouding the validity of the *Burson* plurality. A significant characteristic of a nonpublic forum is that the nature of the property in question must be inconsistent with expressive activity.²⁶⁶ The government may restrict various kinds of speech on government property when that expression is "inherently disruptive" to the official purpose of the forum.²⁶⁷ Such restriction connotes the property's status as a nonpublic forum. This finding contrasts sharply with a designated public forum which has as a principal purpose the free exchange of ideas.²⁶⁸ Contrary to Scalia's finding, it seems plausible, if not certain, that polling places are not only compatible with speech but actually generate the type of expression most constitutionally valued—political speech.²⁶⁹ It stretches the bounds of credulity to view voting polls as incompatible with expressive activity of any type. The very nature of polls serves as a conduit for political expression—the vote.²⁷⁰ Thus, Scalia's conclusion that voting polls are not public fora places the *Burson* plurality on tenuous constitutional ground and perpetuates the confusing state of the public forum doctrine.

2. *Interventionism's Dubious Validity in the Post-Vote Context*

Burson's limited applicability and the continued vulnerability of restrictions on poll access go beyond the perplexing public forum analysis contained in Scalia's pivotal concurrence in that case. *Burson*, and to a limited extent *Hill*, might suggest that exit poll restrictions that fall short of an outright ban might pass constitutional muster given the state's interest to preserve electoral integrity. Yet it is important to note that *Burson* fails to sug-

rule, forum doctrine does not apply to public broadcasting station).

266. See *Cornelius*, 473 U.S. at 804 (asserting that the Court is unlikely to find designated public forum when principal function of property would be disrupted by speech activity) (citing *Greer v. Spock*, 424 U.S. 828 (1976) and *Adderley v. Florida*, 385 U.S. 39 (1966)); *Perry*, 460 U.S. at 44 (stating that extent of right of access depends on nature of property). The compatibility of the property with expressive activity can help determine government intent. *Cornelius*, 473 U.S. at 802.

267. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-85 (1992) (finding solicitation incompatible with function of airport terminal); *United States v. Kokinda*, 497 U.S. 720, 732-33 (1990) (concluding that solicitation on sidewalk in front of post office was inherently disruptive of post office business); *Cornelius*, 473 U.S. at 806 (stating that nature of federal workplace justified control over access). However, the *Cornelius* court did back away from strong incompatibility language, saying that although strict incompatibility was required for exclusion from a public forum, it was not mandated in the context of a nonpublic forum. *Id.* at 808.

268. See *Cornelius*, 473 U.S. at 811 (stating that "a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas").

269. See *supra* note 148 and accompanying text (denoting political speech as an optimal form of expression that merits First Amendment protection).

270. See *supra* notes 146-48 and accompanying text (discussing the electoral process as political voice which ensures governance responsive to the body politic).

gest a method that furthers electoral integrity without unreasonably restricting expressive autonomy. This failure, together with the heightened relevance of poll access in the post-vote context, signals the death knell for most, if not all, post-vote restrictive schemes.

The significance of the autonomous right to disseminate information assumes greater significance in the post-vote context. Exit polling, which provides information relevant to voter preferences, and the media's dissemination of the results of that polling further political discourse and, ultimately, democracy's functionality.²⁷¹ Moreover, *Burson* allowed restrictions on poll access only in the pre-vote context, when the risk of voter intimidation or fraud would be highest. By contrast, the probability of intimidation or fraud after votes are cast (discounting, of course, the tallying of votes) would be comparatively low. This diminished probability of fraud and intimidation weakens any justification for post-vote restrictive schemes.

Furthermore, voters in later time zones, who would be the intended beneficiaries of post-vote restrictions on polling, seem too remote or speculative to justify restrictions on poll access in the post-vote context. There is no proof that restrictions would maximize voter participation in later time zones. Even if one could confirm some marginal benefit from these restrictions, it would be difficult to design narrowly tailored schemes that would survive judicial scrutiny.²⁷²

Yet arguments against post-vote restrictive schemes extend beyond the limited applicability of the *Burson* plurality. Note that post-vote restrictive schemes delay news-gathering from voters with fresh recollections.²⁷³ Prompt investigation and dissemination become essential since the craving for news of election results escalates as polls begin to close. Exit poll restrictions, at least, hamper this immediacy and, at the very worst, inhibit political speech and information. This fundamental flaw of restrictive schemes confirms their incongruity with constitutional liberties and democratic ideals associated with personal autonomy and collective governance.²⁷⁴

On a more theoretical level, one might posit that the judiciary's adoption of a more positive theory of expressive rights, which furthers a more pluralistic form of democracy, would enhance the legality of certain restrictions designed to secure the electoral process. Judicial focus would extend beyond mere abuse of sovereign power to encompass considerations of speech as a legitimate stimulus of autonomy.²⁷⁵ Speech value and its propensity to foster individual freedom would then take center stage in the

271. See *supra* notes 146-48 and accompanying text.

272. See Seager & Handman, *supra* note 21, at 35 (noting that more narrowly tailored restrictions can regulate overbearing behavior by pollsters); see generally Note, *Exit Polls*, *supra* note 60 (discussing the effects of exit polls on the voting process and the constitutionality of restrictions on the collection and dissemination of exit poll data).

273. See Seager & Handman, *supra* note 21, at 35. The Court's decision in *Hill* emphasizes immediacy as a critical element of expressive rights. *Hill v. Colorado*, 530 U.S. 703, 729 (2000).

274. See Seager & Handman, *supra* note 21, at 35.

275. Werhan, *supra* note 168, at 90.

courts' opinions. The potential byproduct of such jurisprudence might be less resistance to governmental tactics that marginally intrude on expressive rights—particularly if the intrusion advances electoral integrity.

Yet a judicial shift to a more positive view of expressive liberties would not ensure the viability of governmental restrictions. Positive theorists do not ignore abuse of governmental power, but supplement examination of that abuse with an analysis of speech as a facilitator of autonomy. Overt restrictions on expressive interests would, therefore, face heightened scrutiny even under a more positive theory of First Amendment jurisprudence.

The effectiveness and utility of restrictive schemes also seem dubious in light of contextual variances of different election contests. Elections, including contests within a campaign, would likely have disparate impacts on the body politic. The sense of urgency associated with a presidential election might differ drastically from those of non-presidential contests, e.g., lower federal offices, state, or local elections. Less high-profile elections, while influential on a local level, would be less effectual on a regional or national level.

The actuality of cause and effect also augurs against restrictions on poll access. The impact of media's coverage seems proportionate to a contest's closeness. For example, in a presidential campaign where reasonable indicators signal a landslide,²⁷⁶ the media's projections seemingly would have a nominal effect on voter conduct. Voter preferences, signaled far in advance of polling results, would be less affected by the media's polling results. Thus, under this scenario, schemes which restrict the media's expressive behavior would have dubious utility.

Another significant factor that militates against restrictive schemes is their inherent impracticality. Even if expressive freedoms were elastic enough to permit restriction,²⁷⁷ decisionmakers would require clear guidelines for their consistent implementation. These guidelines or rules must prescribe when and under what circumstances restrictions on expressive conduct can be invoked. The intended effect, of course, would be achievement of the elusive balance between the media's right to gather and disseminate information and the body politic's need for electoral integrity. Construction of such bright-line rules, however, presents a formidable chal-

276. A number of scholars note the landslide victories of Presidents Johnson, Nixon, and Reagan. See, e.g., Henry L. Chambers, Jr. & Dennis E. Logue, Jr., *Separation of Powers and the 1995-1996 Budget Impasse*, 16 ST. LOUIS U. PUB. L. REV. 51, 56 (1991) (discussing the implications of Lyndon Johnson's landslide victory in 1964); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 137 (1991) (discussing the effects of Richard Nixon's landslide victory on the Environmental Protection Agency's independence); Sonia M. Suter, *The Allure and Peril of Genetics Exceptionalism: Do We Need Special Genetics Legislation?*, 79 WASH. U. L.Q. 669, 725, n.297 (2001) (noting Lyndon Johnson's landslide victory in 1964 and its implications in the passage of landmark Medicare and Medicaid legislation); Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1759, n.51 (2001) (noting Ronald Reagan's 1984 landslide victory over Walter Mondale).

277. For a comparative examination of expressive rights in the United Kingdom, see *supra* notes 159-60 and accompanying text.

lenge. Notwithstanding obstacles presented by the inelasticity of First Amendment jurisprudence,²⁷⁸ it seems implausible to formulate rules that will constitutionally and effectively regulate speech restrictions in the variant circumstances of electoral contests.

The inelasticity of expressive rights and the judiciary's embrace of a more negative theory of liberty do not, however, signal the presumptive failure of *any* effort to preserve electoral integrity. This jurisprudential reality simply signals the need for a focal shift toward strategies that avoid speech restrictions and ensure the continued enjoyment of expressive autonomy.

IV. FEASIBLE "REMEDIES" FOR MEDIA'S PERCEIVED IMPACT ON ELECTORAL INTEGRITY

Discussion thus far suggests a zero-risk strategy for security of the electoral process: simply forego any attempt to minimize the effects of the media's erroneous polling projections. As previously noted, the impact of such reports on voter conduct is, for the most part, speculative²⁷⁹ and possibly obviates the need for governmental intervention. Moreover, the media's role as monitor of governmental process largely discounts residual problems related to informational errors.²⁸⁰ The media generally garners considerable deference from the judiciary, irrespective of any speculative impacts on governmental processes.²⁸¹ Thus, interventionist measures designed to curb perceived effects of erroneous projections appear legally futile and, perhaps, unnecessary. On a more profound level, interventionism infringes on expressive liberties and runs counter to pluralistic democracy's emphasis on mutually-respected autonomy and self-governance.²⁸²

Yet the *perception* of the media's adverse influence on election outcomes contributes to public dissatisfaction with the electoral process in general.²⁸³ Perceptual dysfunctionality leads to disaffection which, in turn, erodes public confidence in governmental structures. This continuing pathology potentially threatens the stability of collective governance and sug-

278. For more regarding the inelasticity of expressive rights in the United States, see generally Part III.B. of this Article.

279. See *supra* notes 56-69 and accompanying text (noting studies that provide inconclusive evidence of media reports' influence on voter opinion and conduct).

280. See *supra* notes 71, 103 and accompanying text (discussing the media's vital role in a legitimate democracy).

281. See *supra* notes 181-230 and accompanying text (delineating cases illustrative of the courts' more negative theory of liberty relating to free speech and press and the proclivity to favor free press rights).

282. See *supra* note 135 and accompanying text (explaining the concept of democracy as an intersection of personal autonomy and preservation of the collective interests of the body politic).

283. For a similar discussion of the role of perception as the genesis of interventionist action by decisionmakers, see Blake D. Morant, *The Relevance of Gender Bias Studies*, 58 WASH. & LEE L. REV. 1073, 1078 (2001) (opining that the perception of bias in the judicial system compels decisionmakers to take appropriate steps to dispel those perceptions).

gests the need for remedial action.²⁸⁴ Despite the symbiosis between autonomy and collective self-governance,²⁸⁵ formulation of legally viable remedies constitutes a formidable challenge. As the remainder of this section demonstrates, any effective strategy must respect personal autonomy as it remedies the media's impact on elections.

A. Avoidance of Overt Restrictions on Poll Access

Discussion of tactics that temper perceived effects from media reports should commence with an admonition: governmental decisionmakers must avoid tactics that restrict the release of polling information. A couple of notable cases confirm the futility of overt restrictions on dissemination.²⁸⁶

In the analogous case of *Bantam Books, Inc. v. Sullivan*,²⁸⁷ a Rhode Island advisory commission informed bookstores of books considered to be "objectionable." The commission further warned owners that sale of listed books could trigger obscenity prosecutions by local police. Irrespective of legitimate state interests, the United States Supreme Court found that the commission's actions intimidated store owners and constituted "informal censorship" that violated the First Amendment.²⁸⁸ *Bantam Books*, during the more formative period of the Court's jurisprudence on governmental interventionism, established judicial intolerance of governmental restraints on speech.

Years later, Judge Gerhard Gesell, in *Hentoff v. Ichord*,²⁸⁹ enjoined publication of a congressional report written "solely for [the] sake of expos[ing] or intimidat[ing]" progressive political groups,²⁹⁰ including the Black Panther Party and Students for a Democratic Society. The court further stated that the government's report had "no relationship to any existing or future proper legislative purpose."²⁹¹ The court did not bar members of Congress from speaking and was deferential to Congressional authority. It did, however, enjoin the report's publication since it exceeded Congress's legislative function and infringed on expressive liberties.²⁹²

Yet general jurisprudential antipathy toward restrictions on expressive behavior has not always deterred legislatures, particularly Congress, from attempts to control the media during elections. In the early 1980s, Congress

284. See Elhauge, *supra* note 10, at 15 (opining that issues that surfaced in the wake of Florida 2000 must be resolved now, "while we are still behind the veil of ignorance and do not know which candidate will benefit [from those remedies]").

285. See *supra* notes 135-41 and accompanying text (noting democratic principles related to collective self-governance and individual interests associated with personal autonomy).

286. See *supra* notes 166-80 and accompanying text (noting the judiciary's employment of a negative theory of liberty in systematically invalidating government-imposed restrictions on the press).

287. 372 U.S. 58 (1963).

288. *Id.* at 69 (as applied through the Fourteenth Amendment).

289. 318 F. Supp. 1175, 1182 (D.D.C. 1970).

290. *Id.* at 1182.

291. *Id.*

292. *Id.*

held a series of hearings on the perceived negative influence of the media's erroneous projections on the electoral process. Colorado Senator Tim Wirth demanded that the networks suppress all announcements of election night winners until the polls had closed in western states.²⁹³ In 1982, Republican lawmakers proposed that those who would project winners of state contests before poll closures should face criminal sanctions.²⁹⁴ As the furor over projections waned, these bills eventually floundered for lack of Congressional action.²⁹⁵ Congress, perhaps in recognition of constitutional proscriptions, has failed to enact legislation that restricts media activity at polling locations.²⁹⁶

Although reflective of the judiciary's adherence to a negative theory of First Amendment jurisprudence, *Bantam Books* and *Hentoff* underscore the dubious legality of heavy-handed tactics against expression, whether exercised by an individual or media source. Yet avoidance of overly-restrictive measures has a more fundamental basis. The effective function of democratic governance also augurs their ultimate failure.

Governmental restrictions on the media also interfere with the natural symbiosis between individual expressive liberties and governmental functioning of the body politic.²⁹⁷ The media's educative and monitoring functions, even when consumed and distorted by frenzy,²⁹⁸ foster governmental integrity. Though media scrutiny in and of itself does not necessarily ensure honest government, persistent examination by the press encourages more circumspect behavior on the part of governmental officials. Any push toward honest government benefits societal members to whom governmental structures remain accountable. Restrictions on polling data stymie informational flow to the body politic. They similarly inhibit meaningful discourse that fosters governmental responsiveness to individual interests. Viable strategies that preserve the electoral process must, as a consequence, avoid heavy-handed restraints and inventively accommodate the media's expressive autonomy.

B. Voluntary Regulation

1. The Compatibility of Voluntary Regulation with Democratic Norms

Voluntary restraint by the media constitutes a potentially effective means to counter reporting errors. Such a scheme envisions some degree of

293. PLISSNER, *supra* note 29, at 85-86.

294. Barlow, *supra* note 60, at 1012, n.62.

295. Leonardo, *supra* note 38, at 298.

296. See Barlow, *supra* note 60, at 1005 n.17, 1011-13 (reviewing legislative history that documents Congress's inability to address problems associated with exit polling).

297. See *supra* notes 135-47 and accompanying text (discussing the intersection of individual and collective interests in a democracy).

298. See *supra* notes 20, 78-103 and accompanying text (providing more detailed analysis of media frenzy).

media self-regulation. Self-imposed restrictions against premature reporting of polling results or the adoption of standard reporting procedures theoretically enhance reporting accuracy. One example of media self-regulation includes ethical codes, which are intended to secure journalistic integrity.²⁹⁹

Regulation by consent has significant appeal. Volition comports with, and is a direct manifestation of, democratic notions of autonomy. As previously discussed in this Article, personal autonomy comprises a key component of democracy.³⁰⁰ Media self-regulation, as an autonomous concept, becomes a democratic exercise of expressive liberty. Voluntary restraints thus avoid the clash between expressive rights and electoral integrity.³⁰¹ The media's self-policing also furthers the body politic's interest in fair elections since the resultant diminution of erroneous information fosters a more intelligent electorate. The absence of governmental interference confirms self-regulation's compatibility with First Amendment norms.

A crucial question on voluntary restraint, however, centers on efficacy. Effectiveness of these schemes can be dubious given the unpredictability of volition and the lack of enforcement mechanisms.³⁰² In some contexts, particularly those involving cataclysmic events, certain self-regulatory schemes maintain viability. The media's self-restraint during the initial phase of the United States' war against terrorism supports this theory.

After the September 11, 2001 attacks on the World Trade Center and the Pentagon, the United States commenced a complex assault on terrorism.³⁰³ Initial objectives in this mission included the capture of reputed terrorist, Osama bin Laden, and members of the al Qaeda network based in Afghanistan. Before commencement of the air assault and maneuvers by ground troops, President Bush and other governmental officials implored the media not to show any of bin Laden's videotaped or written commentary.³⁰⁴ Governmental officials suspected that bin Laden's statements may

299. See *supra* note 14 and accompanying text (noting the journalists' code of ethics as a regulatory control on media conduct).

300. Such manifestation is somewhat reflective of the positive theory of liberty. See *supra* notes 170-72 and accompanying text (describing positive theory of expressive liberties); see also Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921) (noting that metaphysical and political philosophers of the late 18th century advocated the merit of freedom and that the concept of "freedom" constitutes a definitive base of the Declaration of Independence and remains reflective of Jeffersonian democracy, thereby facilitating individual action and minimizing governmental activity or interference).

301. See *supra* notes 183-230 and accompanying text (discussing generally the clash between protection of individual liberties and preservation of interests of the body politic).

302. The flexibility of voluntariness can render an agreement vague, unenforceable, and potentially without adequate remedy in the event of breach. See generally Note, *Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics*, 97 HARV. L. REV. 978 (1984). Additional confusion stems from the parties' latitude to define their actions with respect to the bargain entered. It may be theorized that parties may be free to enter into an agreement; however, their rights and duties pursuant to such an agreement may be fixed independent of the bargain reached by the parties.

303. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force—Terrorist Attacks on World Trade Center and Pentagon*, 96 AM. J. INT'L L. 237, 237-41 (2002) (providing a detailed account of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon and governmental responses in the wake of those attacks).

304. See BIOGRAPHY MAG., Jan. 2002, at 41 (stating that Condoleezza Rice, National Security Advi-

have been encoded with signals to other terrorists or sympathizers.³⁰⁵ Any dissemination of bin Laden commentary might have led to more terrorist activity or jeopardized the pending military response.³⁰⁶ Media sources acceded to the government's request.³⁰⁷ With the exception of truncated stories in print sources, coverage of the "war on terrorism" contained little, if any, bin Laden commentary.³⁰⁸

Media's complicity during the initial phase of the war on terrorism, however, seems more aberration than custom. The extraordinary nature and the unusual circumstance of terrorist attacks on the United States likely attributed to this surprising restraint. Conventional wisdom dictates that, in the face of less apocalyptic events, the media would ignore pleas for restraint and revert to its natural tendency for frenzy.³⁰⁹

The efficacy of voluntary restraints is also proportional to the rate of compliance by the industry. Herein lies volition's fundamental flaw: major media sources must comply if voluntary restraints are to have any true beneficial effect. Other than public opinion, there is virtually no mechanism that enforces compliance.³¹⁰ The refusal of even one media source to comply creates a domino effect that relegates voluntary restraints to meaningless platitudes. Past attempts to attain the media's voluntary restraint during certain elections lend credence to this view.

Sensitive to constitutional limitations after the 1980 and 1984 presidential elections, Congress sought more consensual means of restraint on exit polling. In 1985, Al Swift (D-Wash.), chairman of the House Task Force on Elections, and William M. Thomas (R-Cal.) attempted to forge a "voluntary" agreement that would restrain networks from premature announcements of polling results.³¹¹ The House passed a concurrent resolution that

sor, held a conference call with major networks "urging restraint" from airing bin Laden's taped communications which might contain encoded messages).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* (further indicating that networks agreed not to air "live" bin Laden tapes or to "run clips" without pre-screening or editing taped communications).

309. See *supra* notes 20, 78-103 and accompanying text (explaining the media's penchant for frenzy and the latter's impact on press coverage of significant events). Note, too, that the Internet, where websites continue to proliferate at an amazing rate, will provide instantaneous reports of election projections and threaten the efficacy of voluntary restraints. Those maintaining websites likely would not be subject to any agreement to refrain from early projections and would, therefore, likely scoop election results. Such an occurrence would frustrate the traditional media's agreement of restraint since the information which the agreement was designed to contain would have been released to the general public. The media's competitive nature would compel other sources to release their projections as well. Similarly, internet access would likely diminish the effectiveness of simultaneous voting poll closures. See Carroll et al., *supra* note 83, at 21 (referencing the accessibility of polling information on the Internet).

310. See Michael J. Gerhardt, *Liberal Visions of the Freedom of the Press*, 45 VAND. L. REV. 1025, 1051 (1992) (book review) (noting Lucas A. Powe, Jr.'s thesis that "the public is the ultimate check on the press"); see also LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 297 (1991).

311. See generally Gerhardt, *supra* note 310. Both Swift, chairman of the House Task Force on Elections, and Thomas, the committee's ranking Republican, had a vested political interest in trying to keep the networks from doing anything that might possibly discourage voter turnout in their Western states.

sought the networks' voluntary restraint from election projections until the closure of all state polls.³¹² During congressional hearings, network officials pledged not to broadcast projected outcomes in a state until most of that state's polls had closed.³¹³

Yet its lack of clarity and authority doomed the effectiveness of the agreement from its inception. Interpreted strictly, the agreement would not have expressly prevented the declaration of a winner before the polls had closed.³¹⁴ Thus, in the Bush-Gore contest in Florida, the networks' 7:50 p.m. announcement of a Gore win would have technically complied with the proposed agreement, as most of Florida's precincts had closed by that time.³¹⁵ Despite questions regarding effectiveness, voluntary compliance with an agreement to postpone projections until all polls have closed retains a sense of idealism that comports with democratic norms.³¹⁶

Dubious effectiveness aside, voluntary restraints can be tainted with illegality. To pass constitutional muster, self-regulation must be truly voluntary. Restrictions adopted under a cloud of governmental coercion tend to violate First Amendment prescriptions.³¹⁷ Thus, questionable governmental tactics aimed to induce media consent to restrictions taint any agreement for self-restraint. The reemerged debate over projections in the aftermath of election night 2000 substantiates this point.

Eighteen years after discussion of sanctions for premature election projections,³¹⁸ W.J. "Billy" Tauzin (R-La.), chair of the House Subcommittee on Telecommunications, Trade and Consumer Protection, commenced an investigation into the networks' mistaken Florida projections in the 2000 presidential election.³¹⁹ Tauzin quickly followed this announcement with an admission of the investigation's suspect legality.³²⁰ The strategy became one of hopeful consensus, in which dialogue with the networks might lead to mutual agreement on criteria for election night projections.³²¹ Tauzin sent the major networks letters that demanded responses to detailed questions

312. Barlow, *supra* note 60, at 1012 n.62.

313. PLISSNER, *supra* note 29, at 85.

314. *See id.*

315. Seager & Handman, *supra* note 21, at 35. Note the dubious utility of the agreement if it allowed dissemination of the erroneous projection of Gore as the winner of the Florida contest.

316. Despite its good intentions, the National Commission on Federal Election Reform's (hereinafter "the Commission") recommendation that "[n]ews organizations should not project presidential races until the polls close in the 48 contiguous states" seems little more than a pipe dream. *See* Walter Shapiro, *Election Report Flawed but Laudable*, USA TODAY, Aug. 1, 2001, at A7 (responding to the Commission's proposal that the media refrain from projections with the quip, "Yeah, sure. While you're at it, why not demand that cable news shows not mention Chandra Levy until the case is solved?"); *see also infra* notes 399-403 and accompanying text (providing more detailed discussion of the Commission's charge and ultimate report).

317. *See supra* notes 286-98 and accompanying text (noting the dubious constitutionality of certain restraints against the press).

318. *See supra* notes 311-17 and *infra* notes 318-26 (describing previous proposals by certain members of Congress who sought to stem the media's projection of election winners).

319. Seager & Handman, *supra* note 21, at 29.

320. *Id.*

321. *See* Transcript of Nov. 9, 2000, news conference by Billy Tauzin, R-La., FDCH Political Transcripts, available on LEXIS-NEXIS (Tauzin News Conference).

concerning their election night news-gathering and decisionmaking processes.³²² Congressman Tauzin ultimately sought reforms that would discourage projection of a presidential contest winner until *all* of the state's polls had closed.³²³ ABC and Fox reportedly have already agreed to Tauzin's request.³²⁴ Commonly known as "The Pledge," this non-binding, gratuitous promise amounts to voluntary self-regulation which Congressman Tauzin has "no intent to enforce."³²⁵

So-called voluntary restrictions accepted under duress can be tantamount to unconstitutional restraints. Congress's use of its investigative authority in a subtly coercive manner establishes a slippery slope of legality. As a basic premise, the legislature has broad discretion to hold hearings and subpoena witnesses.³²⁶ Courts generally accord such action enormous deference. Judicial decisionmakers, however, have suggested that congressional hearings and investigations are not without limitation. This is particularly true if Congress acts outside its "legitimate legislative sphere," or if First Amendment interests outweigh the asserted congressional interests.³²⁷ Congressional hearings, if coercive in nature, potentially abridge expressive liberties and, thus, become constitutionally problematic.³²⁸ Pressure exacted through threats of legislative or administrative hearings raises the specter of impermissible governmental restraint.³²⁹ Moreover, Congress may infringe on expressive liberties if it inquires or demands unpublished materials that

322. See Letter from W.J. "Billy" Tauzin, *supra* note 25. Tauzin sent copies of this letter to the chiefs of NBC, ABC, CBS, Fox, Associated Press, and CNN. Telephone Interview with Ken Johnson, Press Secretary to Congressman Tauzin (Dec. 4, 2000).

323. Seager & Handman, *supra* note 21, at 35.

324. David Hatch, *ABC Blinks on Projections: Net Agrees to Wait on Calling Races*, ELEC. MEDIA, Nov. 27, 2000, at 8.

325. Telephone Interview with Ken Johnson, *supra* note 322.

326. See J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797, 803 (2000) (examining Congress's investigative powers, the discord between those powers and Presidential privilege, and the limits on Congress's investigative powers by the executive and judicial branches of government).

327. Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J.L. & POL. 625, 640-41 (1987).

328. Seager & Handman, *supra* note 21, at 2.

In statements about the upcoming congressional hearings on network election reports, Tauzin's press secretary, Ken Johnson, has stressed repeatedly that Congress is not embarking "on a witch hunt" and is not considering any legislation to curb network behavior. But when asked what possible enforcement tools are available to Congress when it cannot constitutionally pass a law banning or delaying the broadcast of exit poll information or predictions, Johnson replied, "Oh, we'll just see them in front of the FCC." He laughed and said he was "just joking," but it is doubtful that the networks would see the humor.

In fact, a Washington, D.C., law firm has filed a formal complaint with the FCC seeking an investigation of the networks for their election night errors and asking the commission to consider sanctions "up to and including" license revocation. The law firm, which filed the complaint on behalf of itself, wants the FCC to investigate whether the networks failed to act "in the public interest," which is a requirement of an FCC license renewal under 47 U.S.C. § 309(a). The firm recently won a D.C. Circuit decision ordering the commission to consider a citizen's group's claim that CBS's 60 Minutes aired an allegedly "distorted" report on the Ukraine. CBS has vigorously denied the claim.

Id.

329. David L. Bazelon, *FCC Regulation and the Telecommunication Press*, 1975 DUKE L.J. 213, 215-17.

elucidate the media's "behind-the-scenes" news gathering practices and editorial decisions.³³⁰ This, of course, implicates issues of journalistic privilege.³³¹ Thus, Congressional inquiries employed tactically to encourage media self-restraint in election projections potentially overstep the bounds of constitutional propriety.

An analogous case notes the unconstitutionally coercive use of congressional hearings. In *Writers Guild of America, West v. FCC*,³³² a federal district judge in California invalidated a family viewing policy designed to limit violent and sexually-oriented programming. Networks voluntarily adopted this policy after a series of public hearings held by Congress.³³³ The court considered the FCC's threats of more public hearings to be more "backroom bludgeoning," rather than voluntary regulatory reform.³³⁴

Like its overt counterpart, coerced self-restraint faces almost certain judicial hostility. Coercion contravenes democratic principles rooted in expressive liberty and personal autonomy.³³⁵ Instead of compelled compliance through regulation or compulsory hearings, Congress should seek truly voluntary media participation in hearings that address problems associated with erroneous projections. Of course, the encouragement of networks and the VNS to refrain willingly from releasing projections until all polls have closed remains a central objective. To avoid the coercive and constitutionally suspect actions that haunted the government in *Hentoff* and *Writers Guild of America*, decisionmakers must avoid veiled threats of regulation, even if networks fail to abide by express agreements for restraint.

A publicly-endorsed agreement to refrain from premature projections could have beneficial effects, despite the lack of enforcement mechanisms. The media's expressed assent to self-restraint at the polls might morally

330. Seager & Handman, *supra* note 21, at 36.

In his letter to the networks, Congressman Tauzin asks, "What relationship and data sharing does your organization have with VNS and what analysis in-house or otherwise is used to project a winner in a State?" Another question is, "Did your organization use different models, standards or timing to call the projected winner in Massachusetts, Texas, Virginia, Georgia, California or Florida?" According to the congressman's office, all of the networks responded to his letter, although some have simply said they are conducting an internal investigation without answering all of his questions.

Id. See Letter from W.J. "Billy" Tauzin, *supra* note 25, at 2.

331. Most courts have recognized a qualified privilege of journalists to refuse to disclose unpublished materials or testify about news-gathering activities, a privilege that applies in both civil and criminal cases even when there is no traditional confidential source to protect. Seager & Handman, *supra* note 21, at 36. The federal reporter's privilege can be overcome only where (1) the news organization has unpublished material that is highly material and relevant and critically needed, (2) disclosure would not unduly intrude into protected First Amendment interests, and (3) the information is not available from other sources. See *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). Whether the reporter's qualified privilege applies to congressional inquiries depends upon the source of the reporter's privilege. According to *Gonzales v. NBC, Inc.*, 186 F.3d 102 (2d Cir. 1999), the question of the source of the privilege remains undecided and awaits a confrontation with Congress to bring the question to the Court. *Id.* at 109 n.6.

332. 423 F. Supp. 1064, 1149-53 (C.D. Cal. 1976).

333. *Id.* at 1142.

334. *Id.*

335. See generally *supra* notes 104-57 and accompanying text (discussing democratic principles of personal autonomy and free expression).

obligate the industry to at least attempt compliance with its agreement. Although this contract³³⁶ may not eliminate early projections, it should curb, to some extent, the media's quest to scoop election results.

The media's agreement for restraint could potentially spawn other residual benefits. Public endorsement of restraint manifests the industry's good faith, which, in turn, could assist in reestablishing voter confidence in the electoral process. The results of attempted restraint by the media could be significant. Increased voter confidence could heighten voter turnout, thereby maximizing democratic participation. Greater participation in the electoral process ensures truer election results. Such a metamorphosis in voter behavior might lead to elections that more accurately reflect the will of the electorate.

2. *The Reality of Media Self-Restraint - Personal Observation of CNN's Coverage of the 2002 Mid-Term Election Results*

Self-restraint, as the preferable means to stem the media's perceived negative impact on electoral processes, has, to this point in the Article, been a largely theoretical premise. Theory, however, is of little analytical value unless it is manifested in practice.

Media self-restraint would seem inevitable after the 2000 election night debacle.³³⁷ The intense public outrage at the media's performance on election night would assume that the industry would take some remedial measures to avoid a reprise.³³⁸ Yet the reality of voluntary self-restraint by broadcast media requires more deliberate inquiry and verification.

The 2002 midterm elections, the first post-2000 major national election process, presented a pivotal opportunity to assess whether the media modified its reporting behavior.³³⁹ To confirm the reality of media self-restraint, I personally witnessed, within their control room and studios, CNN's cover-

336. Because of its formalistic nature, the media's agreement to refrain from early projections constitutes a contract. The *Restatement (Second) of Contracts* defines a "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS sec. 1 (1979). The fundamental purpose of a contract is to preserve a party's bargain and to serve as a tangible embodiment of the party's voluntary assent to the contract's terms. See Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 653 (1983) (stating that "the very purpose of a contract is to ensure performance"); Steven R. Salbu & Richard Braham, *Strategic Considerations in Designing Joint Venture Contracts*, 1992 COLUM. BUS. L. REV. 253, 305 (noting that contracts "perform the traditional legal role of enunciating the terms . . . and helping to ensure performance or to fashion a remedy in the absence of performance").

337. See Thomas C. Tobin, *Will TV Networks Be On Their Best Behavior This Time?*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Nov. 3, 2002, at F1.

338. See Phil Kloer, *Election 2002: Networks Vow Caution on Exit Polls; New Checks May Delay Data Tonight*, ATLANTA J. & CONST., Nov. 5, 2002, at A11; see also Martha T. Moore, *This Year, Media Must Wait Till Votes Counted; Lack of Voter Survey Information Hinders Ability to Project Race Results*, USA TODAY, Nov. 6, 2002, at A10; James Rosen, *This Year, Networks Pledge to Get It Right*, THE NEWS AND OBSERVER, Nov. 4, 2002, at A1.

339. See generally Hal Boedeker, *Networks Pledge to Slow Down, Get It Right; After the 2000 Debacle, Caution is the Watchword this Election Night on TV*, ORLANDO SENTINEL, Nov. 5, 2002, at A6; see also Kloer, *supra* note 338; Rosen, *supra* note 338.

age of the 2002 midterm election.³⁴⁰ Prior to the 2002 elections, CNN, a major network caught in the 2000 election night maelstrom,³⁴¹ conducted an extensive internal review of its reporting procedures.³⁴² That review, coupled with CNN's prominence in the industry, made CNN a perfect subject for this empirical exercise.³⁴³

CNN's (and, perhaps to various extent, other networks') reformation in the aftermath of the 2000 election night coverage was evident during broadcast of the 2002 election night returns.³⁴⁴ Prior to the 2002 election night, CNN made a concerted effort to minimize as much as possible its reliance on the Voter News Service [VNS]³⁴⁵ for projections of winners in key pivotal races.³⁴⁶ Instead, the network implemented a "Real Vote" procedure that included tallying actual cast votes that were verified by both CNN personnel³⁴⁷ and state election officials.³⁴⁸ A New York-based "Decision Desk," which was a consortium of CNN personnel seasoned in election data analysis, evaluated all election data including "Real Vote" and possible VNS data.³⁴⁹ While the "Real Vote" procedure applied primarily to pivotal races, CNN planned to verify the accuracy of voting information related to other contests as well.³⁵⁰ The totality of CNN's reformed procedures evi-

340. While editing this Article in 2002, I contacted CNN Chairman, Walter Isaacson, who put me in contact with Matt Furman in the Department of Public Relations. Mr. Furman, with the assistance of Ms. Valerie Davidson and Ms. Allie Zelenko, graciously granted me access to the CNN studios in Atlanta, where I was able to observe the election night coverage first-hand.

341. See generally Joan Konner et al., *Television's Performance on Election Night 2000: A Report for CNN* (Jan. 29, 2001) (examining the problems CNN experienced during the 2000 presidential elections), at <http://i.cnn.net/cnn/001/ALLPOLITICS/stories/02/02/cnn.report/cnn.pdf> (last visited Sept. 13, 2003).

342. *Id.*

343. Other factors contributed to CNN as a formal study. The network has cultivated and profited from its reputation as a credible and unbiased news source. The network touts itself as "one of the world's most respected and trusted sources for news and information." This characterization would naturally feed the network's drive to scrutinize polling results and ensure accurate reporting. Moreover, as described in more detail below, CNN took aggressive steps to verify the projections of certain key or pivotal races. These factors, together with the network's willingness to allow me access to their production and reporting operations on election night, Nov. 5, 2002, led to CNN as a primary source for testing the self-restraint hypothesis.

344. See CNN, *CNN Announces Election Night Coverage Change, Following 'Debacle'*, Feb. 2, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/stories/02/02/cnn.report/index.html> (last visited Sept. 17, 2003).

345. For more on VNS, see *supra* note 42; see also *supra* text accompanying notes 42-43.

346. CNN personnel generally define pivotal contests as those that preliminary research indicates will be close or whose outcomes will contribute to Republican or Democratic control of either the House or Senate. Interview with Matt Furman, CNN Office of Public Relations, in Atlanta, Ga. (Nov. 5, 2002).

347. CNN posted reporting personnel at the polls of pivotal races.

348. CNN, *Statement of CNN Regarding Future Election Night Coverage*, Feb. 2, 2001 [hereinafter *Statement Regarding Future Election Coverage*], at <http://www.cnn.com/2001/ALLPOLITICS/stories/02/02/cnn.statement/index.html> (last visited July 15, 2003).

349. *Id.*; see also CNN, *Network Executives Tell Panel They Plan Changes*, Feb. 14, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/02/14/election.calls.03/index.html> (last visited Sept. 15, 2003).

350. See *Statement Regarding Future Election Coverage*, *supra* note 348.

denced a high aversion to risk.³⁵¹ The network preferred no projections to possible erroneous projections.³⁵²

Of course, plans can go awry despite the best of efforts and intentions. Election night 2002 confirmed this premise. At approximately 6:30 p.m. on November 5, 2002, CNN reported (before the other major networks) that VNS would not release polling data for any election contest that night.³⁵³ The service found its tabulated results faulty.³⁵⁴ Apparently, the new computer operating system installed in the aftermath of the 2000 fiasco failed to produce reliable data.³⁵⁵ VNS officials doubted the accuracy of its computer-generated results and consequently refused to report any election outcomes.³⁵⁶

The VNS crash had two implications for network coverage that night. The first related to reporting speed.³⁵⁷ Without the VNS data, CNN and other major networks had to rely exclusively on state election board data and their own polling figures to project election results.³⁵⁸ Reliance on actual vote tallies invariably delayed reports of election results. Secondly, the absence of VNS data left a discernable void in the empirical analysis of voter conduct and decisionmaking.³⁵⁹ In addition to voter preferences, VNS data usually provided clues as to particular voting patterns.³⁶⁰ Omnipresent issues concerning national defense, the economy, the future of social programs, and civil liberties issues loomed as large factors in many election contests.³⁶¹ VNS's analysis of polling results would have included tabulated voters' views on these issues.³⁶² The absence of this data forced CNN and other networks to speculate on voting patterns and political implications of

351. *Id.*

352. *Id.*

353. See also Howard Kurtz, *Polling Service's Meltdown Halts Exit Poll Data*, WASH. POST, Nov. 6, 2002, at A23.

354. Jeff Greenfield, *CNN Television Report on VNS* (CNN television broadcast, Nov. 5, 2002).

355. Michael Kinsley, Editorial, *Election Night in the Dark*, WASH. POST, Nov. 8, 2002, at A31 (noting the millions of dollars spent by the networks to revamp a computer system that ultimately failed).

356. David Folkenflik, *TV Vote Coverage Hobbled by Doubt About Software; Computer Program Meant to Analyze Results is Found to be Unreliable*, BALT. SUN, Nov. 6, 2002, at A23; see also Martha T. Moore, *Media Groups Work to Fix Voter News Service, Some Rethinking Participation After Problems*, USA TODAY, Nov. 7, 2002, at A12.

357. See generally Folkenflik, *supra* note 356.

358. In CNN's case, the network would also rely on counts supplied by its own personnel stationed at the polls of pivotal races. See *supra* notes 347-51 and accompanying text (describing CNN's "Real Vote" procedure which included tallies supplied by its own personnel at certain polls). In fact, CNN's Jeff Greenfield explicitly stated that evening that in light of VNS's virtual shutdown, the network would call races when all polls had closed (a clear change from reporting in 2000) and provide early projections only in those races where data indicated a landslide or blowout (at least 40%). Otherwise, the network would rely on "Real Vote" totals. In fact, CNN's first "Real Vote" projection was McConnell's win of the U.S. Senate Race in Kentucky. *Election 2002* (CNN television broadcast, Nov. 5, 2002).

359. See CNN, *VNS Cites Problems with Exit Polls*, Nov. 5, 2002, at <http://www.cnn.com/2002/ALLPOLITICS/11/05/elec2.exit.polls/index.html>.

360. *Id.*

361. See *supra* note 71.

362. See *supra* note 337.

the elections.³⁶³ Commentary on the prospective effects of election results became more conjecture than reasoned opinion based on empirical evidence.³⁶⁴

VNS's crash, together with caution prompted by the fallout from erroneous reporting on election night 2000, contributed to deliberate and measured decisionmaking by CNN and other major networks on election night 2002. From my vantage points in both the control room and broadcast studio, I witnessed the program producer and his staff exercise considerable caution and restraint as they sifted through the constant influx of information relevant to the various electoral contests. CNN's obvious concern for accuracy permeated every step of decisions to call elections that night. As one staffer astutely observed, *no* projection was preferable to a *possible* erroneous projection.³⁶⁵

Some at CNN found the more circumspect reporting of election results a preferable, less disconcerting alternative. One staffer referred to the networks more deliberate approach as a return to "the old days of reporting."³⁶⁶ Some candidates in election contests echoed this sentiment.³⁶⁷ Longer broadcast time appeared preferable to speedy and perhaps erroneous and humiliating projections.³⁶⁸

My observation of CNN's (and from broadcast monitors, other networks') broadcast on November 5, 2002 confirms to some extent the reality of the media's self-restraint.³⁶⁹ Without overt governmental coercion,³⁷⁰ CNN and other networks³⁷¹ modified their data retrieval procedures and reported projected winners with extraordinary caution.³⁷² Intuitively, this significant change suggests the utility of voluntary self-restraint. Of course, my one-night observation does not alone establish self-restraint's legiti-

363. See *Election 2002*, *supra* note 358. Note, too, that the absence of reliable data regarding voter positions on the issues reduces, to some extent, the potency of the media's educational function, a strong and important factor in its relevance in the democratic process. For more regarding the media's function as public educator, see *supra* notes 71-72 and accompanying text.

364. *Id.*

365. Interview with CNN staff members, Atlanta, Ga. (Nov. 5, 2002).

366. *Id.*

367. Personnel from the Jim Talent campaign for the U.S. Senate seat in Missouri expressed a preference for "accurate [voting] numbers from state and county officials, rather than [possibly] wrong results [from VNS]." See *Election 2002*, *supra* note 358.

368. See David Bianculli, *People Have Spoken but Pundits Whisper*, N.Y. DAILY NEWS, Nov. 6, 2002, at 99; Frazier Moore, *TV News Played It Safe, Not Sorry*, in *Election Night Coverage*, DESERET NEWS, Nov. 6, 2002, at WEB 1.

369. See also *CNN Announces Election Night Coverage Change, Following 'Debacle'*, *supra* note 344; see generally *Statement Regarding Future Election Night Coverage*, *supra* note 348.

370. See *supra* notes 304-18 and accompanying text (describing Congressman Tauzin's hearings).

371. The debacle of the 2000 presidential election also led each of the other major television networks to reform its approach to the reporting of results for election night 2002. ABC announced it would rely more on their own field reporters to project winners. Fox News Channel announced it would rely on, among other tactics, phone polls to selected voters in critical states. CBS revised its system by tightening the communication gap between their data-gathering personnel and anchorpersons. Mark Jurkowitz, *TV Networks Step Carefully Around Pitfalls in Key Races*, HOUSTON CHRON., Nov. 6, 2002, at A34; see also Boedeker, *supra* note 339; Kloer, *supra* note 338; Moore, *supra* note 338.

372. See *supra* notes 329-47 and accompanying text (describing CNN's "Real Vote" procedures and its reduced reliance on VNS data).

macy. On a fundamentally contextual level however, the restraint exhibited by CNN and other networks on election night 2002 furthers the notion that overt governmental intervention or restriction is unnecessary,³⁷³ if not simply unconstitutional,³⁷⁴ to prevent a recurrence of the reporting debacle of 2000.

As previously discussed, a pluralist perspective of democracy features autonomy as an essential norm, with each individual respecting the autonomous rights of others.³⁷⁵ Democratic pluralism also recognizes the need to preserve societal structures such as elections and that individuals in a society desire preservation of these structures.³⁷⁶ Self-restraint, as exhibited by CNN and other networks on election night 2002, comports completely with this autonomy-based model. Instead of dubious, external restraints, the networks, who enjoy the autonomous right to report election results, are checked by natural market mechanisms that check abusive conduct. The media's decisionmaking on what to report ultimately rests on its strong quest for ratings and profit.³⁷⁷ Ratings and profits depend upon audiences that seek accurate news.³⁷⁸ Accuracy has a direct nexus with credibility, which, in turn, contributes to viewership.³⁷⁹ Thus, credibility becomes a priority to networks that strive to maximize the number of viewers seeking reliable news.³⁸⁰ Since the lack of credibility threatens viewership and ratings, the networks have a vested interest in reporting accurate projections. Demonstrative public criticism of the media's erroneous projections reinforces this objective.³⁸¹ Thus, a respect-based democracy theory fuels the media's natural desire for pecuniary gain *and* facilitates the self-imposed drive for factual accuracy.³⁸² This thesis appears to have considerable validity in the context of election returns.³⁸³

373. See generally *New York Times v. United States*, 403 U.S. 713 (1971) (holding that any prior restraint of the media by the government carries a heavy presumption of constitutional invalidity (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))); Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 634 (1975) (stating the primary purpose of the First Amendment's protection of the press was "to create a fourth institution outside the Government as an additional check on the three official branches" and noting that the media is the only private business that is afforded protection explicitly in the Constitution).

374. See *N.Y. Times*, 403 U.S. 713 (discussing unconstitutionality of prior restraints).

375. See generally *supra* notes 135-41 and accompanying text (discussing the pluralist perspective).

376. See *supra* notes 130-57 and accompanying text (describing my preferred pluralist model of democracy as endorsed by C. Edwin Baker).

377. George Seldes, *Is the Entire Press Corrupt?*, EXTRA!, Nov/Dec 1994 (featuring an excerpt from GEORGE SELDES, *THE FACTS ARE . . .* (1942)), available at <http://www.fair.org/extra/9411/georgeseldes.html> (last visited July 15, 2003).

378. See Carroll et al., *supra* note 83, at 20-21.

379. *Id.*

380. *Id.*

381. See Barlow, *supra* note 60.

382. See *supra* note 85 and accompanying text.

383. This is not meant to suggest that autonomy theories produce efficacious self-restraint in the reporting of any and all matters of public interest or import. I only advocate the pluralist theory here as a realistic accommodating force that prompts self-restraint within the limited context of broadcast media's reporting of election returns.

Autonomy, in the context of the media's election result projections, establishes a theoretical triad of accuracy, credibility, and restraint. Accurate reporting leads to reputational credibility, a factor that potentially enhances viewership and ratings.³⁸⁴ The quest for accuracy accordingly prompts measured self-restraint.³⁸⁵ This triad constitutes a delicate balance, which rests tenuously on the networks' *belief* in the nexus between accuracy and viewership. Despite this variable, the triad appears palpable and, from my observations of CNN, effective in its effort on the accuracy of projections.

There are, however, probative counterarguments to the natural, self-restraint drive created by democratic pluralism. One could posit that Congressman Tauzin's governmental hearings on the media's reporting,³⁸⁶ not self-restraint, might have spurred the networks to revise their plan for reporting election returns in 2002.³⁸⁷ While such minimal intervention by the government could have persuasive effects, the hearings' rather benign agenda (no threat of regulation) could not alone prompt the networks' conscientious review and revision of its data collection and reporting procedures. One might also suggest that self-restraint neither completely alleviates the problems associated with erroneous projections nor fully minimizes their reoccurrence. This more jaundiced critique, however, seems oblivious to the fact that no mechanism, save overt governmental restraint, which is *per se* unconstitutional, ensures complete and total accuracy. Moreover, this "totality of care" criticism masks the reality that any media self-restraint, which occurs despite the broad freedom to report, substantiates the dubious need for governmental intervention to secure electoral integrity.

CNN and the other networks' modification of their reporting procedures on election night 2002 substantiates, to some extent, the reality of voluntary self-restraint. This manifestation of a pluralist model of democracy not only minimizes the need for dubious governmental restraints but also fosters the media's self-initiated reforms that further interest in electoral integrity.

C. Other Less Restrictive Means That Secure Electoral Integrity

1. Regulatory Control of the Electoral Process

Governmental regulation of electoral mechanics constitutes a politically viable tactic that can preserve electoral integrity. Instead of expressive restrictions, the remedial focus shifts to the sovereign's legitimate policing of

384. Bob Woodward of the *Washington Post* commented on the extent of public embarrassment the erroneous projections of 2000 impacted the industry and compelled some change in reporting methodology. See *America Votes 2002* (CNN television broadcast, Nov. 5, 2002).

385. See *id.*

386. For more regarding Congressman Tauzin's hearings, see *supra* notes 318-25 and accompanying text.

387. See Mike Ferullo, *GOP Lawmaker Charges Bias in Networks' Presidential Calls*, Nov. 16, 2000 (describing Congressman Tauzin's charges of media bias during the 2000 presidential elections) at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/16/tauzin.networks/>.

election procedures.³⁸⁸ This tactic avoids thorny infringement issues associated with the Press Clause. Process regulation also comports with the government's appropriate role as guardian of the body politic's interest in electoral integrity.³⁸⁹

For true viability however, regulatory schemes, if implemented at all, should control process, not data dissemination by private sources. Process regulation leaves the expressive rights of the media in tact and uninhibited.³⁹⁰ Legitimate process-based prescriptions most likely relate to time, place, and manner of voting and polling operations.³⁹¹ Perhaps the most notable of these process-based restrictions are uniform polling hours. The January 2001 House hearing on the 2000 presidential election included discussion of national, uniform polling hours.³⁹²

Uniform poll hours, including same-time poll opening and closing times, could be implemented by the following methods: First, every state would close its voting booths at the same "real time." For example, states in

388. Numerous sources confirm the states' compelling interest to ensure electoral integrity. *See generally* *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (declaring the states "indisputable compelling interest to preserve the integrity of the election process"); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (declaring that the "preservation of the integrity of the electoral process is a legitimate and valid state goal"); *United States Term Limits, Inc v. Thornton*, 514 U.S. 779, 835 (1995) (noting that the states and Congress have an interest in protecting the "integrity and regularity of the election process"); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (espousing that the Court has repeatedly recognized the state's "compelling interest in preserving the integrity of its election process"); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating that government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest). *See also* Becky Kruse, Comment, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CAL. L. REV. 129, 169 (2001) (commenting on the effect of misleading political ads and the effectiveness (and need) for statutes regulating ads, i.e., anti-false speech statutes).

389. *See generally* Elhauge, *supra* note 10 (advocating a number of regulatory electoral reforms, including improved voting machines, limited manual recounts, objective standards in decisionmaking, limiting partisan involvement, definitive rules for involvement by the legislature, and defining certification authority and congressional counting rules).

390. Process regulation can, of course, lead to an indirect or incidental impact on expression, a manifestation that to a lesser extent, implicates constitutional issues related to free speech. *See* David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491 (1988); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779 (1985); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 722-23 (1991) (providing a cogent explanation of valid governmental regulations that have an indirect impact on speech).

391. *See generally* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 380 (2000) (holding generally that *Buckley v. Valeo* State campaign contribution limits are valid so long as they are closely drawn to prevent corruption or its perception). *See also* Kristen E. Larson, *Cast Your Ballot.Com: Fulfill Your Civic Duty over the Internet*, 27 WM. MITCHELL L. REV. 1797, 1806 (2001), (citing David Elliott, *Examining Internet Voting in Washington*, at <http://www.electioncenter.org/voting/InetVotingWhitePaper.html>) (last visited Oct. 6, 2003) (arguing that new laws must be enacted to preserve voting on the Internet and should criminalize jamming in order to protect the integrity of the election process). For a cogent discussion of *Buckley v. Valeo* and the need for campaign limitations to preserve electoral integrity, see David L. Anstaett, Note, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity: Elections Board v. Wisconsin Manufacturers & Commerce*, 2000 WIS. L. REV. 1117, 1123-25.

392. Seager & Handman, *supra* note 21, at 29.

the Eastern Standard Time zone would close their polls at 10 p.m., while states in Central, Mountain, and Pacific Time zones would close their polls at 9 p.m., 8 p.m., and 7 p.m., respectively.³⁹³ Every voting booth, regardless of location, would share simultaneous closure, thus exit poll predictions would have minimal effect on voter participation or preference. The networks' ratings-driven rush to predictions should become relatively innocuous.

Polling hour uniformity has historically garnered considerable support given its comportment with constitutional norms.³⁹⁴ Yet even this seemingly appropriate remedy may suffer from questions of Congressional authority to mandate such a standard.³⁹⁵

Hovering in the backdrop of congressional examination of the electoral process was a comprehensive study conducted by The National Commission on Federal Election Reform.³⁹⁶ The Commission membership included such notable public figures as former presidents Jimmy Carter and Gerald Ford; Griffin Bell, former attorney general of the United States from 1977 to 1979; former United States senators John C. Danforth and Daniel Patrick Moynihan; Hanna Holborn Gray, President Emeritus of the University of Chicago; and Professor Christopher Edley of Harvard Law School.³⁹⁷ Formed in the aftermath of the 2000 presidential election controversy, the Commission sought to formulate non-binding principal policy recommendations that would be a "source of national pride and a model to all the world."³⁹⁸ Regulation of electoral processes constituted the ideological mantra of the Commission. Many of its proposals encompassed such regulatory reforms as maintenance of computerized voter lists, expansion of the number of governmental poll workers, upgrade of voting machines, conversion of election day into a national holiday, and a plea for the media to "exert necessary restraint in predicting election outcomes."³⁹⁹ Some have criticized the Commission despite its noteworthy aspirations.⁴⁰⁰ Criticisms notwithstanding, the most significant of the Commission's contributions to the de-

393. This tactic does not take into consideration Hawaii and Alaska, the election polls of which would have closing hours that would be compatible with polls in the contiguous United States.

394. For more on the debate regarding uniform polling hours, see Barlow, *supra* note 60, at 1011-12.

395. *Id.*; see also James R. Dickerson, *Networks Limit Exit-Poll Data*, WASH. POST, Jan. 18, 1985, at A1.

396. The Miller Center of Public Affairs organized The National Commission on Federal Election Reform [hereinafter "the Commission"] to study election procedures that appeared deficient in the wake of the Bush-Gore contest. For a copy of the Final Report of the Commission, see *The National Commission on Federal Election Reform To Assure Pride and Confidence in the Electoral Process*, Aug. 2001 [hereinafter *Commission's Report*], available at www.reformelections.org/data/reports/99_full_report.pdf.

397. For a complete list of Commission members, see *id.* at 4.

398. *Commission's Report*, *supra* note 396, at 7.

399. *Id.* at 20. For a more detailed delineation of the Commission's recommendations, see generally *id.* at 26-73.

400. Shapiro, *supra* note 316, at A7 and accompanying text (offering criticisms of many of the Commission's recommendations but also recognizing "laudable agenda" it presents for legislative action); Sandalow, *supra* note 13 (blaming the Commission for its failure "to call for federal standards that would force states to adopt the recommendations [contained in its Report]").

bate has been its endorsement of valid regulatory reform measures that improve the electoral process. Regulation of electoral process furthers proper governmental function and simultaneously avoids conflict with the theoretical and constitutional tenets imbued in expressive liberties. The nexus between voting procedure and the media's expressive rights remains reasonably distinct and complementary. Regulatory prescriptions should, therefore, not offend constitutional norms.

Apparently, Congress has recognized the feasibility of process regulation in its proceedings that took place in the aftermath of 2000 presidential election. In December 2001, the House passed H.R. 3295, a bill which, if endorsed by the Senate, would allocate funds to states to implement such improvements as the replacement of punch-card voting mechanisms, the recruitment and training of poll workers, insurance of accurate voter rolls, and the maximization of voter turnout.⁴⁰¹ Despite the House bill's sweeping reforms, it does not require states to comply with uniform procedural standards for elections.⁴⁰² A draft Senate reform measure rectifies this oversight.⁴⁰³ The Senate bill would enforce minimal federal standards for voter registration and maintenance of voter rolls.⁴⁰⁴ The American Bar Association has endorsed (and suggested) regulatory reforms like those proposed in the House and Senate bills.⁴⁰⁵

The legality of reforms becomes questionable, however, when they intrude upon the media's expressive rights. Governmental regulation cannot pose as subterfuge for media restraint. Unreasonable limitations on non-governmental agents' speech tend to offend First Amendment norms.⁴⁰⁶

The problems associated with process regulation extend beyond legality. Similar to the situation with voluntary restraint,⁴⁰⁷ efficacy also becomes a critical issue. Note that regulations directed only toward electoral procedure constitute a more passive control of adverse impacts on electoral process. Their primary impact is on process, not the information that flows

401. For a general description of the House election reform bill, see Rhonda McMillion, *Voting For Change: Congress Looks at Ways to Improve Election Procedures*, 88 A.B.A. J. 67 (Feb. 2002).

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. Regulatory restrictions on governmental agents are of dubious legality. See *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 465-66 (1995) (noting the government's failure to prove harm and, thus, invalidating a law that forbade federal employees from accepting compensation for public appearances or privately authored works); *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 599 (1984) (stating that a content-based regulation of an existing governmental or non-governmental agency's work is unconstitutional); *Pickering v. Bd. of Educ.*, 205, 391 U.S. 563, 568 (1968) (emphasizing that government employees, in this case secondary school teachers, maintain their First Amendment right to speak on matters of public interest); see also Michael L. Wells, *Section 1983, The First Amendment and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 950 (2001) (recognizing the government's strong interests in the regulation of certain employee speech but also noting that government employees may not be "compelled to relinquish the First Amendment rights [that] they would otherwise enjoy as citizens").

407. See *supra* notes 299-390 and accompanying text (explaining the inherent difficulties related to the effectiveness of media self-regulation).

from that process. As a consequence, erroneous projections and faulty information can surface, notwithstanding indirect controls found in process regulation.

2. *The “More-Speech” Rationale*

Effective neutralization of misinformation often requires swift dissemination of accurate information. To counter erroneous projections, governmental entities that police and manage voting procedures can promptly disseminate self-generated information that verifies polling information disseminated by other sources. This “more speech”⁴⁰⁸ rationale compels the government to release its own polling data that accurately reflects vote counts. This affirmative strategy has advantages. Polling information generated by the government serves as counterpoint to erroneous projections and a check on the media’s conduct.

A more significant advantage to the government’s election reports focuses on issues of legality. Proactive dissemination constitutes a “more” rather than “less” speech tactic⁴⁰⁹ that is compatible with First Amendment norms. Similar to appropriate regulations on electoral process,⁴¹⁰ government-generated projections avoid the unconstitutional trappings of suspect restrictions on the media’s expressive conduct. Instead of censor, the government becomes an active participant in the informational flow from elections. As an arguably more reliable source of information, the government shares in the expressive freedoms enjoyed by the media.

Release of government polling information also potentially furthers the common good. As a counter to misinformation, government-generated reports can provide the electorate with the balanced and hopefully accurate data required for reasoned decisionmaking. At a minimum, governmental data that contradicts erroneous polling information signals a political con-

408. For additional explanation of the “more speech” rationale, see Victor C. Romero, *Restricting Hate Speech Against “Private Figures”: Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RTS. L. REV. 1, 21-22 (2001) (noting “more speech” as a “self-help response” in the libertarian tradition which the Supreme Court has recognized as the appropriate response to hate speech), and Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L.REV. 2320, 2381 (1989) (commenting on “more speech” as a response to hate speech).

409. The “more speech” tactic, as employed to counter erroneous projections, adds to the information regarding elections and provides consumers with more balanced data. On the other hand, restrictive schemes on the media’s dissemination of election reports constitutes a “less speech” mechanism that is inherently suspect under jurisprudential norms. For more detailed discussion of the efficacy of “more speech” tactics, see Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.Com*, 54 STAN. L. REV. 831, 884 (2001) (book review) (explaining that many First Amendment proponents advocate the use of “more speech” in response to extremist hate speech and that the tactic “implicitly rel[ies] on a paraphrase of Newton’s Third Law that every example of hateful speech creates an opportunity for an equally powerful [and] effective response”). See also BOLLINGER, *supra* note 107 (explaining the liberal legal thought model which supports the “more speech” rationale); but see John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 103 (1998) (stressing that the “more speech” rationale fails to address the significant way that racist speech affects the participation of minority members in various facets of society).

410. See *supra* notes 391-409 and accompanying text (discussing governmental regulation of voting process as an effective neutralizer of effects produced by erroneous media projections).

test's continuing contention. Those who have yet to vote would realize the continued significance of participation in the electoral process and, perhaps, maintain an incentive to vote.

Of course, media sources may choose not to disseminate the government's reports of election results on voter polls. Context, however, bodes against such blanket rejection. The inherent newsworthiness of governmental polling reports feeds directly into the media's consuming need for sensational news.⁴¹¹ In fact, the major networks' demonstratively increased reliance on governmental sources during coverage of the 2002 midterm election results confirms the newsworthiness of government-generated election results.⁴¹²

Polling reports by the government are not, however, magic panaceas. This tactic increases the transaction costs associated with the administration of voting polls. The government must commit added resources to produce and disseminate voting results more widely. Compilation of polling data and its eventual dissemination would likely require additional personnel and materials. Attainment of funding for these needs during periods of looming deficits and diminishing governmental revenue would be a significant challenge. On the other hand, the magnitude of problems associated with the 2000 presidential election and the resultant public pressure for cures justify some commitment of resources. The expenditure of resources becomes prudent when the social utility of reports contributes to accurate and orderly elections. Interestingly, the Commission's report confirms the eventuality of additional resources as part of a concerted federal effort to improve the electoral process.⁴¹³

Other problems associated with government-generated projections also relate to their ultimate effectiveness. Would additional government-generated data reports counter misinformation or merely exacerbate voter confusion? If the latter is more the case, then governmental reports become more of a hindrance rather than a cure. More information, even if it contradicts erroneous information, has the potential to complicate voter decision-making. Resultant voter frustration can lead to voter disaffection—the problem that governmental officials originally sought to remedy.

Yet, as evidenced during election night 2000, confusion can become an inevitable consequence in close political contests. Frenzy associated with this event's newsworthiness guarantees a proliferation of news from a variety of sources. This informational conundrum will naturally create confusion, regardless of the government's entry into the fray. The potential for government-generated polling data to neutralize the effects of misinforma-

411. For more regarding the quest for sensational news and the phenomenon of media frenzy, see *supra* notes 20, 78-103 and accompanying text.

412. For more regarding the networks' reliance on governmental reports of election results during the 2002 elections, see *supra* note 358 and accompanying text.

413. The Commission acknowledged the need for additional resources to resolve problems similar to those experienced in Florida 2000. See *Commission's Report*, *supra* note 396.

tion seemingly outweighs concerns related to increased public confusion. Alleviation of confusion requires more savvy, discriminating news consumers, not diminished informational flow.

V. CONCLUSION

The media's perceived impact on the 2000 presidential election may have been a temporary dilemma. George W. Bush ultimately assumed the presidency of the United States without demonstrative dissent or civil unrest. Moreover, the urgency associated with November 7, 2000 election night has virtually evaporated in the wake of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. Perhaps that tragedy, the subsequent war in Iraq,⁴¹⁴ and the public's seeming endorsement of President George W. Bush's job performance⁴¹⁵ signal a presumptive end to the 2000 election night controversy. New crises always seem to trivialize old controversies.

Left unchecked, however, old controversies often reemerge in more menacing form. The election of a president every four years, with the next contest approaching in 2004, ensures that the problems associated with the 2000 presidential contest will regain prominence. Memories of butterfly ballots, miscounted and uncounted votes, and erroneous projections will revive debate on the 2000 election debacle. This discourse, irrespective of the reality of problems that generated it, may ultimately compel redress.

Perception of the media's contribution to the electoral system's breakdown in the 2000 presidential election requires considerable retrospective analysis. Clearly, the media's self-imposed restraint during the 2002 mid-term election contests augurs against rash implementation of restrictive schemes. Tactics that restrict expressive liberties must give way to strategies that successfully reconcile the perennial tension between individualized autonomy and the interests of the body politic in fair and honest elections.

414. See John Diamond & Jack Kelley, *War Predictions Fall Flat with Missile Attack; Ships Fire Tomahawks at Bunker in Hopes of Blasting Saddam*, USA TODAY, Mar. 20, 2003, at A3 (noting the surprising manner in which the U.S. forces began their attack on Iraq, namely the concentrated strike on the alleged location of Saddam Hussein); Michael Tackett, *Bush Focused, Firm in Outlining Goals*, CHI. TRIB., Mar. 20, 2003, at 4 (noting President George W. Bush's announcement on Wednesday, March 19, 2003, that the United States was officially at war with Iraq); see also Marie Szaniszlo & Kevin Rothstein, *Almost Home: Mass. Soldier's Tragic Fate*, BOSTON HERALD, July 22, 2003, at 1 (noting that as of July 21, 2003, 233 United States troops had been killed in the war with Iraq).

415. President George W. Bush continues to enjoy a substantially high public approval rating. See, e.g., Stuart Rothenberg, *Bush Has Reason to Celebrate His First Year*, CNN.com/Inside Politics (2001), at <http://www.cnn.com/2001/ALLPOLITICS/12/23/column.rothenberg/index.html> (last visited July 15, 2003); but see Jim Drinkard, *Bush Approval at 59%; Democrats Given Edge on Economy*, USA TODAY, July 22, 2003, at A6 (noting that President Bush's approval rating of 59%, its lowest level since March, is due to the sluggish economic recovery and the continuing U.S. presence in Iraq); Carla Marinucci, *Dean Leads Democrats in California Field Poll; President's Numbers 'Have Begun to Sag'*, S.F. CHRON., July 22, 2003, at A5 (noting that poll results show President Bush's support in California has dropped considerably since the beginning of the war in Iraq); Jeff Zeleny, *Death of 2 Sons is 'Positive News'*, CHI. TRIB., July 23, 2003, at 9 (noting that the president's approval ratings have slipped amid growing questions about the war's aftermath).

Achievement of this balance results in a more pluralistic democracy in which the media plays an integral role. As the National Commission on Federal Election Reform appropriately observed, “[D]emocracy is a precious birthright. . . . [E]ach generation must nourish and improve the processes of democracy for its successors.”⁴¹⁶ This credo applies not only to elections, but also to a democracy in which all citizens enjoy mutually respected rights to expressive autonomy.

416. *Commission's Report*, *supra* note 396, at 19.