

# THE JURISPRUDENCE OF THE MEDIA'S ACCESS TO VOTING POLLS

BLAKE D. MORANT\*

## INTRODUCTION

In 2005, the *First Amendment Law Review* of the University of North Carolina School of Law sponsored a symposium that focused on the media's coverage of elections.<sup>1</sup> The gracious invitation to participate in this program compelled greater contemplation of the intersection of the right to disseminate information relevant to elections and the commensurate responsibility of the media to exercise that right in a manner that preserves the electoral process.<sup>2</sup>

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\* Roy L. Steinheimer, Jr., Professor of Law and Director, Frances Lewis Law Center, Washington and Lee University School of Law; B.A., J.D. University of Virginia. I appreciate the generous efforts of some incredible individuals: Kira Horstmeyer ('07) and Kai-Ting Yang ('07), whose research assistance proved invaluable; Joseph Dunn ('05), who, as my previous research assistant, provided invaluable sources for this Article; Mrs. Terry Evans, whose administrative support was invaluable; Professors Ronald Krotoszynski and Brian Murchison, whose work in the field continues to inspire; and my incredible spouse, Paulette J. Morant, whose inspiration and patience, as always, resulted in the completion of this Article. I also acknowledge the concerted efforts and encouragement of the *First Amendment Law Review*. I owe a special debt of gratitude to Mr. Wyatt Andrews, correspondent for CBS News, whose assistance allowed me to access CBS News' studios on election night 2004, to discover *Beacon Journal Publishing Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004), and to continue my study of the media's coverage of elections.

1. Symposium: The First Amendment and Press Coverage of Elections in the United States, Apr. 15, 2005.

2. See *id.*; see also Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 5, 44-45, 61 (2003) [hereinafter Morant, *Electoral Integrity*] (arguing that voluntary restraint by the media reconciles its free speech rights and its duty to preserve

The media's critical function within a democratic society becomes a fundamental consideration in this discussion. While a variety of theories prevail,<sup>3</sup> I posit that the media functions within a pluralist democracy, one that not only fosters the autonomous rights of its citizenry, but also encourages mutual respect for the autonomous rights of others.<sup>4</sup> Because the views of diverse

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electoral integrity while exercising those rights); Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 598 (2005) [hereinafter Morant, *Endemic Reality of Media Ethics*] (noting the author's role as ombudsman of the media).

3. Three prominent theories of democracy that discuss the media's societal role are civic republicanism, deliberative democracy, and complex democracy. For a better understanding of civic republicanism and the media's role in that system, see Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-11, 1425 (1986) (espousing the idea of civic republicanism, which focuses on the participation of all members of society in democratic processes while de-emphasizing the importance of personal autonomy, and arguing that occasionally speech needs to be restricted to serve the greater interest of public discourse), and OWEN M. FISS, *THE IRONY OF FREE SPEECH* 52-78 (1996) (maintaining that media regulation may be necessary to preserve broadcast medium as a public forum). For an explanation of deliberative democracy, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (advancing liberal republicanism, or deliberative democracy, which requires legislatures to become more activist to protect personal rights), Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-49, 1570 (1988) (describing politics as "deliberative," with an emphasis upon "collective debate," suggesting that all members of a democracy should have access to the media in order to contribute to public debate), and Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (noting that deliberative democracy eschews resource distributions based solely on "raw political power"). For an outline of complex democracy and the media's role in that system, see C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 144 (2002) [hereinafter BAKER, *MEDIA, MARKETS, AND DEMOCRACY*] (complex democracy "assumes that a participatory democracy would and should encompass arenas where both individuals and groups look for and create common ground . . . but where they also advance their own individual and group values and interests"), and C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989) [hereinafter BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH*] (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").

4. See Morant, *Electoral Integrity*, *supra* note 2, at 20-24 (detailing the theory of pluralist democracy); see also BAKER, *MEDIA, MARKETS, AND*

constituencies are valued equally, a pluralist democracy functions to ensure that participation in the debate on matters of public importance is full and robust.<sup>5</sup> Democratic pluralism has a close nexus with deliberative democracy, which encourages the dissemination of diverse viewpoints.<sup>6</sup> The media enjoys expressive autonomy, disseminates a broad spectrum of information and, therefore, becomes the primary facilitator of a pluralistic democracy.

Embedded within this pluralist model of democracy is the premise that personal interest in such freedoms as speech and press are related to, if not dependent upon, the collective interest in societal order.<sup>7</sup> Despite the theoretical validity of this premise, its true relevance lies within its tacit manifestation in judicial opinions that govern media's exercise of expressive rights. Indeed, case law comprises the jurisprudence that ultimately determines the extent to which media impacts the electoral process.

This admittedly modest Article surveys the jurisprudence that defines the boundaries of media's access to voting polls.<sup>8</sup> At first glance, the case law discussed in this piece demonstrates the judiciary's predictable embrace of a normative, negative theory of

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DEMOCRACY, *supra* note 3, at 143-44 (2002) (arguing that complex democracy encourages personal rights as well as fostering common ground between groups and individuals).

5. Blake D. Morant, *Democracy, Choice and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 953, 959 (2004) [hereinafter Morant, *Contemporary Media*].

6. See Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 323 (1994) (describing deliberative democracy as an ideal representative or republican form of government which allows the free airing of various opinions and perspectives on governmental policy through the legislative process, i.e., hearings, debates and amendments).

7. See *infra* Part II (explaining in greater detail the intersection of personal autonomy and collective interests in societal structures such as elections).

8. Many of the cases surveyed in Part I of this Article pertain to access to polling places sought by a variety of individuals or entities. My analysis, however, focuses primarily on the affect these opinions have on the media's access to polling places.

expression.<sup>9</sup> A more probative read of the cases, however, reveals the judiciary's continuing struggle to balance the expressive rights of individuals who seek access to polls in order to gather information, and the compelling interest of the government to ensure the integrity of the electoral process. The restorative balance of personal and collective interests reflects the essence of democratic pluralism, which recognizes the mutuality of competing interests of various constituencies in society.<sup>10</sup>

Part I of this Article presents a chronological overview of the jurisprudence governing access to voting polls and generally categorizes these cases as either a pre-vote context, which generally pertains to access to individuals before they have voted, or a post-vote context, which generally relates to access to voters after they have cast their ballots. These categories serve primarily as general references with basic commonalities. The cases in Part I demonstrate that, in matters in the pre-vote context, courts tend to defer to governmental restrictions given the compelling interests in preventing voter fraud and preserving electoral integrity. On the other hand, courts are less likely to approve restrictions imposed in the post-vote context because of the attenuated presence of fraud.

Notwithstanding the basic distinctions associated with the pre-vote and post-vote categories, Part II of this Article discusses the commonalities of cases discussed in Part I. More specifically, Part II exposes the tension between personal rights of expression, under which the right of access to voting polls falls, and the preservation of electoral integrity, which supports restricted boundaries adjacent to these polls. Then, Part II employs the constructs of democratic pluralism to analyze the judiciary's attempts to resolve the conflict between individualized rights of expression and electoral integrity. This Article ultimately concludes that personal rights of access and true integrity of elections are interdependent and their seeming conflict becomes an essential feature of a pluralist democracy.

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9. For more detailed explanation of a negative theory of expression, see *infra* note 12.

10. See *infra* Part II.

The cases surveyed in this Article expose the continuing tension between the personal right to expressive freedom and society's interest in the preservation of electoral integrity. This tension is endemic in a functional democracy that respects expressive freedom and strives to preserve societal institutions such as elections. The reconciliation of personal rights and collective interests constitutes a compulsory dynamic in a pluralist democracy and ensures the perpetuation of a contemporary and "free" society.

### I. A JURISPRUDENTIAL OVERVIEW: THE TENSION BETWEEN EXPRESSIVE AUTONOMY AND ELECTORAL INTEGRITY

First Amendment jurisprudence reveals a perennial tension between personal, expressive autonomy and the government's need to preserve societal institutions such as elections. The guarantee of expressive autonomy, which the media enjoys,<sup>11</sup> reinforces the dominance of personal, expressive rights over collective interests in the preservation of the electoral process. Freedom of expression became presumptively sacrosanct, which led to the judicial adoption of a negative theory of liberty.<sup>12</sup> Consequently, schemes

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11. The media, like a corporate entity, has a constitutional right to free speech, in particular political speech. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (refusing to distinguish a state's interest in restricting an individual's speech and its interest in restricting corporate speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (treating corporations the same as individuals with respect to First Amendment political speech rights); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (holding that the First Amendment can still apply to paid commercial advertisements). *But see* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (maintaining corporations' free speech rights while limiting corporate speech in the form of campaign contributions). The legal basis of the media's right to free speech right is provided in the Constitution of the United States. U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

12. A negative theory of expression focuses on aversion to government intrusion on expressive rights rather than the value of free speech as the facilitator of personal autonomy. Morant, *Electoral Integrity*, *supra* note 2, at 26. Analysis of a government restriction on free speech begins with the premise that there is great potential for abuse in allowing government to

that restrict information concerning governmental functions face intense judicial scrutiny. The historic case of *New York Times Co. v. United States*<sup>13</sup> provides the basic premise that any restriction on publication of even classified information requires proof of direct and immediate harm to the government.<sup>14</sup> This formidable burden of proof imposed by the Court becomes a significant obstacle to most attempts to restrict information concerning governmental functions, including elections.<sup>15</sup> The “Pentagon Papers” decision

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interfere with a person’s expressive rights. *Id.* In contrast to the negative theory is the positive theory of expression, which focuses on the value of speech in promoting expressive autonomy. *Id.* An individual’s autonomy depends on his or her own assessment of responsibility rather than the sovereign’s exercise of power. *Id.* The judiciary prefers the negative theory in analyzing free speech cases. It believes that expressive rights, which are explicitly protected by the First Amendment, take precedence over the implied collective interest in fair elections. *Id.* at 29, 32. See SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 3, at 209 (explaining that the First Amendment acts as a negative liberty to free individuals from governmental intrusions of their free speech rights); 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 suggesting that government refrain from preventing speech or punishing people for speaking); Morant, *Electoral Integrity*, *supra* note 2 at 30-32 (noting the judiciary’s adoption of a negative theory of expression in deciding *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988); see also *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988); *NBC, Inc. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988); *CBS Inc. v. Growe*, 15 MEDIA L. REP. 2275; *NBC, Inc. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988); *NBC, Inc. v. Karpan*, No. 88-0320-B (D. Wyo. 1988)).

13. 403 U.S. 713 (1971) (per curiam). This decision is also known as the Pentagon Papers case.

14. *Id.* at 726-27 (Brennan, J., concurring). The United States government sought to enjoin newspapers from publishing classified Pentagon documents related to the ongoing Vietnam War. The Court held that the government had no right to restrict the newspapers’ right to free speech and refused to enjoin publication, since any form of prior restraint to expression faced a “heavy presumption” of unconstitutionality. *Id.* at 714 (per curiam) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

15. See Morant, *Electoral Integrity*, *supra* note 2, at 28-30 (noting that, after the “Pentagon Papers” case, subsequent attempts to restrict media free expression in the context of elections predominantly failed). In the following cases, courts denied states’ efforts to prevent media exit polling: *Beacon Journal Publ’g Co., Inc. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004); *Daily*

strongly suggests that speculative or attenuated rationales will not support prior restraints designed to preserve governmental functions such as elections.<sup>16</sup> Even an hour delay in the media's publication of election results would invoke strict judicial scrutiny because the "loss of [expressive] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."<sup>17</sup>

The primacy of expressive rights,<sup>18</sup> together with media's essential role as overseers of democratic functions,<sup>19</sup> contribute to the dubious legality of restrictions on information gathering and access to governmental functions. Yet, the doubtful legality of governmental restrictions is not presumptive, given the critical nature of elections in a democratic society. Moreover, the *possible* impact of media's exercise of their expressive rights on electoral integrity<sup>20</sup> requires a degree of judicial flexibility that permits scrutiny in the contexts of various elections. The analysis below reveals the emergence of a unique jurisprudence that underscores the tension between the personal right to expressive autonomy and the collective interests in the maintenance of electoral integrity.

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*Herald Co.*, 838 F.2d 380; *Cleland*, 697 F. Supp. 1204; *Colburg*, 699 F. Supp. 241; *Karpan*, No. 88-0320-B; *Grove*, 15 MEDIA L. REP. 2275; *Journal Broadcasting of Kentucky, Inc. v. Logsdon*, No. C 88-0147-L(A), 1988 U.S. Dist. LEXIS 16864 (W.D. Ky 1988); and *Smith*, 681 F. Supp. 794; *see also infra* Part I.B. The exception is *Burson v. Freeman*, 504 U.S. 191 (1992). *See infra* notes 38-55 and accompanying text.

16. *See* *Near v. Minnesota ex rel.*, 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, *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).

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

18. *See infra* notes 150-59 and accompanying text (explaining the constitutional dominance of expressive autonomy).

19. *See infra* note 170 and accompanying text (noting the media's function as a check on the government in a democratic society).

20. *See* *Morant, Electoral Integrity*, *supra* note 2, at 10-11 (discussing the alleged impact of the media on elections and voting behavior).

Case law governing restrictions on media's access to polls falls loosely within two basic categories: pre-vote or post-vote contexts. The pre-vote context generally includes government tactics designed to thwart voter intimidation and fraud *before* votes are cast. These tactics specifically attempt to prevent contact by non-voting parties<sup>21</sup> with voters as they approach the polls.<sup>22</sup> The post-vote context encompasses cases in which the government attempts to preserve electoral integrity by imposing limitations on non-voting parties' access to voters at polls. In contrast to pre-vote cases, however, post-vote cases include statutory schemes that strike more broadly to restrict non-voting parties' access to voters possibly before, *but primarily after*, they cast their ballots.<sup>23</sup> As the discussion below suggests, the breadth of governmental restrictions and the nexus of these restrictions with the prevention of voter fraud and intimidation ultimately determine the constitutionality of efforts designed to preserve electoral integrity.

#### *A. Cases Within the Pre-Vote Context*

The sacrosanct nature of expressive autonomy presupposes that restrictions on the media's access to polls face formidable judicial scrutiny.<sup>24</sup> Consequently, courts have traditionally favored personal, expressive rights over the more attenuated impact of the exercise of those rights on electoral integrity.

Emblematic of this tendency was the 1985 case of *Clean-up '84 v. Heinrich*,<sup>25</sup> in which the court reviewed the constitutionality of a Florida statute that prohibited the solicitation of votes, opinions, or petition signatures within 100 yards of a polling place on election

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21. In this essay, "non-voting parties" refers to individuals who seek access to polls for any purpose other than to cast a ballot. "Non-voting parties" do not include government-sanctioned poll workers.

22. For a discussion of cases that fall within the pre-vote context, see *infra* Part I.A.

23. For a discussion of cases that fall within the post-vote context, see *infra* Part I.B.

24. See *infra* notes 151-55 and accompanying text (discussing freedom of speech as a right guaranteed under the Constitution).

25. 759 F.2d 1511 (11th Cir. Fla. 1985).

day.<sup>26</sup> Noting the primacy of expressive autonomy, the court found that the solicitation of personal information at the polls constituted protected speech. Furthermore, the gathering at polls to solicit this information was an association protected by the First Amendment.<sup>27</sup> The Florida statute was, therefore, overbroad because it potentially encroached on the expressive rights of those who were not parties in the lawsuit.<sup>28</sup>

Three years later, the court in *Florida Committee for Liability Reform v. McMillan*<sup>29</sup> issued a finding similar to that in *Clean-up '84. McMillan* focused on a Florida statute that prohibited the solicitation of voters within 150 feet of a polling place.<sup>30</sup> The government emphasized the public's interest in order at the polls and integrity of the voting process.<sup>31</sup> The court found that the government's generalized interest in electoral integrity was insufficiently compelling to permit an overbroad restriction of expressive activity adjacent to polling places.<sup>32</sup> In fact, the court seemingly minimized the impact of voter solicitation, stating that voters who are approached at the polls are merely exposed to "grassroots democratic process [that could] be avoided readily by communicating a declination of interest . . . ."<sup>33</sup>

In 1989, the court in *Firestone v. News-Press Publishing Co.*,<sup>34</sup> found that the part of a Florida statute that banned non-voters from a fifty foot area adjacent to a polling place was overbroad.<sup>35</sup> The government's concern for potential disturbance at

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26. *Id.* at 1513.

27. *Id.*

28. *Id.* at 1513-14.

29. 682 F. Supp. 1536 (M.D. Fla. 1988).

30. *Id.* at 1538.

31. *Id.* at 1541.

32. *Id.* at 1541-42. To support its conclusion that the statute was overbroad, the court focused on such features as the prohibition of virtually all forms of expression within 150 feet of a polling place, its creation of a zone that encompasses both traditional public fora and private property, the existence of other statutes that protect voters from harassment, the availability of less restrictive alternatives, and a previous less restrictive version of the statute that protected electoral integrity. *Id.*

33. *Id.* at 1542.

34. 538 So. 2d 457 (Fla. 1989).

35. *Id.* at 459.

the polls was insufficient to overcome the statute's chilling effect on expressive rights.<sup>36</sup> Moreover, the fifty foot boundary intruded on speech activity within traditional public fora, which have garnered extraordinary First Amendment protection as a venue for free expression.<sup>37</sup>

Despite the tendency to strike down restrictions on access to voting polls, cases in the pre-vote context have demonstrated limited judicial tolerance for minimalist restrictions designed to prevent voter fraud and intimidation. The Supreme Court of the United States in the case of *Burson v. Freeman*<sup>38</sup> signaled a degree of tolerance for minimalist restrictions in the pre-vote context. In *Burson*, a Tennessee statute limited campaign activity within 100 feet of any polling place entrance.<sup>39</sup> Opponents argued that the statute violated a candidate's First Amendment right to communicate with voters.<sup>40</sup> The Tennessee Supreme Court found that the statute was a content-based restriction on speech and failed to meet the rudiments of strict scrutiny, which requires that the state prove that its restriction directly addressed a compelling interest.<sup>41</sup>

Contrary to the Tennessee Supreme Court's finding, Justice Blackmun, writing for the plurality, opined that the facially content-based statute met the rigors of strict scrutiny.<sup>42</sup> The government's compelling interest to remedy Tennessee's history of voter intimidation and fraud outside polls legitimized the imposed restraint, which directly addressed the issue of election integrity.<sup>43</sup> 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

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36. *Id.*

37. *Id.* But see *infra* notes 48 and accompanying text (dismissing physical boundary dimensions as a factor in determining whether or not the statute passes strict scrutiny).

38. 504 U.S. 191 (1992).

39. *Id.* at 193-94.

40. *Id.* at 194.

41. *Id.* at 195.

42. *Id.* at 206-11.

43. *Id.* at 207-08.

ballot is to limit access to the area around the voter.”<sup>44</sup> Blackmun attributed this unusual finding of a content-based regulation’s constitutionality to the law’s preservation of electoral integrity.<sup>45</sup> Noting that the electoral process remains an essential event in a democratic society, Justice Kennedy, concurring in Blackmun’s sentiments, stated, “[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.”<sup>46</sup>

Whether the Tennessee statute was narrowly tailored to address voter intimidation and fraud was an issue that spawned problematic analysis. The plurality rejected the notion that a reduction in the restricted boundary to twenty-five feet would serve the state’s compelling interest. This finding underscored the view that the statute was overbroad.<sup>47</sup> The Court summarily dismissed the relationship between boundary dimensions and the statute’s furtherance of the State’s compelling interest.<sup>48</sup>

In my view, Scalia’s concurrence, which was the fifth and deciding vote, left the decision in *Burson* on tenuous legal footing. Scalia found that areas adjacent to polling places were not traditional public fora.<sup>49</sup> As a result, the legislative restrictions in question comported with the more relaxed review standard reserved for reasonable, viewpoint-neutral regulation.<sup>50</sup>

While the *Burson* plurality sustained limited restrictions on polling access in the pre-vote context, the Court’s holding in the case remains on somewhat precarious grounds. Justice Stevens’s vigorous dissent criticized the plurality which, in his view, “blithely

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44. *Id.*

45. *Id.* at 206-11.

46. *Id.* at 214 (Kennedy, J., concurring).

47. *Id.* at 210.

48. *Id.*

49. *Id.* at 214-16 (Scalia, J., concurring). *But see* Daily Herald Co. v. Munro, 838 F.2d 380, 384-85 (9th Cir. 1988) (finding that voting polls constitute public fora).

50. *Burson*, 504 U.S. at 214-15 (Scalia J., concurring). For a more detailed analysis of Scalia’s argument, that the areas adjacent to voting polls do not constitute public fora, see Morant, *Electoral Integrity*, *supra* note 2, at 33-39.

dispensed with the need for factual findings” of alleged voter intimidation and fraud.<sup>51</sup> Stevens noted that the Florida Supreme Court and other lower federal courts had invalidated other state restrictions similar to those imposed in Tennessee.<sup>52</sup> Like the officials in Tennessee, those who sought poll restrictions in other states failed to produce evidence of voter intimidation and, therefore, failed to justify restricted access to voting polls.<sup>53</sup> Justice Stevens found that the government must prove the existence of palpable harm that the proposed solution directly remedies.<sup>54</sup> This harm to electoral integrity must be real, and the remedy must be narrowly tailored to address that harm. Stevens’s admonition became a significant hurdle for governments that sought to restrict access to polls on the generalized premise of electoral integrity.<sup>55</sup>

Notwithstanding its somewhat questionable reasoning, *Burson* remains viable precedent. In fact, other cases invoke *Burson’s* reasoning when the government proves that minimal restrictions in the pre-vote context are related to the preservation of electoral integrity.

The Fifth Circuit in *Schirmer v. Edwards*,<sup>56</sup> substantiated the constitutionality of a Louisiana statute that prohibited the solicitation of signatures within 600 feet of poll entrances.<sup>57</sup> The court analogized the Louisiana statute to the Tennessee statute in *Burson*, and found that Louisiana had a compelling interest in the protection of citizens’ voting rights.<sup>58</sup> The 600-foot boundary did not, in the court’s view, “significantly impinge” on the First Amendment rights to access.<sup>59</sup> The court emphasized the *Burson* finding that the distance of the boundary line prescribed by the statute, while not dispositive of constitutionality, relates primarily

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51. *Id.* at 222. (Stevens, J., dissenting).

52. *Id.* at 222-23.

53. *Id.*

54. *Id.* at 217.

55. *Id.*

56. 2 F.3d 117 (5th Cir. 1993).

57. *Id.* at 124. In *Schirmer*, the challenged statute applied to attempting to obtain signatures for a recall petition. *Id.*

58. *Id.* at 121.

59. *Id.*

to the degree of intrusion on access to polls.<sup>60</sup> The *Schirmer* opinion stated that the Louisiana statute was narrowly tailored because the boundary was increased to 600 feet only after the previous boundary of 300 feet was ineffective.<sup>61</sup>

In the more recent case of *Marlin v. D.C. Board of Elections and Ethics*,<sup>62</sup> the D.C. Circuit reviewed a Washington, D.C. Board of Elections provision that prohibited activity that may interfere with orderly conduct of elections, and takes place within a reasonable distance of the polls.<sup>63</sup> Echoing Justice Scalia's view in *Burson*,<sup>64</sup> the *Marlin* decision stated that polling places do not constitute either traditional or government-designated public fora.<sup>65</sup> Relying substantially on *Burson*, the court opined that the D.C. Board of Election's provision satisfied the reasonableness test that should apply to the regulation of speech in a non-public forum.<sup>66</sup>

Unlike *Marlin*, more recent cases narrowly construed *Burson's* holding and required a more demonstrative showing of the nexus between the government's restrictions and the preservation of voter integrity. The case of *Anderson v. Spear*<sup>67</sup> involved a statute that prohibited the distribution of instructive literature within 500 feet of polling places.<sup>68</sup> To determine the constitutionality of this statute, the court recognized that *Burson* placed a "modified" burden on the government to prove that its restriction is both reasonable and does not significantly impinge on personal, expressive rights.<sup>69</sup> The application of this modified

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60. *Id.* at 121-22.

61. *Id.* at 122. Note that the *Schirmer* court explicitly rejected the applicability of post-vote context cases such as *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), which, in the court's view, involved different compelling interests.

62. 236 F.3d 716 (D.C. Cir. 2001).

63. *Id.* at 718. The Board of Elections provision included any activity intended to persuade an individual to vote for or against a particular candidate. *Id.*

64. See *supra* notes 49-50 and accompanying text.

65. *Marlin*, 236 F.3d at 719.

66. *Id.* at 719-20.

67. 356 F.3d 651 (6th Cir. 2004).

68. *Id.* at 654.

69. *Id.* at 656.

burden of proof led the court to conclude that the statute in question was not reasonable in light of the totality of circumstances.

The *Anderson* court disputed the reasonableness of the government's ban on all electioneering speech within the restricted area.<sup>70</sup> The court cited testimony suggesting that stricter penalties, in lieu of broad restrictions on access, would have addressed the government's interests more effectively.<sup>71</sup> Moreover, while *Burson* did not provide a bright-line rule regarding the distance, the *Anderson* court also noted *Burson's* admonition that certain restrictions on access to polls could constitute impermissible burdens on First Amendment expressive activity.<sup>72</sup> The court, accordingly, found that the state's 500-foot boundary, which was exponentially greater than the restriction in *Burson*, significantly impinged on expressive rights.<sup>73</sup>

*United Food & Commercial Workers Local 1099 v. City of Sidney*<sup>74</sup> also strictly construed *Burson* in the pre-vote context. In this case, the government prohibited individuals from seeking signatures for a referendum in areas adjacent to polling places on election day.<sup>75</sup> The petitioners contended that their activity took place on access ways that were outside of the 100-foot campaign-free zones.<sup>76</sup> While the court acknowledged *Burson's* finding that boundaries and campaign-free zones pass constitutional muster, the areas beyond these zones constituted traditional public fora in which restricted access garners greater scrutiny.<sup>77</sup> The court in *United Food* then remanded the case for a factual determination of whether the petitioners' expressive rights were chilled by alleged threats of arrest, and whether those threats were reasonable under the circumstances.<sup>78</sup>

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70. *Id.* at 659.

71. *Id.*

72. *Id.* at 657.

73. *Id.* at 663.

74. 364 F.3d 738 (6th Cir. 2004).

75. *Id.* at 741.

76. *Id.* at 742.

77. *Id.* at 746-47.

78. *Id.* at 752-53.

Other cases have confined *Burson's* holding to expressive activity conducted in public areas. Consequently, while government may restrict access in the pre-vote context within a reasonable distance of polling places, those restrictions may not impermissibly burden expressive activity that takes place on private property.<sup>79</sup> Governmental restrictions that explicitly limit campaign activity on private property fall outside the scope of *Burson* and are, therefore, unconstitutional.<sup>80</sup>

### *B. Cases Within the Post-Vote Context*

The dominance of expressive autonomy in First Amendment jurisprudence becomes particularly evident in cases involving the restriction of expressive activity that occurs in the post-vote context. Of particular note, exit polling by media constitutes the primary expressive activity in the post-vote context.<sup>81</sup> Because post-vote activity often involves contact with individuals after they have voted, restrictions in this context have a more attenuated nexus with the government's interest in electoral integrity. As a result, courts view governmental attempts to limit post-vote activities with notable antipathy.

The most significant post-vote case that reviewed restrictions on exit polling is *Daily Herald Co. v. Munro*.<sup>82</sup> In *Daily Herald Co.*, the court reviewed a Washington state statute prohibiting anyone from conducting "any exit poll or public opinion

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79. See, e.g., *Calchera v. Procarione*, 805 F. Supp. 716, 720 (E.D. Wis. 1992) (holding that a statute prohibiting electioneering within 500 feet of polling places was clearly unconstitutional because it encompassed public sidewalks and streets, as well as private residences).

80. See *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 595 (4th Cir. 1993) (holding that a county ordinance that broadly limited the number of temporary signs on private property was an impermissible content-based restriction and was not narrowly tailored to further government interests related to public nuisance or safety).

81. The post-vote context encompasses cases in which the government imposes limitations on non-voting parties' access to voters at polls in an attempt to preserve electoral integrity. See *supra* notes 1-10 and accompanying text.

82. 838 F.2d 380 (9th Cir. 1988).

poll with voters” within 300 feet of a polling place.<sup>83</sup> 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.<sup>84</sup> The United States District Court of Washington declared the statute unconstitutional, noting that the media’s exit polling procedures were systematic, reliable, and not inherently disruptive.<sup>85</sup> Exit polling constituted highly protected speech that contributed to political discourse.<sup>86</sup> 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.”<sup>87</sup> The appellate court, signaling its tacit adoption of a negative theory of expression, further noted the protection of exit polling as a newsgathering function, stating that “the First Amendment protects the media’s right to gather news.”<sup>88</sup>

The pivotal finding that the 300-foot vicinity around polling places constituted a traditional public forum was central to the ruling in *Daily Herald Co.*<sup>89</sup> Once polling areas were designated public fora, any content-based restrictions on speech in those areas had to withstand strict scrutiny.<sup>90</sup> Unless narrowly tailored to promote a compelling governmental interest, the statute was presumptively unconstitutional.<sup>91</sup> The court acknowledged the

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

84. Susan E. Seager & Laura R. Handman, *Congress, the Networks, and Exit Polls*, 18 COMM. LAW., Winter 2001, at 1, 32 [hereinafter Seager & Handman, *Congress, the Networks, and Exit Polls*].

85. *See id.*

86. *See* Anthony M. Barlow, *Restricting Election Day Exit Polling: Freedom of Expression vs. the Right to Vote*, 58 U. CIN. L. REV. 1003, 1016 (1990).

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

88. *Id.* at 384.

89. *Id.* at 384-85.

90. *Id.* at 385. *But cf.* Morant, *Electoral Integrity*, *supra* note 2 (discussing the confusing state of the public forum doctrine).

91. *Daily Herald Co.*, 838 F.2d at 385.

significance of the state's interest<sup>92</sup> in maintaining order and decorum at the polls and "preserving the integrity of their electoral processes."<sup>93</sup> Yet, predictably, this more collective interest in electoral integrity is significantly outweighed by concerns related to restrictions on information access, a right related to expressive autonomy.<sup>94</sup> The Washington legislature, in the court's view, failed to tailor its statute narrowly to advance these interests.<sup>95</sup> Less restrictive means, i.e., the requirement of separate entrances to polls or size reduction of the restrictive area, would have adequately advanced the state's ends.<sup>96</sup> The Washington statute

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92. Although the Court did not explicitly find, it impliedly found that the state's interest was compelling. *See generally id.* at 382-89.

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

94. *See generally 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); *United States v. Harrelson*, 713 F.2d 1114, 1116 (5th Cir. 1983). The *Harrelson* court stated:

The 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.

*Id.*; *see also* 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) ("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).

95. Seager & Handman, *Congress, the Networks, and Exit Polls*, *supra* note 84, at 32.

96. *Daily Herald Co.*, 838 F.2d at 384-85; *see also* Note, *Exit Polls and First Amendment*, 98 HARV. L. REV. 1927, 1935 (1985).

was, therefore, overbroad because its proscriptions interfered with such non-disruptive activities as exit polling.<sup>97</sup>

Also noteworthy to the majority in *Daily Herald Co.*, was the lower court's finding that the legislature's bid for decorum at the polls constituted a pretext. The true purpose behind the legislative restriction was to prevent broadcast of early election returns - an action that allegedly influenced voter turnout.<sup>98</sup> The court found that this generalized interest failed to justify restrictions on speech.<sup>99</sup> The Washington statute's broad reach effectively blocked all the exit poll information including post-election newspaper stories and analyses by academics.<sup>100</sup> Consequently, the legislature did not employ the least restrictive means to accomplish its ends. In fact, a pre-existing, less restrictive law seemingly strengthened the court's rebuke of this legislation.<sup>101</sup>

Other cases emulated *Daily Herald Co.*'s cautionary analysis of restrictions on access to voters in the post-vote context. In *CBS v. Smith*,<sup>102</sup> a Florida statute that prohibited solicitation of voters' opinions within 150 feet of a polling place on election day contravened media's First Amendment right to gather and report information about the political process.<sup>103</sup> The overbroad statute<sup>104</sup>

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97. *Daily Herald Co.*, 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).

98. See generally *Daily Herald Co.*, 838 F.2d 380.

99. *Id.* at 387.

100. *Id.* at 387-88. In his concurring opinion, Judge Stephen Reinhardt emphasized that it was the public dissemination of the exit poll information, not personal discussions or news-gathering, that was the core First Amendment activity warranting the utmost protection. *Id.* at 389 (Reinhardt, J., concurring). 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. *Id.* at 390. This 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." *Id.* Exit polls must be protected because they "provide information not only on the outcome of the election but also on why people vote the way they did." *Id.*

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

102. 681 F. Supp. 794 (S.D. Fla. 1988).

103. *Id.* at 796.

was not narrowly tailored to further the state's interest in electoral integrity and failed strict scrutiny.<sup>105</sup> Of particular note in the *Smith* opinion was the specific finding that exit polling was a special form of protected speech.<sup>106</sup> In fact, the court observed that the absence of exit polling would result in the loss of unique and valuable data.<sup>107</sup>

In the same year as *Daily Herald Co. and CBS Inc. v. Smith*, the court in *NBC, Inc. v. Colburg*,<sup>108</sup> reviewed a Montana statute that prohibited solicitation of voters' opinions within 200 feet of a polling place on election day.<sup>109</sup> A focal point of the court's opinion was media's fundamental right to gather and disseminate information on how and why individuals voted.<sup>110</sup> Not only was the 200-foot boundary an unconstitutional limitation on exit polling,<sup>111</sup> but the statute's alternate and more minimal twenty-five foot zone also failed strict scrutiny.<sup>112</sup>

A federal district court in Georgia similarly rejected a governmental restriction on the post-vote activity of exit polling. The case of *NBC, Inc. v. Cleland*<sup>113</sup> involved a statute that specifically prohibited exit polling within 250 feet of a polling place.<sup>114</sup> The government essentially argued that the restriction served a compelling interest to preserve the sanctity of polling places and to encourage voter participation.<sup>115</sup> The *Cleland* court responded in classic, predictable fashion, finding that the content-based statute was overbroad in its restriction on even non-

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104. Similar to the analysis in *McMillan* and other pre-vote context cases, the *Smith* court based its finding of overbreadth on the statute's broad restrictions on almost all forms of expression: prohibition of disruptive exit-polling, prohibition of non-disruptive exit-polling, and proscription of speech in traditional public fora. *Id.* at 796, 803.

105. *Id.* at 804.

106. *Id.* at 803.

107. *Id.* at 805.

108. 699 F. Supp. 241 (D. Mont. 1988).

109. *Id.* at 242.

110. *Id.*

111. *Id.* at 243.

112. *Id.* at 242.

113. 697 F. Supp. 1204 (N.D. Ga. 1988).

114. *Id.* at 1206.

115. *Id.* at 1206-07.

disruptive exit polling.<sup>116</sup> The State, therefore, failed to narrowly tailor the statute, evidenced by the sweeping proscription of all exit polling, lack of evidence of the impact of exit polling on voter participation, and duplication in other statutes prohibiting electioneering adjacent to polls.<sup>117</sup> The court noted that electoral integrity could have been preserved by less restrictive means, such as the required identification of exit pollsters, notice that voters may refuse to answer pollsters' questions, or the establishment of separate entrances or exits for voters.<sup>118</sup>

In dicta, the court in *Cleland* curiously appeared to endorse twenty-five feet as the constitutionally permissible boundary adjacent to the polls.<sup>119</sup> The *Cleland* court resurrected the notion of distance as a determinant of the constitutionality of polling place restrictions. In effect, the judge found that, the twenty-five-foot boundary, instead of the Georgia statute's larger boundary of 250 feet, was a permissible boundary due to its more minimal restriction. This decision is somewhat at odds with the Supreme Court's opinion in *Burson*, which suggested that the relevant determinant of constitutionality was not the precise measurement of the boundary, but the boundary's nexus with the prevention of voter intimidation and fraud.<sup>120</sup>

The dicta in *Cleland* suggests that limitations on post-vote activities, which have a more attenuated impact on electoral integrity, merit a minimalist, bright-line boundary rule that *Burson*, a pre-vote activities case, does not endorse.<sup>121</sup> While minimalist restrictions in the post-vote context may have some legitimacy, they require support in the form of proof that a problem with electoral integrity actually exists, and that the means to preserve this interest in voting integrity are directly and palpably related to that interest.<sup>122</sup>

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116. *Id.* at 1211.

117. *Id.* at 1211-12.

118. *Id.* at 1212-13.

119. *Id.* at 1215.

120. *See Burson v. Freeman*, 504 U.S. 191, 206-11 (1992).

121. *See supra* notes 49-50 and accompanying text.

122. *See Burson*, 504 U.S. 191 at 210.

*Journal Broadcasting of Kentucky, Inc. v. Logsdon*<sup>123</sup> involved a Kentucky statute that prohibited exit polling within 500 feet of the entrance to polling places. Relying substantially on *Daily Herald Co.*,<sup>124</sup> and echoing the reasoning in *Cleland*,<sup>125</sup> the court found that the Kentucky statute was not narrowly tailored because it prohibited even non-disruptive exit polling.<sup>126</sup> The court interestingly observed that polling places constituted traditional public fora in which the state could not, without considerable proof, restrict exit polling.<sup>127</sup>

Judicial rejection of restrictions on access to polls in the post-vote context continued with predictable regularity, particularly in cases specifically involving the media. In *Beacon Journal Publishing Co., Inc. v. Blackwell*,<sup>128</sup> the Secretary of State of Ohio issued a directive stating that a statute which prohibited loitering adjacent to polling places applied to anyone, including the press.<sup>129</sup> With support of others in the industry,<sup>130</sup> Beacon Journal Publishing Company, Inc. challenged the government's interpretation of the anti-loitering statute.<sup>131</sup> In a review of the district court's denial of Beacon Journal Publishing Company Inc.'s motion for a temporary

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123. No. C 8-0147-L(A), 1988 U.S. Dist. LEXIS 16864 (W.D. Ky. Oct. 21, 1988).

124. *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988).

125. *NBC, Inc. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988); see *supra* notes 116-18 and accompanying text.

126. *Logsdon*, 1988 U.S. Dist. LEXIS 16864, at \*4-\*5.

127. *Id.* Note that the *Logsdon* court's finding that exit polling takes place in traditional public fora (polling places) contrasts sharply with Justice Scalia's finding in *Burson*. For the Justice Scalia's concurrence, see *supra* notes 49-50 and accompanying text.

128. 389 F.3d 683 (6th Cir. 2004).

129. *Id.* at 684. The statute states that "no person shall loiter or congregate within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place . . . ." OHIO REV. CODE ANN. § 3501.35 (2005).

130. On Election Day November 2, 2004, CBS News allowed me to observe their coverage of the election returns. The Court of Appeals issued its decision in *Beacon Journal Publishing* during my visit at CBS. Although not noted in the decision, it was clear from my conversation with CBS News executives that CBS and the other major networks support Beacon Publishing Company's petition.

131. *Beacon Journal Publ'g*, 389 F.3d at 684.

restraining order, the Court of Appeals acknowledged the government's presumptively compelling interest in electoral integrity.<sup>132</sup> This finding, however, did not absolve the government of the burden to prove that the blanket denial of media's access to polls furthered a compelling interest.<sup>133</sup> Noting the government's failure to sustain this burden of proof, the court rejected as speculative the supposition that "turmoil [at the polls] could be created by hordes of reporters and photographers."<sup>134</sup> Following the decisive pattern of previous cases that reviewed restrictions on access to polling places in the post-vote context,<sup>135</sup> the court vacated the district court's order and mandated that the government accommodate the media's non-disruptive access to areas adjacent to polls, "for the purpose of newsgathering and reporting."<sup>136</sup>

## II. DEMOCRATIC PLURALISM AND THE TENSION BETWEEN EXPRESSIVE FREEDOM AND ELECTORAL INTEGRITY

The pre-vote and post-vote categories of the cases presented in Part I of this Article constitute paradigmatic templates for the discussion of the tension between expressive rights of individuals who seek access to voting polls and the body politic's interest in fair elections. Cases within these categories exhibit some similarities. For example, pre-vote cases, such as *Burson v. Freeman*<sup>137</sup> and *Schirmer v. Edwards*,<sup>138</sup> emphasize that the right to vote is more vulnerable to intimidation or fraud, a finding that

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132. *Id.* at 685.

133. *Id.*

134. *Id.*

135. *See supra* Part I.B.

136. *Beacon Journal Publ'g*, 389 F.3d at 685. Judge Cook, the sole dissenter in *Beacon Journal Publishing*, acknowledged the merit of the petitioner's First Amendment claim. However, he could not find that the district court abused its discretion in its denying injunctive relief. *Id.* (Cook, J., dissenting).

137. 504 U.S. 191 (1992).

138. 2 F.3d 117 (5th Cir. 1993).

justifies measured limitations on access to polling places.<sup>139</sup> On the other hand, cases in the post-vote context, such as *Daily Herald Co. v. Munro*<sup>140</sup> and *Beacon Journal Publishing Co. v. Blackwell*,<sup>141</sup> find that restrictions on access require proof of potential disruption to the voting process.<sup>142</sup>

Another interesting distinction in these cases is the relevance of the restrictive boundary's size in the determination of its constitutionality. In certain pre-vote cases in which the restricted boundary was invalidated despite the possible proclivity for voter fraud and intimidation, courts note that the boundaries in question were too large and, therefore, suggest that a small restricted zone might be constitutionally permissible.<sup>143</sup> By contrast, many of the post-vote cases that dealt specifically with the issues of exit polling and the projection of winners flatly reject restrictions, regardless of size, because of concerns related to free speech and press.<sup>144</sup> Most post-vote cases buttress their findings against restrictions with the observation that the government failed to provide empirical evidence that links access, particularly by the media, with disruption of the voting process.<sup>145</sup>

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139. For a detailed discussion of *Burson*, see *supra* notes 38-55 and accompanying text, and for an analysis of *Schirmer*, see *supra* notes 56-61 and accompanying text.

140. 838 F.2d 380 (9th Cir. 1988).

141. 389 F.3d 683 (6th Cir. 2004).

142. For an analysis of *Daily Herald Co.*, see *supra* notes 82-101, and for a discussion of *Beacon Journal Publ'g*, see *supra* notes 128-36.

143. In pre-vote cases such as *Clean-up '84*, *Firestone*, *Schirmer*, and *Anderson*, the courts noted that the restricted boundary imposed by the government was too large. See Part I.A for detailed analysis of the courts' discussions regarding these governmental restrictions.

144. In post-vote cases such as *Daily Herald Co.*, *Smith*, and *Colburg*, the courts uniformly found that state restrictions on exit-polling and projections of elections unconstitutionally limit freedom of the press. See Part I.B for a detailed discussion of these and other post-vote cases. *But see* *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1215 (N.D. Ga. 1988) (appearing to endorse twenty-five feet as the constitutionally permissible boundary justified by the state's compelling interest in electoral integrity).

145. See, e.g., *Beacon Journal Publ'g*, 389 F.3d at 685 (stating that fear of disruption that could be caused by media's presence at polling places is "purely hypothetical" and cannot justify a restriction on First Amendment freedom of the press); *Daily Herald Co. v. Munro*, 838 F.2d 380, 385 (9th Cir.

One should not, however, construe these categories as immutable or mutually exclusive. Cases may have both pre-vote and post-vote implications. For example, *Firestone v. News-Press Publishing Co.*<sup>146</sup> focuses on the constitutionality of a comprehensive Florida statute prohibiting non-voters from the actual voting rooms and a fifty-foot area adjacent to polling places.<sup>147</sup> *Firestone* presents an analysis that is applicable to pre-vote activity, such as the solicitation of voters, *and* post-vote activity, such as exit polling.<sup>148</sup>

In addition to *Firestone*, many of the cases discussed in Part I of this Article share decisional commonalities, exposing the rather tenuous nature of these categories. In fact, the distinctions between access to polls before (pre-vote) and after (post-vote) individuals cast their ballots appear less germane than the fundamental question of whether the exercise of First Amendment access to polling places *at any time* has a deleterious impact on the electoral process. The opinions of many cases discussed in this essay underscore the rather fluid nature of pre-vote/post-vote distinction. The rule that the government must prove that restrictions are necessary to further the government's interests in electoral integrity appears universally applicable to *any* restriction on access to polls, regardless if that access occurs before or after individuals have voted.<sup>149</sup>

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1988) (stating that “there was no evidence that someone did not vote or voted differently because of the exit polls”); *CBS Inc. v. Smith*, 681 F. Supp. 794, 804 (S.D. Fla. 1988) (opining that “there is no . . . evidence to support the contention that exit polls or reporters’ interviews with willing voters have ever disrupted any polling place in the state”); *Cleland*, 697 F. Supp. at 1211-12 (observing that “[t]he State produced no first-hand evidence that any voter had ever decided not to vote because of the existence of exit polls, or that such a result was in any way a real danger”).

146. 538 So. 2d 457 (Fla. 1989).

147. *Id.* at 459-60.

148. For a detailed discussion of *Firestone*, see *supra* notes 34-37 and accompanying text.

149. See, e.g., *Beacon Journal Publ'g*, 389 F.3d at 685 (stating that the Ohio statute's broad restrictions on access to polling places requires proof that the restrictions are “necessary to serve the state's compelling interest [in orderly elections]” and “narrowly drawn to achieve that end”); *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (quoting *Perry Educ. Ass'n v. Perry Local*

More relevant than the pre-vote/post-vote distinction of these cases is their collective attempt to balance personal autonomy, which access to polling places implicates, and the body politic's interest in fair elections. This attempted balance of the personal right of autonomy with the society's right to fair elections underscores the somewhat kinetic nature of constitutional rights.<sup>150</sup>

The apparent dominance of autonomy in the judiciary's balance of personal and collective rights seems fundamentally related to the express provision of free speech in the Constitution.<sup>151</sup> Expressive freedom fosters all forms of personal autonomy<sup>152</sup> and applies to all persons, both natural and corporate.<sup>153</sup> A truly democratic society must foster an individual's expressive liberties, which, *inter alia*, include freedoms of speech and press.<sup>154</sup> As the

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Educators' Ass'n, 460 U.S. 37, 45 (1983)) (suggesting that tailored restrictive boundaries, adjacent to pools and implemented to minimize intimidation and fraud, can be constitutional so long as they do not "significantly impinge" on First Amendment rights).

150. The use of the term "kinetic" here in this Article connotes the constant motion or flux of competing interests within a democratic society. *See generally* Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 724 (1997) (stating that constitutional power is a dynamic "among the People" and, therefore, is kinetic and not static).

151. The First and Sixth Amendments restrict governmental action against individuals. *See generally* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 8 n.8 (3d ed. 2000); Morant, *Electoral Integrity*, *supra* note 2, at 26-27 (describing expressive liberties in the United States as inelastic).

152. *See* C. Edwin Baker, *Media That Citizens Need*, 147 U. PA. L. REV. 317, 320 (1998) (stating that "liberal pluralism" recognizes "intractable diversity" with conflicting values, ideas and interests as normative).

153. *See supra* note 11. *See generally* Randall Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995) (noting expressive liberty as an originally conceived right of human-kind, with institutional speech as an abstraction from that of the individual); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 514 (2001).

154. *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

cases in Part I of this Article illustrate, the media is entitled to the right of free expression, particularly if the expression relates to the industry's dissemination of information regarding elections.<sup>155</sup>

Personal autonomy and its preservation, however, do not completely define a democratic society. "Society" constitutes a body of individuals who must cooperate to further personal goals.<sup>156</sup> This composite of individuals constitutes the body politic,<sup>157</sup> which exerts authority through an elected executive<sup>158</sup> and a legislature composed of popularly elected representatives.<sup>159</sup>

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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).

155. See, e.g., *New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (stating that the press must be free to publish without censorship); *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (deciding that "the information disseminated based on [exit polling and] . . . the process of [exit polling]" constitute protected speech); *CBS Inc. v. Smith*, 681 F. Supp. 794, 796 (S.D. Fla. 1988) (opining that gathering and reporting information regarding elections are two basic rights protected by the First Amendment); *NBC, Inc. v. Colburg*, 699 F. Supp. 241, 242 (D. Mont. 1988) (finding that gathering and disseminating exit poll results constitute speech that is protected by the First Amendment).

In other contexts, however, media may experience limitations on expressive rights. As a result, access to criminal trials often depends on the form of media seeking access (broadcast versus print) and the impact on a defendant's right to a fair trial. See *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (noting that different media forms require different scrutiny as decision-makers balance media access rights with a defendant's right to due process).

156. See Katherine Van Wezel Stone, *Labor and the Corporate Structure Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 167 (1988) (citing ANTHONY GIDDENS, *STUDIES IN SOCIAL AND POLITICAL THEORY* 348 (1977)) (noting a society is "a system of power founded in entrenched divergencies of interest").

157. For a more complete definition of "body politic," see Morant, *Electoral Integrity*, *supra* note 2, at 4-5.

158. See Morant, *Electoral Integrity*, *supra* note 2, at 21-23.

159. Article I of 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 generally *City of Milwaukee v. Illinois*, 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

Valid elections contribute to representation that theoretically advances the interests of members of a collective society. Periodic elections check representative power, which is exercised in a manner that preserves societal well-being<sup>160</sup> and concomitantly respects personal liberties. An electoral process that is untainted by fraud or voter intimidation ensures responsive governance.<sup>161</sup> Electoral integrity, therefore, becomes critical to a legitimate democracy.<sup>162</sup> A common theme that runs through many of the cases presented in Part I of this Article is the importance of elections in a functional democracy - a truism that undergirds the government's compelling interest to preserve electoral integrity.<sup>163</sup>

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representatives, has the power to make laws that are applicable to the general populace).

160. "Societal well-being" correlates to Professor Baker's concept of the common good, a dominant feature of the republican theory of democracy and an element of Baker's preferred complex democracy theory. *See Baker, supra* note 152, at 331-36.

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

162. *See id.*

163. *See, e.g.,* *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (recognizing that the government has a compelling interest in proactively, rather than retroactively, securing the right to vote); *Beacon Journal Publ'g Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004) (noting the state's interest in enabling citizens to vote freely without intimidation); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 747-48 (6th Cir. 2004) (noting the state's valid interest in preserving order at polling places); *Marlin v. D.C. Board of Elections and Ethics*, 236 F.3d 716, 720 (D.C. Cir. 2001) (noting the state's interest in maintaining order in the election process); *Schirmer v. Edwards*, 2 F.3d 117, 121 (5th Cir. 1993) (noting the state's compelling interest in the preservation of the right to vote); *Calchera v. Procarione*, 805 F. Supp. 716, 720 (E.D. Wis. 1992) (noting the state's compelling interest in maintaining the integrity of the electoral process and ensuring that voters are free from intimidation and harassment); *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1211 (N.D. Ga. 1988) (opining that the state has a compelling interest in maintaining the sanctity of polling places and encouraging voter participation).

An individual's right to vote, however, constitutes an expressive mechanism<sup>164</sup> with normative implications. Individuals in a democratic society express governing preferences through votes that are informed and cast freely without undue influence. The need for such integrity in voting underscores the seminal function of media, which can inform the electorate and ensure the soundness of the voting process. As the court in *CBS v. Smith*<sup>165</sup> observes, data, particularly that related to exit polling, serves to explain "issues of public importance" and become the functional tools of scholars who explain voting behavior.<sup>166</sup>

The right to vote also becomes a governmental priority, particularly if one views the government in a pluralist democracy as a facilitator of personal autonomy.<sup>167</sup> Accordingly, the government must not only foster unintimidated participation in the voting process,<sup>168</sup> but it must also ensure that its efforts to preserve voter integrity do not impinge upon the informational flow required to educate voters and monitor the voting process. Information gathered and exchanged near voting polls facilitates expression that can reveal the functionality of the voting process, and this explains the judicial aversion to restrictions on access to areas adjacent to

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

165. *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988).

166. *Id.* at 805. Other cases discussed in Part I underscore the societal function of media as the facilitator of voting integrity and democracy. See, e.g., *Daily Herald Co. v. Munro*, 838 F.2d 380, 388 (9th Cir. 1988) (noting that exit poll results are valuable to analysts and scholars who study the electoral process); *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1211 (N.D. Ga. 1988) (stating that information from exit poles can reveal social and political trends and voting tendencies). *But see* Morant, *Electoral Integrity*, *supra* note 2, at 10-11 (discussing the alleged impact of the media's erroneous projections on voter conduct during the 2000 presidential election).

167. See *infra* notes 168-70 (arguing the importance of both expressive autonomy and the right to vote as constructs of democratic pluralism).

168. See *supra* notes 42, 58, 132 and accompanying text (noting the government's compelling interest in electoral integrity).

polls.<sup>169</sup> In particular, media's access to polls becomes critically important as the conduit for information that checks governmental functionality, regardless of speculative assumptions associated with the industry's negative impact on the voting process.<sup>170</sup>

Personal and governmental interests in voting integrity are symbiotic. In fact, the government's influence, authority, and ultimate credibility hinge on the collective will of an informed electorate. Personal liberties and the government's legitimacy are, therefore, inexorably connected, with neither flourishing without the other.<sup>171</sup> The collective nature of these interests tacitly explains,

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169. Many of the cases detailed in Part I recognize the government's interest in electoral integrity but reject restrictions on access to areas near polling places as an impermissible abridgement of speech and access. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (finding that governmental restrictions on voter solicitation could become impermissibly burdensome at "some measurable distance from the polls," but Tennessee's 100-foot boundary was "on the constitutional side of the line"); *Calchera v. Procarione*, 805 F. Supp. 716, 720 (E.D. Wis. 1992) (recognizing that the government's compelling interest in electoral integrity did not justify the state's restricted zone of 750,000 square feet); *Committee for Sandy Springs, Georgia, Inc. v. Cleland*, 708 F. Supp. 1289, 1291 (N.D. Ga. 1988) (finding that a restricted 250-foot zone around voting polls to be overbroad, but noting that a smaller zone may be constitutional); *Florida Committee for Liability Reform v. McMillan*, 682 F. Supp. 1536, 1541 (M.D. Fla. 1988) (stating that voters need protection only within the polling place).

170. Cases in Part I underscore the media's seminal function in checking government and the particular need for the industry's access to polls. *See, e.g.*, *Beacon Journal Publ'g Co. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004) (observing that the government's interest in electoral integrity cannot justify restrictions on freedom of the press without evidence that media's access interferes with an individual's right to vote); *NBC, Inc. v. Colburg*, 699 F. Supp. 241, 242 (D. Mont. 1988) (opining that the gathering and dissemination of news regarding voting behavior is protected speech that cannot be unduly restricted by the government); *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1211-12 (N.D. Ga. 1988) (finding that, despite the state's interest in electoral integrity, governmental restrictions enacted to ensure that voters are not "bothered" by pollsters are unconstitutional).

171. *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, 60-72, 85-86 (1982) (finding the codependency of individuality/autonomy and democracy, the latter pertaining to interests critical to preservation of the

if not justifies, the jurisprudential dominance of expressive freedom in these cases.<sup>172</sup>

The interdependence of a citizen's right to vote and the government's interest in electoral integrity constitutes the essence of democratic pluralism, which recognizes the symbiosis of personal and collective rights and fosters a mutuality of respect for these competing interests. Democracy's legitimacy depends on its furtherance of a reciprocal respect for the expressive autonomy of others.<sup>173</sup>

In my view, the jurisprudence of access to polling places tacitly fosters democratic pluralism through the attempted balance of individualized and collective interests. A democracy that preserves both personal expressive rights and fair and fully participatory elections requires decision-makers to further the interests of the body politic in electoral integrity, while simultaneously promoting respect for personal expressive rights. This more pluralistic form of democracy recognizes that the prosperity of the individual and the body politic depends upon the recognition of their independence when resolving their apparent conflict in cases such as those discussed in Part I of this article.

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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).

172. Note that the majority of cases in Part I found governmental restrictions on access to areas adjacent to polling places unconstitutional. In fact, 63% of the pre-vote cases and 100% of the post-vote cases rejected governmental restrictions on access to polling places. *See supra* Part I.

173. Others seem to endorse Baker's dignitary view of autonomy. *See* DAVID A. B. 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 various voices in a society); JOHN RAWLS, *POLITICAL LIBERALISM* xxiv-xxvii (1993). *See generally* BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, *supra* note 2, at 602-05 (detailing the mutual-respect notion of democracy); Morant, *Contemporary Media*, *supra* note 5, at 959, 962 (discussing a respect-based model of autonomy).

## CONCLUSION

The following quotation from *Democratic Party v. Lungren*<sup>174</sup> illustrates the judiciary's deep respect for the personal right to free expression:

Properly viewed, the first amendment protects free expression as an end in itself. But even under a narrower . . . view of the first amendment, there is an irreducible core requirement. It is that political speech must be free so that the sovereign people can decide public issues. To posit that the people may decide incorrectly, and therefore should be denied information in order to steer their decisions, is to posit some other sovereign who can decide when the people are likely to be mistaken, and what they should be allowed to know. Little would be left of the first amendment under such a regime.<sup>175</sup>

As the following quotation from *Wesberry v. Sanders*<sup>176</sup> indicates, the judiciary also recognizes the sanctity of the right to vote such that “[n]o 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.”<sup>177</sup>

These seemingly antithetical quotations expose the continual tension between freedom of speech and the more collective interests in free and fair elections. It is doubtful that a predictable formula for the achievement of a balance between these interests truly exists. Beyond the elusive search for that formula, however, lies a dynamic that defines an active, democratic society. The quotations from *California Democratic Party* and *Wesberry*, together with the cases previously discussed in this Article,

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174. 919 F. Supp. 1397 (N.D. Cal. 1996).

175. *Id.* at 1402.

176. 376 U.S. 1 (1964).

177. *Id.* at 17.

illustrate this dynamic. The judiciary's attempts to resolve the apparent conflict between free speech and the preservation of electoral integrity represents the very essence of democratic pluralism - that expressive autonomy must be evaluated in light of the collective interest in fair and honest elections. This interdependence of personal and collective interests remains an inescapable norm of a free society, and contributes to the breadth and vitality of a truly pluralistic democracy.