DEMOCRACY, CHOICE, AND THE IMPORTANCE OF VOICE IN CONTEMPORARY MEDIA

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INTRODUCTION

A robust press in a democratic society remains a philosophical truism. But what does "robust" truly mean when applied to contemporary media? Judging from most commentary, the term primarily refers to the industry's right to expressive freedom and the deference afforded that right. This interpretation of autonomy reflects a nor-

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1. See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); William Penner, Note, Cohen v. Cowles Media Co.: Upsetting the First Amendment Scales, 26 U.S.F. L. Rev. 753, 780 (1992) (opining that cases involving media restrictions require the consideration of values in light of the public's interest in an open and robust press); Jay Framon, Notes and Comments, The First Cut Is the Deepest, but the Second May Be Actionable: Masson v. New Yorker Magazine, Inc. and the Incremental Harm Doctrine, 25 Loy. L.A. L. Rev. 1483, 1525 n.282 (1992) (noting that when assessing plaintiff's defamation claims, society's interest in a free and robust press is stronger than an individual's interest in redressing a trivial injury to his or her dignity); Mark A. Byrd, Comment, Quotations and Actual Malice: Bridging the Gap Between Fact and Fiction, 10 N. Ill. U. L. Rev. 617, 620-21 (1990) (noting that courts have adopted more relaxed defenses to defamation suits, such as a showing of a statement's substantive truth, in recognizing the value of a free and robust press, and in an effort to prevent media self-censorship); Leslie Yalof Garfield, Note, Curtailment of Early Election Predictions: Can We Predict the Outcome?, 36 U. Fla. L. Rev. 489, 496 (1984) (stating that a robust press also promotes free and open discussion).

2. See C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891, 938 (2002) (arguing that press freedom provides the press with an "unimpeded, uncensored, opportunity to perform its constitutionally based role: being an independent source of information and vision"); David A. Anderson, Freedom of the Press, 80 Tex. L. Rev. 429, 483 (2002) (opining that the tradition of expressive freedom is founded on independence from government, political parties, and advertisers, as well as journalistic integrity); Garfield, supra note 1, at 496
mative conceptualization of unrestricted behavior. Such an unduly simplistic interpretation of autonomy, however, diminishes media’s essentiality as a guarantor of democracy. If media functions to secure democratic processes, then its robust nature must include both the sacrosanct right to expressive freedom and the duty to report the variety of viewpoints and perspectives that appeal to a diverse society.

This modest Article, which only commences the discussion of this rich topic, advances a more expansive view of robustness as it relates to the functionality of the media within an increasingly diverse society. I posit that genuine autonomy and media’s legitimacy hinge not only upon its freedom to disseminate, but also on the duty to exercise that right in a manner that incorporates the diversity of individualized perspectives. Viewpoint diversity summarily defines multiplicity of voice and must become a prevalent factor in media’s decisions to dis-


4. To explore fully the omnipresent tension between individual expressive rights and the societal need for expansive discourse would consume the space that the DePaul Law Review has dedicated to this Symposium. I, therefore, consider my Article the first in what I hope will be a series of scholarly pieces that examine the critical issue.

5. I employ the term “diverse” to connote both ethnicity and viewpoint. Of course, this Article had its genesis through the invitation of this Symposium, which focuses on race as proxy. Commensurately, diversity incorporates race and ethnicity. The ever-increasing number of diverse individuals in society certainly underscores the timeliness of this Symposium. However, diversity, when discussed in the context of a responsible free press, is not confined to race and ethnicity. It also applies to viewpoint. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS (2000) available at http://www.quickfacts.census.gov/qfd/states/html (last visited Mar. 29, 2004) (reporting that 24.9% of Americans responding to the 2000 decennial census listed an ethnicity other than “White only”). Compare this with U.S. Census Bureau statistics for the 1990 decennial census, reporting that only 19.7% of respondents listed an ethnicity other than “White only.” See U.S. CENSUS BUREAU, UNITED STATES - RACE AND HISPANIC ORIGIN: 1790 TO 1990, available at http://www.census.gov/population/documentation/twps0056/tab01.pdf (last visited Apr. 18, 2004). See Bill Ong Hing, Vigilante Racism: The De-Americanization of Immigrant America, 7 MICH. J. RACE & L. 441, 454 (2002) (noting that the growth of diversity in the United States, now at an all-time high, is a concept that has defined this country since its founding); cf. Nancy S. Kim, The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis, 27 N.M. L. REV. 101, 138 (1997) (arguing that in the justice system, traditional notions of subjective standards, such as intent, are no longer applicable in light of the increasing diversity of the body of peoples to which they apply). Kim opines that as a result of this changing societal structure, the legal rules designed to promote fairness must also adapt to changing societal needs. Id. at 138.

6. For a more detailed explanation of multiplicity of voice, see infra notes 77-87 and accompanying text.
seminate news and information. This Article advocates the continuation of the government's media ownership rules, which generally foster multiplicity's objective of robust discourse.

Part II of the Article commences with a discussion of media's function in a democracy. “Democracy” remains a relatively abstract concept that is essential to any discussion of media's role in a diverse society. Part II explains the various theories of democracy, commencing with the libertarian, autonomy-based norm that contributes to media's drive to inform, educate, and maximize wealth. It then contrasts strict autonomy theory with civic republicanism, which deemphasizes autonomy to ensure a more balanced debate. Part II then explains my preference for a theory of democracy that emphasizes mutual respect for the autonomous rights of others. This respect-model of autonomy incorporates multiplicity as a factor in media's decision to report information.

Part III of the Article describes the governmental influences on media's embrace of multiplicity. It briefly examines judicial decision making that, over time, has limited governmental efforts that foster multiplicity through programs that set aside procurements to minorities or traditionally marginalized groups. The focus then shifts to race-neutral tactics that ensure broader ownership and control of media sources. Central to this discussion are the Federal Communication Commission (FCC) rules that limit ownership of media sources—a tactic that, despite its nexus with multiplicity, may be weakened by the agency's controversial decision to relax those rules. Part III then rebuts the FCC's rationale for relaxation of those rules with a revisionist view of scarcity. Instead of a blanket aggregate of total media sources, the definition of scarcity, as it pertains to the utility of ownership restrictions, should reflect only those sources from which the majority of individuals receive news and information.

Media's continued utility depends upon the industry's conscientious and deliberate attempts to report information that responds to the needs of increasingly diverse constituencies. Such thoughtful decision making, which multiplicity of voice advances, ensures a robust debate.

7. Certainly examination of the media within the context of this Symposium that focuses on race as proxy is appropriate. Media has had a fundamental if not catalytic influence on society's discussion of race, ethnicity, and gender. See infra notes 29-31 and accompanying text (providing details of coverage of the O.J. Simpson arrest and trial as an example of media impact on discussion of racial issues). While multiplicity often encompasses racial and gender viewpoints, it is not confined to those issues. It is a broad construct that includes a variety of perspectives on an array of issues. For more regarding multiplicity and its parameters, see infra notes 77-87 and accompanying text.
of critical issues and enhances media’s function as a monitor of democracy’s functionality.

II. MEDIA’S FUNCTION WITHIN A DEMOCRACY

A critique of media should commence with an examination of the industry’s role within a democratic society. Perhaps media’s most utilitarian function is its tendency to inform on matters of societal import. The motivation to inform the public ideally leads to dissemination of information about the government and, theoretically, preserves democracy. The informative function, which is virtually tantamount to a duty, has prompted many to refer to the industry as the “Fourth Estate.” Appreciation of this duty, however, requires some


conceptualization of the democracy that media fosters.\textsuperscript{11}

\section*{A. Autonomy-Based Theories of Democracy and Their Motivational Influences}

A true democracy conjures images of a society in which each member enjoys an equal right to "life, liberty, and the pursuit of happiness."\textsuperscript{12} Aristotelian principles, which have probative relevance to modern conceptualizations of democracy, emphasize equality and justice in terms of the just application of legal principles and the "moral" training of citizens who adopt a habit-forming behavior of law abidance.\textsuperscript{13} Liberty becomes synonymous with autonomy and, thus, in-

\textsuperscript{11} "Fourth Estate" reflects the "role of the First Amendment and its critical contribution to the people's self-governance".

\textsuperscript{12} \textit{See} Baker, Media, Markets, and Democracy, supra note 9, at 129-53. The author comments on several forms of democracy and media requirements of each. An elitist democracy does not require a press that provides for, or promotes, society's political involvement, but only one that performs the watchdog, or "checking function." \textit{Id.} at 133. A liberalpluralist form of democracy requires a press that facilitates the democratic bargaining process between the governors and the governed by providing individuals and organized groups with information pertinent to their respective interests and helping to motivate people to promote those interests. \textit{Id.} at 138, 148. A republican form of democracy requires a press that facilitates "the process of deliberating about and choosing values and conceptions of the common good"; one that is thoughtfully discursive, yet inclusive. \textit{Id.} at 143, 148. Finally, a complex form of democracy requires media that assist groups in recognizing when their interests are at stake, search for "general societal agreement on 'common goods,'" and "pursue their own separate vision." \textit{Id.} at 149. For more on various forms of democracy and their respective media requirements, see generally Baker, supra note 8.

\textsuperscript{13} \textit{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") (citation 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. \textit{Id.} at 718-21. \textit{See} Rajendra Ramlogun, 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 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); \textit{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).

cludes expressive freedom, which is a cornerstone of democracy. Freedom of speech and press theoretically leads to an informed and educated citizenry that seeks to maximize individual goals and desires. This libertarian notion constitutes a fundamental, normative construct of a democracy. The societal significance of expressive autonomy as a core right of individuals bodes for minimal governmental restriction—a linchpin concept in the negative theory of free speech.


14. The First Amendment of the U.S. Constitution guarantees, inter alia, freedom of expression and 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 the Constitution states, constitutes a relatively generic term that encompasses a variety of media forms, including print and broadcast. Of course, media are not fungible, with each medium of communication constituting a “law into itself.” See Kovacs v. Cooper, 336 U.S. 77, 87 (1949). Secondly, the First Amendment paradigm applies differently to various forms of media. See generally FCC v. League of Women Voters, 468 U.S. 364 (1984); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

15. See Wolfgang Von Leyden, Aristotle on Equality and Justice: His Political Argument 81, 82 (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 “equalisation of desires”).

16. 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 the 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 everyone, [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: Freedom of Speech and Extremist Speech in America 57 (1986) (opining that libertarian’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).

17. 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,
 Libertarian or autonomy-based theories, which seemingly dominate the jurisprudential landscape, have influenced the motivational behavior of contemporary media sources. One ancillary effect of expressive autonomy includes the industry’s tendency to influence public thought and behavior.\textsuperscript{18} While it is debatable whether news reports and editorial commentary can actually change attitudes, there is historical proof that media acts subtly to influence public behavior.

In his political pamphlet, \textit{Common Sense}, Thomas Paine urged the fledgling colonies of America to revolt against England.\textsuperscript{19} Paine failed to convert the Tories, but crystallized the resentment of many colonists who adopted a revolutionary ideology. There were, of course, more modern examples of media’s subtle impact on events. William Randolph Hearst’s \textit{New York Journal} argued for war against Spain in

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the Court should heed this underlying purpose of the Constitution and promote an active and constant participation in collective power. See generally Stephen Breyer, \textit{Our Democratic Constitution}, 77 N.Y.U. L. REV. 245 (2002).

18. See Leonard M. Baynes, \textit{Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule}, 37 U. RICH. L. REV. 819, 893-94 (2003) (noting the effects of media’s projection of stereotypes on children, namely their shaping of those children’s perceptions of people of color, which are carried through to adulthood); Paul A. LeBel, \textit{Misdirecting Myths: The Legal and Cultural Significance of Distorted History in Popular Media}, 37 WAKE FOREST L. REV. 1035, 1036-37 (2002) (noting the potentially detrimental effects of broadcast and published works of fiction, namely cases in which the viewer has been incited to carry out violent acts); Michael L. Landsman, \textit{The European Community’s Television Quota Reappraised}, 8 MEDIA L. & POL’Y 29, 32 (1999) (citing the Third Reich’s use of the mass media as an example of the potential for using the power of media to influence thought and behavior). The author quotes Hitler as saying that “he could never have conquered Germany without the loudspeaker.” \textit{Id.}

19. See generally Thomas Paine, \textit{Common Sense}, in \textit{2 The Life and Works of Thomas Paine} 97 (William M. Van der Weyde ed., 1925). See also David Ray Papke, \textit{Law, Cinema, and Ideology: Hollywood Legal Films of the 1950’s}, 48 UCLA L. REV. 1473, 1482 (2001) (citing Thomas Paine as saying, in \textit{Common Sense}, that in America the law could be king); Paul Schiff Berman, \textit{An Observation and a Strange but True “Tale”: What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?}, 52 HASTINGS L.J. 123, 133 (2000) (citing Thomas Paine, in \textit{Common Sense}, as suggesting that in order to fill the gap left by overthrowing the monarch, the American people could draft a legal charter, place it on top of the Bible, and then place a crown on the charter); Gregory C. Keating, \textit{Fidelity to Pre-existing Law and the Legitimacy of Legal Decision}, 69 NOTRE DAME L. REV. 1, 4 n.3 (1993) (quoting Thomas Paine, \textit{Common Sense}, in \textit{Common Sense and Other Political Writings} 3, 32 (Nelson F. Adkins ed., 1953)) (“But where, says some, is the King of America? I’ll tell you, friend, he reigns above, and does not make havoc of mankind like the royal brute of Britain . . . . In America the law is king. For as in absolute governments, the King is law, so in free countries the law ought to be King; and there ought to be no other.”); Helen K. Michael, \textit{The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of “Unwritten” Individual Rights?}, 69 N.C. L. REV. 421, 446-47 (1991) (citing the democratic theory of natural law as that which inspired Thomas Paine’s call to arms in \textit{Common Sense}); Stephanie A. Levin, \textit{The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military}, 35 VILL. L. REV. 1009, 1030 n.96 (1990) (citing Thomas Paine as saying, in \textit{Common Sense}: “Every spot of the old world is overrun with oppression” and “[w]e have it in our power to begin the world over again”).
1898. While no one would say that Hearst’s publication sparked the movement toward war, it undoubtedly contributed to a climate of war fever.\(^{20}\)

More recent and dramatic examples of media’s influence were reports of Trent Lott’s statements during the centennial birthday celebration of retired Senator Strom Thurmond of South Carolina.\(^{21}\) Many opined that these reports sparked intense public discourse that contributed substantially to Lott’s resignation as Republican Majority Leader in the House.\(^{22}\)

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21. See Thomas B. Edsall, Lott Decried for Part of Salute to Thurmond; GOP Senate Leader Hails Colleague’s Run as Segregationist, Wash. Post, Dec. 7, 2002, at A6 (noting the criticism surrounding Senator Lott’s statement that the United States would have been better off if then-segregationist candidate Strom Thurmond had won the presidency in 1948); Kenneth R. Bazinet, Jesse Wants Lott Cast Out for Dixiecrat Dig, N.Y. Daily News, Dec. 9, 2002, at 8 (noting Reverend Jesse Jackson’s calling for Senator Lott to resign as GOP leader after his remarks regarding Strom Thurmond).

22. See Sheryl Gay Stolberg & Elisabeth Bumiller, In a Rare Political Moment, Powell Criticizes Sen. Lott; Meanwhile, Sen. Lincoln Chafee of Rhode Island Becomes the First Republican Senator to Publicly Call for Trent Lott’s Resignation, Grand Rapids Press, Dec. 19, 2002, at A3 (noting Senator Lincoln Chafee of Rhode Island as the first Republican senator to publicly call for Lott’s outright resignation); Mary Leonard, Conservatives Say Lott Hurts Agenda They’re Contending He Should Resign For Their Programs To Advance, Boston Globe, Dec. 20, 2002, at A3 (noting conservatives’ fear that the firestorm engulfing Senate GOP leader Trent Lott has “jeopardized prospects for welfare reform, school vouchers, expanding federal grants to religious charities, and confirming conservative judges”); Stephen Dinan, Lott Resigns Senate Leadership Post; Will Retain His Seat; Frist Set To Succeed Him, Wash. Times, Dec. 21, 2002, at A1 (noting Senator Lott resignation as Senate Republican leader as a result to pressure over the racially-charged comments he made regarding Strom Thurmond); Vincent Morris, Spent Trent Quits GOP Helm: Will Remain in Senate as Frist Waits in Wings, N.Y. Post, Dec. 21, 2002, at 5 (noting the pressure Senator Lott received from Republican allies, forcing him to resign his leadership post).
Full and fair reporting has legitimacy beyond its tendency to expose wrongs or influence behavior. It also correlates to media’s ethical responsibility to provide complete information for a diverse populace. Fulfillment of this equitable duty would presuppose the inclusion of multiple viewpoints on issues of societal importance.


for larger audiences.26 Profit maximization seems to overshadow media’s ethical duty to disseminate fully information about important societal matters.27 Indeed, the drive for audience often encourages feeding frenzy, which can significantly distort news reports.28

need to maximize profits to compete with other media giants often surpasses their obligation to offer fair and complete programming); Larry E. Ribstein, Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002, 28 J. CORP. L. 1, 46-47 (2002) (noting that the prevalence of news content regarding corporate fraud is furthered by the media’s profit incentive to attract more viewers and those viewers’ viewing preferences); C. Edwin Baker, Media Concentration: Giving Up On Democracy, 54 FLA. L. REV. 839, 871 (2002) (arguing that when government policymakers recommend less intervention and regulation, they give in to the film industry’s search for higher profit levels and create a viewing environment less likely to sympathize with diverse social issues); Susan Harris, Open Hearings: A Questionable Solution, 26 WM. MITCHELL L. REV. 673, 678 (2000) (describing the perspective of those advocates for closed hearings in juvenile protection cases as driven by the fear of the media’s profit motive and trend of only covering cases that serve a prurient public interest, which bear the risk of causing emotional harm to the child); Hasen, supra note 24, at 1631 (describing media owners as profit- or influence-maximizers who use their news outlets to endorse their own interests and secure access to public officials); Shaun B. Spencer, Reasonable Expectations and the Erosion of Privacy, 39 SAN DIEGO L. REV. 843, 874 (2002) (noting that sensational stories, and the accompanying profit levels, provide incentive for news groups to disclose potentially embarrassing private facts about public officials).

26. See Kelly L. Cripe, Comment, Empowering the Audience: Television’s Role in the Diminishing Respect for the American Judicial System, 6 UCLA ENT. L. REV. 235, 250 (1999) (noting that as ratings climb, so do profits, and the incentive to cover high-profile trials from “gavel to gavel!”); Lidsky, supra note 9, at 218 (arguing that news shows can afford to use questionable newsgathering techniques because of the higher profits associated with the higher ratings they seek); David A. Logan, Masked Media: Judges, Juries, and the Law of Surrupitious Newsgathering, 83 IOWA L. REV. 161, 161-62 (1997) (arguing that undercover reporting by “newsmagazine” shows, which raise serious issues of journalistic ethics, have proliferated due to increasing ratings and thus profits); Karen L. Gulick, Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry, 27 CONN. L. REV. 53, 81 (1994) (noting the coloring of classic black-and-white films leads to a larger market-share rating and thus profits).

27. See infra notes 77-87 (discussing the concept of multiplicity of voice).

28. See Margery Malkin Koosed, The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications, 63 OHIO ST. L.J. 263, 286-87 (2002) (asking whether media frenzy has prompted more persons to gather fame through becoming a witness, possibly leading to a skewed version of their testimony due to constant media exposure); Marc Galanter, An Oil Strike in Hell: Contemporary Legends About the Civil Justice System, 40 ARIZ. L. REV. 717, 717 (1998) (arguing that distorted, sensationalized stories resulting from media frenzy lead to a perception of the civil justice system which perpetuates frivolous lawsuits); Margaret M. Russell, Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice, 95 MICH. L. REV. 766, 793 (1997) (positing that the behavior of attorneys in the O.J. Simpson case was influenced by the media frenzy, namely the ever-present cameras in the courtroom); Jonathan M. Remshak, Comment, Truth, Justice, and the Media: An Analysis of the Public Criminal Trial, 6 SETON HALL CONST. L.J. 1083, 1116 (1996) (noting that federal court proceedings have not been subject to the same type of media frenzy that state court proceedings have been, mostly due to the inadmissibility of cameras into the courtroom, thus affording greater protection to the defendant’s right to a fair trial); Barbara Moretti, Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation, 11 CARDOZO ARTS & ENT. L.J. 857, 878 (1993) (opining that the media frenzy spawned by a political candidate’s alleged sexual indiscretions leads to an inadequate coverage.
Perhaps the most notorious example of media frenzy was coverage of the O.J. Simpson arrest and trial for the murder of Nicole Brown Simpson, his estranged wife.\textsuperscript{29} \textit{Time} magazine published on its cover an obscure and darkened picture of a recently arrested Simpson.\textsuperscript{30} Some believed that the \textit{Time} publication of a more sinister-looking Simpson inflamed racial animus.\textsuperscript{31} Moreover, distorted and seemingly unending coverage of sensational events, such as the Simpson trial, undoubtedly resulted from media's zeal to capture a huge audience.\textsuperscript{32}

Other manifestations of the quest for ratings are sensational programs such as reality and tabloid-like shows. Professor Cass R. Sunstein believes that media's ravenous quest for gain, fueled by rampant autonomy, has contributed to the increase in sensational programming.\textsuperscript{33} The proliferation of this type of programming lends credence of the more significant issues facing the electorate). The author argues: "Under these circumstances, the press fails miserably in its appointed function." \textit{Id.}


31. \textit{See Time Magazine Darkens and Blurs O.J. Simpson Mug Shot}, June 21, 1994, 1994 WL 10150984 (noting that \textit{Time} and \textit{Newsweek} both used Simpson's mug shot, but that \textit{Time} had an artist darken and blur the face, but not, according to a \textit{Time} spokesperson, in an effort to mislead); \textit{see also} Peter Arenella, People v. Simpson: \textit{Perspective on the Implications for the Criminal Justice System—Foreword}: \textit{O.J. Lessons}, 69 S. CAL. L. REV. 1233, 1258 (1996) (arguing that the darkened \textit{Time} magazine picture epitomizes how badly our culture deals with race); Edgar Allen Beem, \textit{Bying the Hand That Needs Them}, \textit{Maine Times}, May 12, 1995, at 16 (referencing \textit{Time's} decision to "digitally darken O.J. Simpson's complexion to make him look more sinister").

32. \textit{See Marge Injasoulian & Gregory L. Leise, Media Crises}, 36 CATH. L. W. 97, 106-07 (1995) (noting that the hysteria surrounding the press's quest for sensationalism and, thus, increased readership and viewership, often leads to "inaccurate reporting and incomplete source verification"); \textit{see also} Kevin A. Isen, \textit{When Is First Amendment Speech No Longer Protected by the First Amendment: A Plaintiff's Perspective of Agricultural Disparagement}, 10 DEPAUL Bus. L.J. 233, 256 (1998) (noting the controversy surrounding Oprah Winfrey's dissemination of false information regarding the safety of beef products in the United States, and her show's purposeful editing and packaging of the false information, including the deletion of scientific rebuttal, in order to increase ratings).

to the argument that the media inflames rather than informs, and incites rather than educates. Indeed, when motivation devolves solely to profit, media contravenes its ethical responsibility to inform fully and honestly.34

Despite its negative byproducts, autonomous behavior in the form of self-criticism can check the negativity from media frenzy. For example, after Time published the sinister-looking photograph of O.J. Simpson, other sources reported the outrage of those who thought the magazine inappropriately inflamed racial attitudes. Time ultimately acknowledged the error as an unintended consequence.35 Another example of a check on media's behavior was the reported outrage expressed over erroneous projections in the 2000 presidential election. After resounding public criticism, many broadcast sources took unprecedented steps to reform the procedures used to report election returns.36

34. See supra note 23 (listing various journalistic ethics codes). One negative by-product of media's drive for ratings is erroneous projections in elections and the accompanying effect on the electoral process. See Election 2000: The Role of the Courts, The Role of the Media, The Roll of the Dice, Conference Report, Northwestern University, Jan. 2001, 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).


36. See Editorial, Driving Voters Away, WALL ST. J., May 7, 2001, at A22 (editorial aside); Bill Sammon, Networks' Early Call Kept Many from Polls: Florida Section Affected by TV, WASH. TIMES, May 7, 2001, at A1; Letters to the Editor, BALT. SUN, Nov. 18, 2000, at A20 (opining that the networks' erroneous call of the Florida winner massively affected turnout in the West, and stymied Republican "get-out-the-vote" efforts in California); Daniel T. Zanoza, Editorial, Remembering Sweetness with Gift of Life, CHI. SUN-TIMES, Nov. 12, 2000 at 48 (arguing that the major networks' early projections in Florida represented the height of irresponsibility and were unfair to both Presidential candidates); see also David Foster, West Coast Voters Angry at Early Call of Presidential Election, ASSOC. PRESS ONLINE, Nov. 5, 1996, available at 1996 WL 4447931 (noting the concern by many groups that the networks' early projections of the presidential race can dissuade potential voters, who have been told their candidate has already lost, from going to vote at all); Terry Dickson, Let Pelote Prophecy Campaign, FLA. TIMES-UNION, Sept. 9, 2001, at B1 (suggesting an election reform tactic that would forbid the reporting of the results from polls in the East until those in the West close so as not to dissuade those in the western states from voting); Ted Van Dyk, Editorial, Election Proposals Address Problems, SEATTLE POST-INTELLIGENCER, Aug. 9, 2001, at B4 (citing the bipartisan commission on election reform proposing that "no-national-election result in any state be projected until polls have closed in all [forty-eight] contiguous states"); Yochi J. Dreazen, Networks' Coverage of Election Draws Study's Criticism, WALL ST. J., Feb. 5, 2001, at B14 (citing a report written by a panel of three respected journalists as criticizing the networks' reliance on faulty data and projections from the Voter News Service).
Yet despite its more ancillary benefits, expressive autonomy's more dominant manifestation remains the quest for profit. The commensurate quest for audience often consumes decision making to the point that other more noble motivations, such as multiplicity, become secondary. Conglomerate ownership and profit's pervasive influence on media behavior compel examination of the industry's responsiveness to society's diverse constituency.

B. Autonomy's Shortcomings and Alternative Theories

Autonomy-based notions of democracy tend to obscure a fundamental fact: Citizens exercise their rights within the collective unit of a society. As a consequence, libertarian rights of individuals depend upon the preservation of the collective interests of the society in which they live. This reality compels a conceptualization of democracy that extends beyond stark notions of autonomy.

Various theories espouse a broader view of democracy. The deemphasis of individual autonomy in order to maximize universal participation by members of society constitutes a key concept of civic republicanism. Civic republicans focus on the security of democratic


37. For more on "society," see infra notes 69 and 70 and accompanying text.

38. See Baker, supra note 8, 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 that 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 media's appropriate role in society.

39. 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' searches for common ground and fostering of the common good, while also advancing their own individual or group interests). Id. at 319-39.

40. 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 Law & Hist. Rev. 1, 7 (1994) (describing "civic republicanism" as a positive liberty that empowers a community through the fostering of "public good"); see also Micheal A. Gillespie & Michael Lienessch, Ratifying the Constitution 85 (1989); 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 conceptualiza-
processes through a fostering of expressive rights of all members of society. Thus, each citizen, regardless of socioeconomic status, should experience meaningful participation in political processes of the body politic.

To Professor Owen Fiss, the goal of any democracy should be the preservation of self-governance for all members of society. Collective self-determination, thus, becomes a central focus of democracy and overshadows individual autonomy. Fiss also posits that the free market's tendency for unequal wealth distribution leads to a participatory imbalance on matters of public interest. Those of greater wealth dominate debate, and that domination contributes to a lack of informed choices in political matters. Thus, autonomy preservation, which is a staple of the free market, has value only to the extent that it furthers collective self-governance for all members of society. Fiss embraces limited governmental regulation of democratic processes (even when such regulation impacts speech) to promote egalitarian public debate.


42. See Owen M. Fiss, Why the State?, 100 HARV. L. REV. 781, 786 (1987) (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, supra note 41, at 1410.

43. See Fiss, supra note 41, at 1409-10.

44. 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 Fiss, supra note 16, at 52-78; Fiss, Liberalism Divided, supra, at 154-58. 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, supra note 42, at 786 (espousing that decisionmakers should judge action by the impact on the richness of public debate, rather than interference with autonomy). Others scholars have more or less echoed this theme. See, e.g., Cass R. Sunstein, Democracy and the Problem of Free Speech (1993); C. Edwin Baker, Giving the Audience What It Wants, 58 OHIO ST. L.J. 311, 366-72 (1997); Stephen A. Gardbaum, Broadcasting, Democracy, and the Market, 82 GEO. L.J. 373, 395 (1993); Thomas I. Emerson, The Affirmative Side of the First Amendment, 15 GA. L. REV. 795, 795-98 (1981).
Professor Sunstein, like Fiss, embraces civic republicanism to the extent that it fosters deliberative democracy.\textsuperscript{45} Sunstein posits that democracy depends upon each member of society participating \textit{meaningfully} in public discourse.\textsuperscript{46} Overemphasis of autonomy preservation skews public debate,\textsuperscript{47} fosters sensational journalism,\textsuperscript{48} and contributes to media frenzy.\textsuperscript{49} Democracy requires that media maximize participation in public discourse on issues critical to the body politic.\textsuperscript{50} The furtherance of universal participation requires some measure of governmental regulation, the goal of which is the ultimate diversification of public debate.\textsuperscript{51}

Summarily stated, Fiss and Sunstein argue for the deemphasis of autonomy and a heightened awareness of balanced, meaningful political discourse.\textsuperscript{52} Such historic and landmark First Amendment cases as

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\end{quote}

\textsuperscript{45} Sunstein, \textit{Beyond the Republican Revival}, \textit{supra} note 45, at 1548-49, 1570 (describing politics as “deliberative,” with an emphasis upon “collective debate”).


\textsuperscript{47} Cass R. Sunstein, \textit{Deliberative Trouble? Why Groups Go to Extremes}, 110 \textit{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 reflection and exchange among people with competing views”); \textit{see also} \textit{Deliberative Democracy: Essays on Reasons and Politics} (James Bohman & William Rehg eds., 1997); \textit{Amy Gutmann} \& \textit{Dennis Thompson, Democracy and Disagreement} 128-64 (1996), \textit{Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse of Law and Democracy} 287-328 (William Rehg trans., MIT Press 1996).

\textsuperscript{48} See Blake D. Morant, \textit{Electoral Integrity: Media, Democracy, and the Value of Self-Restraint}, 55 \textit{Ala. L. Rev.} 1, 6 (2003) (describing media frenzy as the industry’s proclivity for the “schizophrenic-like” coverage of high profile events, and the resultant tendency to sensationalize or distort news reports); \textit{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 more on “gossip rather than governance” and “titillation rather than scrutiny”).

\textsuperscript{49} Sunstein, \textit{supra} note 44, 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”).

\textsuperscript{50} \textit{See id.} at 83; \textit{cf.} Fiss, \textit{Liberalism Divided,} \textit{supra} note 44 (deemphasizing autonomy with an eye toward enhancement of the “quality of public debate” and the “informational needs of the public”).

\textsuperscript{51} \textit{See supra} notes 41-51 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 &

Fiss and Sunstein's brand of civic republicanism has its critics. Although I greatly appreciate the Fiss-Sunstein model, I advance a more essentialist notion of democracy. The theory I embrace comports


54. 395 U.S. 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."). The Court ultimately upheld the Fairness Doctrine, as promulgated by the FCC, as consistent with Congressional purpose and the enhancement of First Amendment freedoms of speech and press. Id. at 391-92. The Court, however, has limited this holding to the arena of broadcast television. See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637 (1994).


56. 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." See DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE 2 (1989); Jane Wong, The Anti-Essentialism v. Essentialism Debate, in Feminist Legal Theory: The Debate and Beyond, 5 WM. & MARY J. WOMEN & L. 273, 274-75 (1999) (noting essentialism as characteristics that are of the essence and, therefore, "unchangeable"); see also 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); 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, 1242-44 (1991); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990); Joan Williams, Deconstructing Gender, 87 MICH.
with that of Professor C. Edwin Baker. Baker firmly believes that each individual has the right to influence and engage others.\textsuperscript{57} Embedded in that right is the respect for the autonomous rights of others. Consequently, autonomous rights of individuals, regardless of their socioeconomic status, are equal and without priority.\textsuperscript{58} Democracy, therefore, is legitimate only to the extent that it furthers a reciprocal respect for the expressive autonomy of others.\textsuperscript{59}

In my view, democracy should not only secure individual liberties, but also encourage respect for the autonomous rights of others. This pluralist, respect-notion of democracy fosters fuller participatory debate since the opinions and views of diverse constituencies are valued and promoted equally.\textsuperscript{60} Encouragement of the respect for the autonomous rights of others in tandem with society's collective interest in full and robust debate on important issues represents a pluralistic form of democracy.\textsuperscript{61}

Of course, achievement of a balance between individual and collective interests becomes a formidable challenge given their inherent differences. Expressive autonomy generally trumps collective interests

\textsuperscript{57} See C. Edwin Baker, Human Liberty and Freedom of Speech 59 [hereinafter Baker, Human Liberty] (1989) (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"); Baker, Media, Markets, and Democracy, supra note 9.

\textsuperscript{58} See Baker, Human Liberty, supra note 57, at 48-49; see also Thomas I. Emerson, The System of Freedom of Expression 6 (1970).

\textsuperscript{59} Others appear 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 A. Ackerman, Social Justice in the Liberal State (1980).

\textsuperscript{60} 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 9, at 143-44. The author posits a more realistic theory of "complex democracy" that draws on elements of both liberal pluralist and republican democracy. "[I]t 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.

\textsuperscript{61} See Baker, supra note 8, at 327-30 (stating that "liberal pluralism" recognizes "intractable diversity" with conflicting values, ideas, and interests as normative).
in societal processes such as elections \(^{62}\) and governmental necessity.\(^{63}\) Perhaps the Constitution's express provision of individual rights signifies a priority that contributes to this imbalance.\(^{64}\)

Expressive freedom broadly applies to both natural and corporate persons.\(^{65}\) This postulate empowers the media to exercise its expressive rights,\(^{66}\) albeit with some limitation defined by context.\(^{67}\)

Personal liberties, particularly those related to expression, appear to trump societal interests.\(^{68}\) This result has guarded validity given

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62. See Morant, supra note 49 (noting the prior restraint doctrine as the most significant example of expressive autonomy's supremacy over electoral integrity concerns).

63. See Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 WM. & MARY L. REV. 1939, 1958-59 (2003) (offering a “private rights theory” that balances the government’s regulatory interest against a citizen’s private expressive autonomy). The author cautions, however, that this theory “gives the Court substantial discretion to cast expressive interests as trivial in the face of weighty, non-speech regulatory objectives.” Id. at 1958.

64. The Bill of Rights, which includes the First and Sixth Amendments, restricts governmental action against individuals. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 8 n.8 (3d ed. 2000); see also infra notes 65-74 and accompanying text (describing expressive liberties in the United States as inelastic).


66. See Anderson, supra note 2, at 444 (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).

67. One context in which 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 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).

68. See Daily Herald Co. v. Munro, 838 F.2d 380, 389 (9th Cir. 1988) (holding unconstitutional a Washington state statute that restricted the media's ability to perform exit polls to a distance of no less than 300 feet from a polling place); In re Express-News Corp., 695 F.2d 807, 811 (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, 237-38 (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 Morant, supra note 49, at 29 (noting that the courts have dealt with the clash of expressive rights and electoral integrity by defaulting to “the protection of individual autonomy, with more minor sanctioning of minimalist measures that ensure fair elections”); 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, 453 (2002) (arguing that a “citizen's right to solitude must be balanced against the public's right to know and the media's
that the Constitution expressly provides for civil liberties but only impliedly recognizes collective societal interests. Carte blanche acceptance of this priority remains, however, simplistically myopic in light of the inherent interdependence of individual and collective interests. "Society" represents a collective body of individuals who must coalesce to some extent to further individual goals. Individual liberties and sustenance of the body politic are symbiotic. Neither can flourish without the other. Thus, a true democracy strives to achieve a reasonable and admittedly difficult balance between these sometimes competing interests. Overemphasis of individual interests can result in group disparities that stymie participation in public debate by more marginalized constituencies. Conversely, an agenda focused solely

First Amendment right to gather news’’); 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 “the First Amendment rights to gather news and publish ought not to be disregarded without searching inquiry and compelling justifications”).

69. One of the most highly contested issues involving constitutional liberties is a woman’s right to abortion and the consequent societal interest in the health of both the fetus and the mother. See generally Jeffrey A. Van Detta, Constitutionalizing Roe, Casey and Carhart: A Legislative Due-Process Anti-Discrimination Principle That Gives Constitutional Content to the “Undue Burden” Standard of Review Applied to Abortion Control Legislation, 10 S. CAL. REV. L. & WOMEN’S STUD. 211, 233 (2001) (noting that while the Supreme Court has found a personal liberty interest in a woman’s constitutional right to an abortion, “[t]he federal and state governments exercise [their] implied power to protect life through legislative or administrative action,” and thus protect the collective interest); see A. Michael Lee, State ex rel. Angela M.W. v. Kruzicki: The Wisconsin Court of Appeals Introduces a Dangerous New Weapon in the Battle Over “Fetal Rights”, 30 GA. L. REV. 1183, 1210-11 (1996) (noting “a woman’s express constitutional right to physical liberty,” as opposed to her “implied constitutional right to an abortion”); see also infra note 90 and accompanying text (discussing congressional recognition of the need for deliberative democracy).

70. 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 ANTHONY GIDDENS, STUDIES IN SOCIAL AND POLITICAL THEORY 347, 348 (1977)) (internal quotation marks omitted); see also supra note 37 and accompanying text (arguing that autonomous individuals exercise their freedoms within the framework of a society).

71. See FREDERICK SCHAUER, SPEECH: A PHILOSOPHICAL ENQUIRY 35-46, 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)); 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); 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).

72. See 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 tendency for personal advancement over other fellow societal members “leads to conflict, anarchy, and ultimately reduces the possibilities for personal advancement”); LEONARD W.
on collective societal interests may quash individual initiative.\textsuperscript{73} A fully functional and pluralistic democracy continually strives to further society's interest in robust debate, while simultaneously promoting respect for the expressive rights of all members of that society. This pluralistic concept is closely related to deliberative democracy, which focuses on a fully participatory and public discussion of societal issues.\textsuperscript{74} Within this theoretical framework, media optimizes its utility and enhances public debate when the information it disseminates reflects a broad spectrum of viewpoints.

C. Multiplicity's Compatibility with a Respect-Model of Democracy

A theory of democracy in which autonomous individuals are encouraged to respect the expressive rights of others potentially maximizes participation in public discourse.\textsuperscript{75} This respect-model of autonomy captures the very essence of multiplicity, and tacitly re-

\textbf{Levy, Origins of the Bill of Rights} 149 (1999) (stating the Supreme Court's position in \textit{Dennis v. United States} that individualized action in preparation for revolution can produce anarchy); \textbf{Charles Taylor, Philosophical Arguments} 220 (1995) (opining that unabashed self-regulation can lead to anarchy); \textit{but see} James B. Staab, \textit{The Tenth Amendment and Justice Scalia's "Split Personality"}, 16 \textit{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).

\textsuperscript{73} See \textit{David Campbell, Breach and Penalty as Contractual Norm and Contractual Anomie}, 2001 \textit{Wis. L. Rev.} 68, 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); \textit{The Honorable Sandra Day O'Connor, The Life of the Law: Principles of Logic and Experience from the United States: The Fairchild Lecture}, 1996 \textit{Wis. L. Rev.} 1, 5 (finding that communism's failure's was due, in part, to the public's view of alternatives through print and broadcast media); \textit{Stephen J. Solarz, The Collapse of Communism and the Future of the Korean Peninsula}, 19 \textit{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); \textit{Bruce J. Winick, On Autonomy: Legal and Psychological Perspectives}, 37 \textit{Vill. L. Rev.} 1705, 1754 (1992) (attributing communism's failure to the states control over production and distribution, and its inability (or unwillingness) to accommodate individual choice).

\textsuperscript{74} See Congressman Gerald B.H. Solomon & Donald R. Wolfensberger, \textit{The Decline of Deliberative Democracy in the House and Proposals for Reform}, 31 \textit{Harv. J. on Legis.} 321, 323-25 (1994). The authors describe a deliberative democracy as "an ideal representative" or republican "form of government that allows the free airing of various opinions and perspectives on governmental policy through the legislative process (i.e., hearings, debates, and amendments). Id. at 323. The authors also characterize the elements of deliberation as information, arguments, and persuasion. Id. at 325 (citing Joseph M. Bessette, \textit{Is Congress a Deliberative Body?}, in \textit{The United States Congress: Proceedings of the Thomas P. O'Neill, Jr., Symposium} 3, 5 (Dennis Hale ed., 1982)). \textit{See also} Cass R. Sunstein, \textit{Congress, Constitutional Moments, and the Cost-Benefit State}, 48 \textit{Stan. L. Rev.} 247, 266 (1996) (noting that part of the "defining creed of a deliberative democracy" is that governmental judgments should dictate regulatory policy only when "undergirded by sound science").

\textsuperscript{75} See \textit{supra} note 74 for sources that describe deliberative democracy.
quires the media to recognize the perspectives of the increasingly diverse constituency it serves.76

Multiplicity consists of the dissemination of information that is reflective of the variant range of views and perspectives of a diverse constituency.77 The concept's expansive notion of participatory debate relates naturally to deliberative democracy, which embodies discussion of important political issues by the broadest cross-section of society.78 The relationship between deliberative democracy and multiplicity remains one of cause and effect. The furtherance of multiplicity, which embraces ideas that appeal to a diverse audience, fosters deliberative democracy's emphasis on full and robust public debate. The two concepts are, thus, interrelated.79

Voice is a holistic concept that constitutes a distinct perspective, among many, on critical societal issues. Society's increasing diversity80 ensures a variety of perspectives, a phenomenon that contributes to multiplicity of voice. Multiplicity compels a heightened

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76. For more on the increasing diversity of the United States, see supra note 5.
77. See Regents of University of California v. Bakke, 438 U.S. 265, 313 (1978) (noting that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples"); Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 77 (1963) (arguing that the "citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them"); Business-Higher Educ. Forum, Investing in People: Developing America's Talent on Campus and in the Workplace 29-30 (2002), available at http://www.acenet.edu/bookstore/pdf/investing_in_people.pdf (last visited Jan. 26, 2004) (arguing that students' exposure to diverse perspectives in the college environment enhances their participation in democratic society, including community involvement, volunteer efforts, politics, and activities that promote racial understanding); J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 379 (arguing that the long-term effects of the unequal distribution of power is an unequal exposure of ideas, leading to the stifling of new and more radical ideas).
78. See supra note 74 for an explanation of deliberative democracy.
79. See The Federalist No. 10 (James Madison) (Garry Wills ed. 1982) (arguing that a representative government ensures a more deliberative democracy); Carlos J. Cuevas, Bankruptcy Code Section 105(a) Injunctions and State and Local Administrative and Civil Enforcement Proceedings, 4 Am. Bankr. Inst. L. Rev. 365, 424 (1996) (arguing that a proposed judicial standard that limits the court's use of its equitable powers to enjoin state or local government proceedings would ensure democratic deliberation by promoting civic republicanism, public values and the common good); Jim Rossi, Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts To Restructure the Electric Utility Industry, 1994 Wis. L. Rev. 763, 833 (arguing that when agencies use adjudicatory proceedings to perform generic rulemaking functions, the courts should apply a hard look doctrine to ensure that a participatory and deliberative decision-making process has occurred); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 471 (1989) (opining that our constitutional structure "ensure[s] a kind of deliberative democracy" by its hostility towards regulatory "measures that impose burdens or grant benefits merely because of the political power of private groups").
80. See supra note 5 for documentation of increased diversity in the United States.
sensitivity to the variety of viewpoints and perspectives of societal members. Although multiplicity relates to content, it does not implicate restrictive means to compel its implementation. The embrace of multiplicity transforms media into a genuine catalyst for robust debate on many issues, including those that implicate race, ethnicity, or gender. Voice multiplicity encourages sensitivity to issues that are important to traditionally marginalized groups and heightens awareness of the effects of prejudice and stereotypes.81

Multiplicity, however, has a broad connotation that extends beyond race, ethnicity, and gender. While the concept ensures greater responsiveness to traditionally disadvantaged or marginalized groups, its fundamental objective remains the maximization of viewpoint diversity. This broader conceptualization transforms multiplicity into a universally accepted norm. Consequently, governmental rules that encourage media's greater adoption of multiplicity82 should avoid the strict scrutiny that the courts systematically apply to remedial programs predicated on race or ethnicity.83

Despite its obvious relevance to full and robust discourse, multiplicity can become an ancillary factor in the decision to disseminate news and information. In addition to media's motivation for profit,84 the beliefs and attitudes of decisionmakers within a media source significantly influence the information disseminated by that source. Media sources often assume the ideological perspectives of either their decisionmakers or corporate sponsors whose behavior is substantially im-

81. See Leonard M. Baynes, White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming, 45 ARIZ. L. REV. 293, 304 (2003) (arguing that most negative stereotypes of people of color are learned through electronic encounters, i.e., television); Barry C. Feld, Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash”, 87 MINN. L. REV. 1447, 1529 (2003) (arguing that the media's focus on only the most violent of crimes reinforces racial stereotypes); Ediberto Román, Who Exactly Is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media, 4 J. GENDER RACE & JUST. 37, 40 (2000) (arguing that the use of dominant stereotypes in the media reinforces "a biased and untrue perception of reality").

82. Governmental rules that further multiplicity generally take the form of either contractual set-asides for disadvantaged groups or ownership restrictions that prevent monopolization and control of media sources. For a discussion of the contractual set-asides and the judiciary's intense scrutiny thereof, see infra notes 107-122 and accompanying text. For a more detailed analysis of governmental restrictions on the ownership of certain media sources and the validity of those restrictions, see infra notes 88-99, 141-163 and accompanying text.

83. See infra notes 119-122 and accompanying text (detailing the Court's Fourteenth Amendment equal protection analysis applied to remedial programs that the government uses to remedy discrimination based on race).

84. See supra notes 24-28 (discussing media's obsession with profit).
pacted by their personal attitudes and beliefs. In light of this strong and virtually unavoidable consequence, media must conscientiously and deliberately incorporate multiplicity in its decisions to report information.

Of course, the technological explosion of informational sources and casual observations of media’s coverage of significant news events may suggest a tacit embrace of multiplicity. Superficial or incidental inclusion of minority or diverse views does not, however, truly manifest multiplicity. Instead, decisionmakers within media sources must consciously employ multiplicity as an integral consideration as they choose news and information to report. In the absence of media’s voluntary incorporation of multiplicity, governmental decisionmakers should provide market incentives that ensure media’s responsiveness to the informational needs of a diverse constituency.

III. Influences on Media’s Focus on Multiplicity of Voice

A. Governmental Advancement of Multiplicity—The Federal Communication Commission’s Initiatives

The twentieth century development of broadcast media (radio and television) provided the means to disseminate information quickly and broadly to a large audience—one that is usually greater than that for print media. The advent of television and radio has led fewer Americans to rely on print media for their daily news. Given its

85. See Gerry Spence, Give Me Liberty!: Freeing Ourselves in the Twenty-First Century 245-59 (1998) (defining the voice of the media as representing the owners’ social and political ideals); Ethan Klingsberg, Judicial Review of Access to the Media/New Trends in Access to the Media—Beyond the Voice and Intended View Conception of Speech: Expanding the First Amendment Goal of Rich Public Debate To Protect a Multiplicity of Discourses, in RIGHTS OF ACCESS TO THE MEDIA 177 (András Sajó ed., 1996) (noting the Court’s perception of “voice” as the “source” of a message); see also Lee C. Bollinger, Why There Should Be an Independent Decennial Commission on the Press, 1993 U. CHI. LEGAL F. 1, 22 (positing that the voice of a nation’s media is affected by its social and economic system).

86. See Wally Suphap, Getting It Right Versus Getting it Quick: The Quality-Timeliness Tradeoff in Corporate Disclosure, 2003 COLUM. BUS. L. REV. 661, 664 (noting that “technological advances on information flow” have led the SEC to require disclosure of financial information in a quicker and more accurate fashion); Ted Schneyer, The Future Structure and Regulation of Law Practice, 44 ARIZ. L. REV. 521, 522 (2002) (noting that technological advances allow the public to access a vast amount of legal information without the intervention of attorneys); Erik S. Knutsen, Techno-Neutrality of Freedom of Expression in New Media Beyond the Internet: Solutions for the United States and Canada, 8 UCLA ENT. L. REV. 87, 111-12 (2001) (arguing that technological advances in media types (e.g., Internet, cable) will soon render the historical problem of scarcity of broadcast frequencies nonexistent).

87. Indeed, during the presentation of this piece during the DePaul Law Review Symposium, a participant opined that media’s reporting of events are, at present, exceedingly diverse.

88. A recent study showed that 95% of Americans regularly rely on some form of broadcast media for news on national and international events, while only 29% reported they rely on
dominance in terms of audience, broadcast media has become a critical news source that overwhelmingly influences public debate. Moreover, the owners of media sources and their agents control this debate through their discretionary choice of information that is disseminated. Ownership of media sources, therefore, impacts the diversity of perspectives provided by those sources. The owners' discretion to report information is a formidable right that remains broad and largely unfettered unless tempered by such public externalities as viewer preference or governmental regulation.89

In recognition of media's influence on public debate, Congress has historically enacted legislation that furthers deliberative democracy and, commensurately, multiplicity.90 By congressional authority, the FCC has attempted to diversify public discourse through the enforcement of certain broadcast rules.91 One such rule was the fairness doctrine, which required broadcasters to give sufficient coverage to opposing views on public issues. In Red Lion Broadcasting Co. v. FCC,92 the United States Supreme Court upheld the constitutionality of the doctrine, and decided that broadcasters acted as public trustees

national newspapers, such as the New York Times. Roper Ctr. at Univ. of Conn., America on the Eve of War Survey (March 14, 2003), at http://web.lexis-nexis.com/universe/form/academic/s_roper.html (last visited Aug. 11, 2003). See Krootszynski & Blaiklock, supra note 20, at 870 (noting political candidates' use of television in conducting their campaigns, notably because "television provides the most effective means of generating a mass audience").

89. Kathleen Q. Abernathy, The Role of the Federal Communications Commission on the Path from the Vast Wasteland to the Fertile Plain, 55 Fed. Comm. L.J. 435, 437-38 (2003) (noting that even though media owners control the content of their stations' programming, that control does not go unchecked by the public's preferences); Carl Hilliard, Constitutional Conflict over Race and Gender Preferences in Commercial Radio and Television Licensing, 38 U. Kan. L. Rev. 343, 347-48 (1990) (noting as the basis for the FCC's preference in limiting the number of licenses one company can obtain, the assumption that a larger number of owners will lead to a larger number of viewpoints, thus programming decisions reflecting a wider range of opinions); see generally Matthew L. Spitzer, Justifying Minority Preferences in Broadcasting, 64 S. Cal. L. Rev. 293 (1991) (acknowledging media owners' control over programming decisions, but analyzing whether the decision-making process is, in fact, influenced by the sex and race of the owner).

90. See National Endowment for the Arts, 20 U.S.C. § 954 (2000) (founding the NEA for the purpose of encouraging a diversity of ideas and views); Mark Seidenfeld, Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity, 75 Tex. L. Rev. 559, 562 (1997) (noting agency structures that are designed by Congress to encourage regulations that reflect a diversity of perspectives). See also Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (finding that the minority ownership preference policies adopted by the FCC were supported by strong congressional backing and the important governmental objective of the broadcasting of diverse views); but see Neal Devins, Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight, 69 Tex. L. Rev. 125, 138 n.93 (arguing that "Congress's failure to codify the diversity preference suggests" weaker support than viewed by the Court).


based on the affording of an economic privilege in the form of a license.\textsuperscript{93}

Notwithstanding its noble goal, the fairness doctrine ultimately fell into judicial and administrative disrepute. Courts criticized its excessive impingement on expressive rights and dubious effectiveness.\textsuperscript{94} With the advent of new media forms and the questionable notion of scarcity, the FCC ultimately revoked the fairness doctrine.\textsuperscript{95}

Instead of direct content regulation through such means as the fairness doctrine, the FCC continued to influence broadcast behavior through regulations that either established preferences for certain disadvantaged individuals seeking proprietary rights in media sources,\textsuperscript{96} or restricted the percentage of ownership of certain media forms.\textsuperscript{97} Both of these regulatory mechanisms, despite their objectives to further multiplicity,\textsuperscript{98} have incurred considerable scrutiny in recent years. As explained more cogently below, the agency’s preference programs

\textsuperscript{93} Id. at 390.

\textsuperscript{94} See Syracuse Peace Council v. FCC, 867 F.2d 654, 659 (D.C. Cir. 1989) (striking down the FCC’s fairness doctrine as contrary to “both the public’s right to diverse sources of information and the broadcaster’s interest in free expression”) (emphasis added).

\textsuperscript{95} In Syracuse Peace Council, the court held that the Commission’s findings on the increased diversity of outlets and programming in the then current market adequately supported its refusal. Id. at 669.


\textsuperscript{97} See Communications Act of 1934, 47 U.S.C. § 151 (2000) (creating the Federal Communications Commission, for the purpose of regulating broadcast communications); Id. § 533(e) (authorizing the FCC to “prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system”). The FCC has recently proposed new regulations regarding the limits on broadcast ownership. See Broadcast Ownership Rules, 68 Fed. Reg. 46,286, 46,355 (Aug. 5, 2003) (to be codified at C.F.R. pt. 47). Before this promulgation, the rules prohibited any entity from controlling television stations which reach an excess of 35% of all television households in the United States. See 47 C.F.R. § 73.3555(e) (2002). The proposed rule would raise that limit to 45% and allow cross-ownership (of television, radio, and newspaper companies) in the same market. See generally Broadcast Ownership Rules, 68 Fed. Reg. at 46,355. Michael Powell, Chairman of the FCC, has stated that the increase in the limit is justified by a changed media marketplace, which supports an abundance of media sources, including cable and satellite service providers. See infra note 152 and accompanying text.

\textsuperscript{98} See supra notes 96-97.
that implicate race or ethnicity have become susceptible to constitutional attack.

B. The Precarious State of Programs That PromoteMultiplicity

1. Guarded Judicial Tolerance of Governmental Programs That Foster Multiplicity

Multiplicity's theoretical nexus with democracy justifies governmental efforts that encourage its embrace by the media. Multiplicity of voice ensures fuller dissemination of information and resultantly enriches public discourse.99 Given this fundamental construct, one might surmise that the judiciary would support governmental strategies that encourage multiplicity, even if those strategies implicate race. Early Supreme Court decisions tend to support this view.100 In fact, these earlier decisions confirm the legitimacy of limited rules that enhance diversity and enrich public debate through prescriptions that expand minority ownership.101

In Fullilove v. Klutznick,102 the Supreme Court concluded that a federal program requiring a ten percent award of federal public works grants to minority contractors was permissible under equal protection principles embodied in the Fifth Amendment.103 Instead of strict scrutiny or another standard of equal protection review, the Court justified its finding on the remedial power of Congress to correct past discriminatory behavior and the systemic pattern of discrimination in the award of federal construction grants.104 Six years later, the Supreme Court commenced greater scrutiny of race-based remedies. In Wygant v. Jackson Board of Education,105 a plurality of the Court struck down a collective bargaining agreement that allowed local school authorities to limit the number of minority teachers eligible for layoff. The Court indicated that the Equal Protection Clause of the

99. See supra notes 75-87 and accompanying text (noting multiplicity's furtherance of deliberative democracy and its compatibility with a respect-model of autonomy).
100. See generally FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (finding the diversification of mass communications through the regulation of broadcast ownership to be a judicially sustainable tactic to promote a compelling public interest).
101. Associated Press v. United States, 326 U.S. 1, 20 (1945) (noting that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"); see generally FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (holding that a policy promoting the widest possible dissemination of information from diverse sources is consistent with the First Amendment).
102. 448 U.S. 448 (1980).
103. Id. at 491-92.
104. Id. at 489.
Fourteenth Amendment required a demonstration of past discrimination by the government.106

The judiciary's seeming hostility toward remedial programs predicated on race became most evident in City of Richmond v. J.A. Croson Co.107 In Croson, a contractor challenged a directive that general contractors who were awarded city construction contracts must subcontract at least thirty percent of the total contract amount to one or more minority business enterprises. The thirty percent set-aside, however, did not apply to contracts awarded to minority-owned general contractors.108 In its holding, the Court distinguished Fullilove, noting that the City of Richmond, unlike Congress, did not have the remedial power granted under Section 5 of the Fourteenth Amendment. The city could implement remedial programs if it demonstrated that it had participated in systematic racial discrimination in the local construction industry. The city, however, did not substantiate the prevalence of overt discrimination in the Richmond construction industry. The Court, accordingly, opined that the city lacked a compelling interest that justified the apportionment of public contracts on the basis of race.109

One year after Croson, the Supreme Court seemingly mollified its stance against programs that expand proprietary opportunities for minorities in the broadcast industry. In Metro Broadcasting, Inc. v. FCC,110 the Court reviewed a challenge to FCC regulations that provided a preference for those who either sought new licenses or attempted to purchase existing stations. The resultant diversification of ownership could ultimately foster multiplicity within the media industry.111 As the Court observed, the FCC's rules sought to expand the control of mass media sources112 and thereby secure more diversity in the information disseminated by these broadcast outlets.113 The regu-

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106. Id. at 274.
108. Id. at 477-78.
109. Id. at 505.
111. See supra notes 75-87 and accompanying text (defining multiplicity in terms of viewpoint diversity).
113. See FCC Abandons Proposal To Limit Multiple Ownership of Cable TV Systems, and Initiates New Proposal To Permit Ownership of Cable Systems by Major TV Networks; Amendment to the Commission's Rules Relative to Diversification of Control of Community Antenna Television Systems, 410 Ent. L. Rep. 2, 3 (1982). The author notes that "the FCC's 'cross-ownership' rule was designed to foster diversification of control of the channels of mass commu-
lations manifested the FCC’s recognition of the critical intersection between viewpoint diversity and ownership of media sources.114 Responding to the challenge that the FCC’s regulations violated the Equal Protection Clause of the Fifth Amendment to the Constitution, the Court held that the agency’s preference programs served the important governmental objective of promoting diversity within the broadcast industry. Furthermore, the agency’s regulations were substantially related to achieving that objective.115 The Court ultimately concluded that “benign race-conscious measures mandated by Congress for such an important purpose as diversity need satisfy intermediate, rather than the strict scrutiny applied to state and local preference programs.”116

Decisions subsequent to Metro Broadcasting, Inc., however, suggested a discernable shift in the Court’s view of remedial programs predicated on race. In Adarand Constructors, Inc. v. Pena,117 the Court retreated completely from its tolerance of race-based programs. Writing for the majority, Justice Sandra Day O’Connor repudiated the Metro Broadcasting decision as aberrational and inapposite to Croson’s requirement that governmental programs must survive strict scrutiny. The Court, accordingly, overruled Metro Broadcasting, Inc., and found that the federal set-aside program that created racial pref-

114. Metro Broad., Inc., 497 U.S. at 566.
115. Id. at 600.
116. See id. at 564-65 (holding that “benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives”). Metro Broadcasting was eventually overruled on different grounds by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). See generally Adarand Constructors, Inc., 515 U.S. 200 (level of judicial analysis applied to the review of all racial classifications imposed by federal, state, or local governments is strict scrutiny).
117. 515 U.S. 200.
ferences in highway construction contracting violated Fifth Amendment due process norms.\textsuperscript{118}

\textit{Adarand} seemingly galvanized the Court's enmity toward race-conscious remedies for past discrimination. Any such program that uses race as a foundational premise must survive strict scrutiny to ensure that it furthers a compelling governmental interest.\textsuperscript{119}

Imposition of a strict scrutiny standard appeared to have struck a deathblow for race-based, remedial programs. Justice O'Connor, however, rejected this "strict in theory, but fatal in fact" view.\textsuperscript{120} She believed that preference programs could withstand scrutiny if the government narrowly tailored those programs to further a compelling interest. Yet Justice O'Connor's attempt to debunk the fatalism of strict scrutiny rang hollow in light of Justices Antonin Scalia and Clarence Thomas's views on the matter. Justice Scalia's concurrence in \textit{Adarand} noted that the government could never have an interest compelling enough to sanction discrimination based on race to atone for past racial discrimination.\textsuperscript{121} Justice Thomas added that programs predicated on race "can be as poisonous and pernicious as any other form of discrimination."\textsuperscript{122} Judging only from his concurring vote, Justice Anthony Kennedy likely supported, to some extent, this more suspect view of remedial programs. Without a seismic shift in thinking among the Justices, it seemed unlikely that any race-based program would survive strict scrutiny.

Justice O'Connor's dicta regarding the possible viability of race-based remedies, nonetheless, had a prophetic ring. The critical question left unanswered in \textit{Adarand} was whether the achievement of diversity in any context constitutes a compelling state interest. The Court answered this question in the much anticipated case of \textit{Grutter v. Bollinger}.\textsuperscript{123}

\textsuperscript{118} \textit{Id.} at 227.

\textsuperscript{119} \textit{Id.} at 235. The Court held that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." \textit{Id.} (construing Fullilove v. Kluczniak, 448 U.S. 448, 496 (1980) (Powell, J., concurring)).

\textsuperscript{120} \textit{Id.} at 202.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Adarand Constructors, Inc.}, 515 U.S. at 241.

\textsuperscript{123} \textit{Grutter v. Bollinger}, 123 S. Ct. 2325 (2003). \textit{reh'g denied} 124 S. Ct. 35 (2003). See Leonard M. Baynes, \textit{Paradoxes of Racial Stereotypes, Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcast Licensing}, 52 ADMIN. L. REV. 979, 981 (2000) (stating that the \textit{Adarand} decision was problematic in that "the court did not express an opinion on whether diversity was still a compelling governmental interest . . . . [I]t calls into question the legitimacy of all FCC affirmative action programs based on diversity, and it fails to take into account that the FCC programs were premised on strong First Amendment considerations").
2. The Subtle Implications of Grutter v. Bollinger on Race-Based Programs that Further Multiplicity

Grutter focused on a program designed to enhance diversity within higher education. The facts of the case included a white Michigan resident who, with a 3.8 grade point average and 161 LSAT score, challenged her denial of admission to the University of Michigan Law School. She alleged that the law school’s use of race as a predominant factor significantly enhanced the chances of admission of certain minority group members at the expense of applicants from disadvantaged racial groups.\textsuperscript{124} The University of Michigan argued that a diverse student body constituted a compelling interest that justified the consideration of race in admissions.\textsuperscript{125}

The Court commenced with a predictive analysis of Grutter. Writing for the majority once again, Justice O’Connor first reiterated that governmental actions based on race should be reviewed under strict scrutiny to ensure that the government had not infringed an individual’s right to equal protection of the laws.\textsuperscript{126} Similar to her finding in Adarand, she discounted the view that strict scrutiny automatically dooms a remedial program. She emphasized that race-based governmental actions should be reviewed within the context in which they are applied. To this end, the University of Michigan Law School argued that the state had a compelling interest to maintain a diverse student body in higher education.\textsuperscript{127}

Under the first prong of strict scrutiny analysis, the Court endorsed Justice Lewis Powell’s view, which he expressed in Regents of the University of California v. Bakke,\textsuperscript{128} that a diverse student body constitutes a compelling state interest that supports the consideration of race in university admissions.\textsuperscript{129} The Court rejected the notion that only government programs that used race to remedy past discrimination could survive scrutiny.\textsuperscript{130} Emphasizing the uniqueness of the educational context, the Court observed: “Given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”\textsuperscript{131}

\textsuperscript{124} Grutter, 123 S. Ct. at 2332-33.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 2338 (citing Adarand, 515 U.S. at 237).
\textsuperscript{127} Id.
\textsuperscript{128} 438 U.S. 265 (1978).
\textsuperscript{129} Id. at 2337.
\textsuperscript{130} Grutter, 123 S. Ct. at 2339.
\textsuperscript{131} Id.
The Court in *Grutter* then shifted its focus to strict scrutiny's second prong, which requires governmental programs to be narrowly tailored. The majority determined that a quota system that insulates each category of applicants from competition with all other applicants would not satisfy this requirement.\textsuperscript{132} Race or ethnicity merely constituted *one positive factor* in a candidate's overall application.\textsuperscript{133}

The Court ultimately found the University of Michigan Law School's admissions program to have been "holistic" in its review of applications, and functioned to discover how the applicant, regardless of race, could contribute to the university's goal of diversity.\textsuperscript{134} The Law School's program was constitutional, and it adequately ensured that all factors that impact diversity were meaningfully considered alongside race.\textsuperscript{135}

The implications of *Grutter*, particularly as it relates to race-based programs that further multiplicity in the media industry, remain to be seen. Similar to the University of Michigan's argument in *Grutter*, one might posit that diversity constitutes a compelling governmental objective for the media industry. Programs that diversify the ownership of media sources could broaden public discourse and, accordingly, augment media's service to a democracy that thrives to ensure mutual respect for the expressive rights of all citizens of society.\textsuperscript{136} Governmental programs that enhance opportunities for historically discounted groups potentially foster multiplicity, which, in turn, fosters reciprocal respect for the autonomous expressive rights of others.\textsuperscript{137}

Of course, one may argue that race-based set-asides potentially prompt those who feel unfairly disadvantaged by these programs to become hostile toward the rights of the historically disadvantaged. Yet this potential attitudinal effect represents only one, perhaps short-term, impact of set-asides. These programs serve as procedural constructs which, over time, diversify the power structures of media

\textsuperscript{132} *Id.* at 2342.

\textsuperscript{133} *Id.*

\textsuperscript{134} *Id.* at 2343.

\textsuperscript{135} *Id.* at 2344.

\textsuperscript{136} See supra notes 75-87 and accompanying text (discussing multiplicity's compatibility with a mutual respect theory of democracy).

\textsuperscript{137} Of course, one may argue that race-based set-aside and similar programs potentially cause those who feel disadvantaged by these programs to become hostile or unsympathetic to the autonomous rights of historically disadvantaged groups such as minorities and women. I posit, however, that mutual respect of autonomous rights constitutes a procedural as well as attitudinal construct. Viewed within the lens of procedural manifestations of respect, race-based programs provide minorities and women greater access to public discourse through ownership of sources. This enhanced participation theoretically compels consideration of the views of those whose voices may have been minimized, muted, or ignored.
sources. That diversification has the potential to ensure greater sensitivity to the views of traditionally marginalized groups, maximize participation by members of those groups in public discourse and, therefore, enrich democratic processes.\footnote{138}

Justice O'Connor has clearly warned, however, that the Court's finding of racial diversity as a compelling interest was confined to the educational context.\footnote{139} Grutter's limited applicability portends the vulnerability of race-based programs designed to further multiplicity within the media industry. Despite their utilitarian objectives, these programs face the formidable challenge of strict scrutiny and proof of a compelling governmental interest in diverse ownership of media sources. The Court's requirement of a demonstrative nexus between diverse ownership and viewpoint diversity looms as an impediment to the constitutionality of these programs. This reality, together with the difficulty of narrowly tailoring these programs, may suggest the need to expand interventionist strategies beyond the spectrum of race. Others, particularly Professor Ronald J. Krotoszynski, Jr., have echoed this sentiment and criticized the FCC's implementation of preferences when the Commission has fundamentally failed to connect minority ownership to viewpoint diversity.\footnote{140}

Clearly, race-based programs designed to foster multiplicity face formidable legal challenges. Race-consciousness aside, however, one might assume that carefully crafted, race-neutral rules that minimize the monopolization of media sources would constitute permissible and governmentally preferable means to ensure viewpoint diversity. The FCC, nonetheless, appears poised to relax its legally viable programs that prevent media conglomeration and, commensurately, further multiplicity.

\footnote{138. See supra note 75 and accompanying text (explaining that a mutual-respect theory of democracy enhances public debate); but see infra note 140 and accompanying text (offering cogent arguments that race-based set-asides in the media industry are basically ineffectual).}

\footnote{139. Grutter, 123 S. Ct. at 2347.}

\footnote{140. Professor Krotoszynski and A. Richard M. Blaiklock challenge the FCC's notion that its regulations that increase minority ownership of, or decision-making authority in, media sources furthers viewpoint diversity. Krotoszynski and Blaiklock observe that the lack of nexus between a person's status as a minority and her viewpoints. Krotoszynski & Blaiklock, supra note 20, at 825. They, in fact, state that "it is insulting to assume that minority station owners would be more likely to forego sound business decisions to pursue an ideological agenda." Id. at 852. Thus, utilizing race or gender as a shorthand for the identification of group viewpoint is inherently imprecise. Id. at 856.}
3. **FCC’s Modification of the Rules that Promote Multiplicity**

The FCC has historically attempted to promote multiplicity with race-neutral rules that controlled broadcast source ownership.\(^{141}\) The original rules restricting ownership of certain media sources responded to concern over the scarcity of broadcast frequencies for over-the-air broadcast mediums.\(^{142}\) Despite their longstanding utility and legal viability, these rules have come under increased scrutiny by the agency.

A policy rationale for the FCC’s more intense review relates to the rules’ impact on economic efficiency.\(^{143}\) Rules that modify commercial behavior often draw criticism due to their interference with the natural forces of a competitive market.\(^{144}\)

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141. FCC National Television Multiple Ownership Rule, 47 C.F.R. § 73.3555(e)(1) (2002). The Rule states:

[No license for a commercial TV broadcast station shall be granted, transferred or
assigned to any party . . . if the grant, transfer or assignment of such license would result
in such party . . . owning, operating or controlling, or having a cognizable interest in TV
stations which have an aggregate national audience reach exceeding 35 percent.

Id.


144. See Chris Baker, *FCC Chief Sees Upsets for the Giants; ‘High Tech’ Means Swift Changes*, WASH. TIMES, Jul. 8, 2003, § 1, at 1 (noting Michael Powell’s, Chairman of the FCC’s, belief in the power of free markets and push towards less regulation); Jim Kirk, *FCC Eases Restrictions for Media*, CHI. TRIB., June 3, 2003, at A1 (citing Chairman Powell as justifying the relaxing of regulations on media ownership by the need for over-the-air broadcasters to grow, thus reducing costs and helping improve profitability in the light of the advent of cable and satellite providers); Dick Polman, *New Rules May Alter U.S. Media Ownership, Likely Revisions Could Limit the
Perhaps the most significant catalyst for the review of these rules, however, is the Telecommunications Act of 1996 (the Telecom Act).\textsuperscript{145} The Telecom Act seeks to "reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."\textsuperscript{146} To fulfill this goal, the Telecom Act eliminates provisions limiting the number of AM or FM broadcast stations that could be owned by one entity nationally, and it also raises the limits on the number of AM and FM stations that one entity could own in a single market.\textsuperscript{147} The Telecom Act also softens limitations on national television station ownership to thirty percent, and directs the FCC to investigate the necessity of limits on television station ownership within a given market.\textsuperscript{148}

The dominant objective of the Telecom Act is deregulation of the broadcast industry.\textsuperscript{149} The FCC must accordingly engage in rulemaking to reexamine the continued utility of ownership rules. Note the Telecom Act's precise language on this point:

In every even-numbered year . . . the Commission—\textsuperscript{(1)} shall review all regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service; and \textsuperscript{(2)} shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.\textsuperscript{150}

Pursuant to the Telecom Act's directive, the FCC conducted rulemaking procedures to determine the continued efficacy of rules that restrict ownership of media sources.\textsuperscript{151} Michael K. Powell, the FCC's chair, summarized the Commission's charge and focus:

Over the past twenty months we have been working tirelessly towards achieving three critically important goals: (1) Reinstating le-

\textit{Diversity of Voices, Views, PHILA. INQUIRER,} June 1, 2003, at A1 (noting that the large conglomerate firms, such as Viacom and Disney, have lobbied the FCC, arguing that market forces, rather than regulation of ownership, would ensure diversity, competition, and localism).


\textsuperscript{146} Id.

\textsuperscript{147} Id. § 202.

\textsuperscript{148} Id.

\textsuperscript{149} Id. § 1; Pete Schulberg, \textit{Itsy-Bitsy Chip for TV; Big Leap for Parents,} PORTLAND OREGONIAN, Feb. 20, 1996, at D1 (noting the deregulation of the communications industry with the passing of the Telecommunications Act of 1996).

\textsuperscript{150} Telecommunications Act of 1996, § 402 (codified at 47 U.S.C. § 161(a) (2000)).

gally enforceable broadcast ownership limits that promote diversity, localism and competition (replacing those that have been struck down by the courts); (2) Building modern rules that take proper account of the explosion of new media outlets for news, information and entertainment, rather than perpetuate the graying rules of a bygone black and white era; and (3) Striking a careful balance that does not unduly limit transactions that promote the public interest, while ensuring that no company can monopolize the medium.152

The FCC continued to emphasize the need for restricted ownership in order to preserve competition and viewpoint diversity.153 Yet, despite this finding for continued restriction, the FCC voted to modify present rules to increase the percentage of media sources that may be controlled by a single owner. The majority of the commissioners argued that the merger of television stations would result in better news programming.154 They also believed that the new rules would protect over-the-air broadcast networks from the economic squeeze associated with the advent of cable and satellite providers.155

The modified rules would continue to prohibit any mergers among the top four networks (ABC, CBS, FOX, and NBC); however, they would allow media companies to own a conglomeration of stations that reach up to forty-five percent of U.S. television households. The new rules would also remove the previous broadcast-newspaper and radio-television cross-ownership restrictions. Such hybrid ownerships could occur in markets with four or more television stations. The new rules retain limits on local radio ownership. A single company may own eight stations (five in each class of FM or AM) in markets of forty-five or more stations; seven stations (four in each class) in markets of thirty to forty-four stations; six stations (four in each class) in markets of fifteen to twenty-nine stations; and five stations (three in each class) in markets of fourteen or fewer stations.156

The FCC's decision to amend the ownership rules was far from unanimous. In fact, two of the commissioners wrote spirited dissents.

Commissioner Michael J. Copps objected to the majority's approval of the rule modifications on both procedural and substantive grounds.

153. See id. (noting that the new rules still retained restrictions against networks merging and tightened limits on radio ownership).
155. Id.
His objections focused on the FCC's failure to complete sufficient analysis to confirm the effect of the modified rule on consumers. He attacked the rules on substantive grounds, arguing that the FCC arbitrarily raised the limits on media ownership without assessing fully the effects of this change on local media voices. In sum, Copps believed the FCC put the competitive interests of the major broadcast networks before those of the public who seek locally originated news programming and diverse perspectives. Despite these factors, Copps opined that the courts would not find the rules to be arbitrary.157

Commissioner Jonathon S. Adelstein echoed Copps's arguments and added that the majority lacked demonstrative evidence to justify additional mergers of media sources. Adelstein stated that the studies on which the majority relied had been attacked on many levels and were generally criticized as unreliable.158

Public reaction to the FCC's proposed changes has been predictably swift and vociferous.159 Some have applauded the FCC's rule change as a stimulus for growth in the industry.160 Reactions from members of Congress, however, have been mixed. Leadership in the House refuses to interfere with the FCC's proposed change.161 The Senate,


159. See David Ho, New Media Rules Put FCC Chief on the Spot; Michael Powell's Moves That Eased Restrictions on Ownership Left Him at Odds with Members of Congress from Both Parties, Phila. Inquirer, Aug. 5, 2003, at E1 (noting the negative political pressure the Chairman has received from both Republicans and Democrats following the promulgation of the new rules on media ownership); Janet Hook, GOP-Led Congress Increasingly Defies Bush, L.A. Times, Aug. 3, 2003, at A1 (noting that a large majority of both conservatives and liberals in the House came together to approve a bill blocking the FCC rules); see also John C. Roberts, Dishonest Communications Reform, Chi. Trib., June 4, 2003, § 1 at 25. The author, Dean emeritus and professor of law at DePaul University College of Law, criticizes the explanations Chairman Powell has provided for the new rules, calling them "blatantly disingenuous, if not dishonest . . . ." Id.

160. See Associated Press, Senators Say They Can Force Vote On FCC Rule, Chi. Trib., July 30, 2003, § 3, at 4 (noting the Bush Administration's support of the rule changes and subsequent threat to use a presidential veto to block any bill Congress may pass which rolls back the cap limits). The author also notes that many media companies support the change as necessary to promote growth and competition in a market saturated with cable and satellite television providers. Id. See also Richard Simon & Janet Hook, FCC Rule May Bring a Veto Standoff, L.A. Times, July 25, 2003, at C1 (noting House Energy and Commerce Committee Chairman W.J. "Billy" Tauzin's (R-La.) firm support of the FCC decision).

161. See H.R. 2799, 108th Cong. (2003). Representative Maurice Hinchey (D-N.Y.) proposed an amendment to the appropriations bill that would prohibit funds to be used by the FCC for the implementation of the new rules. The amendment failed by a vote of 174-254. The appropria-
however, has introduced an extraordinary bill that would modify, if not veto, the FCC’s new rule. Approved by the Committee on Commerce, Science, and Transportation on June 19, 2003, the Senate bill would prevent excessive concentration of the nation’s television broadcast stations.\textsuperscript{162} The bill, if ultimately endorsed by Congress, would effectively block the FCC’s new rules and reinstate previous limitations on media ownership.\textsuperscript{163} Congressional consensus to modify the FCC’s proposed change will not end this controversy, however. President George W. Bush promises to veto any legislation that alters the FCC’s new rule.\textsuperscript{164}

\textbf{C. The Promotion of Multiplicity in Media Decision Making—Governmental Incentives and Voluntary Adoption}

\textit{1. Toward a Broader View of Scarcity}

The FCC’s justifications notwithstanding,\textsuperscript{165} there remain significant factors that bode against the relaxation of media source ownership rules. Even FCC Chairman Powell, a staunch supporter of the relaxed rules, acknowledges the need to guard against the monopolization of

\begin{footnotesize}
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\item 162. See S. 1046, 108th Cong. (2003).
\item 163. \textit{See also Senate To Vote On ‘Congressional Veto’ of FCC Media Ownership Rules, 23 COMM. DAILY 146 (2003) (noting that the bill, if approved, would codify the 35% broadcast ownership cap and include a cross-ownership cap and radio divestiture). Of course, the veto of agency decisions is articulated in congressional legislation. Title V, Chapter 8 of the U.S. Code governs congressional review of agency rulemaking. 5 U.S.C. § 801 (2000). That chapter provides that before a rule can take effect, the promulgating agency must submit the rule, along with supporting documentation to each house of Congress. \textit{Id.} § 801(a)(1). The rule takes effect upon submission to Congress, but Congress may then void the rule through a joint resolution of disapproval, which may or may not be vetoed by the President. \textit{Id.} §§ 801(a)(2)-802. In the event of an un-vetoed joint resolution, the rule may not be reissued in a substantially similar form. \textit{Id.} § 801(b)(2). A “major rule,” however, does not take immediate effect, but instead must endure at least a sixty-day waiting period after submission to Congress or publication in the Federal Register. \textit{Id.} § 801(a)(3)(A). A major rule is defined as:
\item [A]ny rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.
\textit{Id.} § 804(2).
\item 164. \textit{See Associated Press, supra} note 160 (noting the Bush Administration’s threat of using a Presidential veto); \textit{see also} David Lieberman, \textit{House Vote on Media Ownership Slams FCC, USA TODAY}, July 28, 2003, at 84 (noting that by attaching a challenge to the FCC’s regulations to the appropriations bill, the House signals that it is confident it will survive a presidential veto).
\item 165. \textit{See supra} notes 154-156 and accompanying text (discussing the FCC’s proposed change to rules limiting ownership of broadcast sources).
\end{itemize}
\end{footnotesize}
media sources. He states this view irrespective of the proliferation of media sources.166

If we accept ownership regulation as a mechanism that furthers multiplicity, then the discussion should shift to the extent of restricted ownership. The extent of that restriction, however, defies calculation. In fact, any rule, past or present, has not definitively linked the percentage of ownership to the increase or decrease in the diversity of views disseminated by competing sources. This factor may have tacitly contributed to the drive to relax the FCC’s rules. To modify these longstanding rules on this basis, however, seems short-sighted at best. The effect of conglomerate ownership would, at the very least, be intuitive. Intuition notwithstanding, the lack of a precise calculus of ownership influence on informational flow does not justify an arbitrary reduction of ownership restrictions.

Commissioner Copps’s dissent points to the capricious manner in which the FCC arrived at the raised ownership ceiling of broadcast sources. According to Copps, other uncontested studies demonstrated that a thirty-five percent limitation on ownership bolstered affiliates’ power to preempt network programming to promote the goal of localism. The commissioners who voted to modify the rules apparently have ignored this fact. Instead, they find the increased ceiling of forty-five percent necessary to preserve competition among over-the-air networks. Copps, however, believes that the competition among these sources and their commercial viability remain secure. He argues that the majority fails to acknowledge that over-the-air networks are guaranteed carriage to cable subscribers and maintain the greatest reach of any medium of mass communications. Thus, competition, at least among over-the-air and cable broadcasters, has been equalized under present, more stringent ownership restrictions. Copps further observed that the majority produces no evidence demonstrating that raising ownership limits to forty-five percent would promote the public interest goals of diversity, localism, and competition.167

As the history of regulation confirms and Chairman Powell observes, the principal justification for restricted ownership remains the scarcity of sources from which individuals receive news information. Powell, in his July 2, 2003 statement accompanying the notice of proposed rulemaking, referenced the diversity index that assigns assessment weights to various media outlets. After reviewing the results of a survey of 3,000 Americans, the assigned weight corresponds to the

166. See supra notes 152-153 and accompanying text (noting the need for continued limitations on media ownership).
value consumers place on various sources within those outlets (radio, newspapers, broadcast television, and the Internet) for news and information. Powell posits that the diversity index supports the rule change because it does not distinguish the news content of sources within those outlets.\textsuperscript{168} Copps, however, finds the reliability of the diversity index suspect because it fails to distinguish between the amount of local news provided by a local affiliate station, for example NBC, and news provided by a cable source such as the Home Shopping Network.\textsuperscript{169}

In my view, Copps’s argument has considerable validity. He tacitly argues for a broader view of “scarcity.”\textsuperscript{170} I heartily agree. An empirical determination of scarcity must reflect the dominant sources from which individuals receive news of social or political import. The FCC’s present conceptualization of scarcity relies solely upon the sheer number of any media sources for news, regardless of the size of the audience that those sources attract.\textsuperscript{171} This singular definition of scarcity is both misleading and myopic.

An increase in the aggregate number of media sources does not signal an end to the scarcity of sources that are most consulted for news. If broadcast outlets and newspapers continue to dominate the market as sources for news and information, then monopolization of those sources threatens dissemination of different viewpoints. An increase in alternative and underused sources does not ensure that individuals will be exposed to a variety of opinions. If the objective is to maximize the dissemination of complete information to the greatest number of constituents, then scarcity must be viewed in terms of the number of sources from which individuals primarily obtain news and information.

Several polls have documented the dominance of broadcast media and newspaper as sources for news. In a January nationwide study conducted by the University of Connecticut, pollsters were asked, “Overall, where would you say you get most of your news from: tele-

\textsuperscript{168} See Press Release, Statement of Michael K. Powell, \textit{supra} note 152.


\textsuperscript{170} \textit{Id.}

\textsuperscript{171} See Press Release, Federal Communications Commission, Statement of Chairman Michael K. Powell, at 8 (July 2, 2003), \textit{available at} http://hraunfoss.fcc.gov/edocs\_public\_attachment\_FCC-03-127A3.pdf (last visited Jan. 21, 2004) (arguing that the previous ban on newspaper-broadcast or radio-television ownership could not be “justified as necessary in the public interest in light of the abundance of diverse sources available to citizens for their news consumption,” namely the proliferation of news sources via cable television and the internet). \textit{Id.}
vision, newspapers, radio, magazines, the Internet, or some other source?” The responses to the survey question were as follows:

<table>
<thead>
<tr>
<th>Source</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Television</td>
<td>65%</td>
</tr>
<tr>
<td>Newspapers</td>
<td>21%</td>
</tr>
<tr>
<td>Radio</td>
<td>9%</td>
</tr>
<tr>
<td>Internet</td>
<td>2%</td>
</tr>
<tr>
<td>Some other source</td>
<td>2%</td>
</tr>
<tr>
<td>Magazines</td>
<td>1%</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>1%</td>
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During March 2003, the Roper Center at the University of Connecticut surveyed 1,005 registered likely voters nationwide. Ninety-five percent of those polled responded that they regularly consult broadcast news on the major networks, a cable channel like CNN, or public broadcast stations such as National Public Radio to receive news about national and international events. In the same survey, thirty-six percent responded that they regularly read a magazine such as *Time, Newsweek, U.S. News,* or *The Economist* for national and international information. Twenty-nine percent indicated that they regularly read a national newspaper such as the *Washington Post,* the *New York Times,* the *Wall Street Journal,* the *Los Angeles Times,* or the *Financial Times* for news. In a similar poll of 3,002 Americans taken April 26 through May 12, 2002, seventy-eight percent stated that they watched TV news programs regularly. Fifty-three percent of respondents watched TV network evening news programs regularly.

In a December 2002 poll, the Gallup Company also sampled individuals regarding their source preferences for news. This poll presented the following questions and resultant responses: “[P]lease indicate how often you get your news from each of the following sources—every day, several times a week, occasionally, or never.


How about nightly network news programs on ABC, CBS or NBC?” The responses were as follows:

- Every day: 43%
- Several times a week: 16%
- Occasionally: 25%
- Never: 15%
- No opinion: 1%

“Please indicate how often you get your news from each of the following sources—every day, several times a week, occasionally, or never. How about public television news?” The responses were as follows:

- Every day: 35%
- Several times a week: 12%
- Occasionally: 29%
- Never: 24%

“Please indicate how often you get your news from each of the following sources—every day, several times a week, occasionally, or never. How about local television news from TV stations in your area?” The results of the poll were as follows:

- Every day: 57%
- Several times a week: 16%
- Occasionally: 18%
- Never: 9%175

These polls obviously lack the scientific precision of more formalized, sociological studies. This deficiency might consequently limit their credibility. They constitute, nonetheless, probative barometers of the public’s preference for certain media sources. Despite the proliferation of alternative sources for news and information,176 broadcast media—television, newspaper, and radio—remain the overwhelmingly dominant sources for news and information.177 Most significant in these surveys is the fact that broadcast media consistently ranks as the primary source for most individuals. Notwithstanding procedural and methodological criticisms of these surveys, they substantiate the premise that a distinct segment of the media industry—television and newspaper—enjoys the largest audiences.

176. See Press Release, Statement of Michael K. Powell, supra note 171, at 4 (noting that there are now three twenty-four-hour all-news networks, seven broadcast networks, and over three hundred cable networks, and that 85% of television households are cable or satellite service subscribers).
177. See supra notes 172-177 and accompanying text.
The mere existence of alternative, yet seldom used sources hardly guarantees that diverse viewpoints on matters of governmental importance will be freely disseminated and, perhaps most important, received by a sizable audience. If one accepts the premise that television and newspapers dominate the informational landscape, then it stands to reason that monopolization of these dominant sources looms as an impediment to multiplicity.\textsuperscript{178} The presence of independent sources such as the Internet or private publications does not ensure the dissemination of a variety of viewpoints and perspectives. Regulatory control of the ownership of dominant media sources, therefore, constitutes the primary, if not solitary, tool required to maximize viewpoint diversity.

2. \textit{The Ideal Solution—Natural Incentives for the Adoption of Multiplicity}

Consumer behavior and monopolistic tendencies support the need for some degree of control over media ownership. Rules that govern market behavior, however, will continually face criticism and scrutiny due to their economic inefficiency and lack of precision.\textsuperscript{179} Media's voluntary acceptance of multiplicity represents a more intellectually and, perhaps, legally attractive alternative to regulatory control. The question remains, however, whether volunteerism will truly work to foster the widespread dissemination of diverse views and perspectives.

Many media sources expressly recognize their duty as the “Fourth Estate”\textsuperscript{180} to disseminate divergent views on matters of governmental importance.\textsuperscript{181} Perhaps this ethical obligation will prompt voluntary

\textsuperscript{178} See Steven Brill, Holding the Media Accountable in the Age of Osama, Kobe, and Arnold, Address at the Washington and Lee University’s Ethics in Journalism Lecture Series (Oct. 3, 2003). Steven Brill agreed that the monopolization of media constituted a significant and realistic barrier to responsible and responsive journalism.

\textsuperscript{179} See sources cited supra note 143 and accompanying text.

\textsuperscript{180} See sources cited supra note 10 and accompanying text (describing media's function as the “Fourth Estate”).

\textsuperscript{181} See Todd F. Simon, \textit{Libel as Malpractice: News Media Ethics and the Standard of Care}, 53 FORDHAM L. REV. 449, 472-74 (1984) (noting the two most influential groups to promulgate journalism codes of ethics are the Society of Professional Journalists (SPJ) and the American Society of Newspaper Editors (ASNE)). The SPJ Code of Ethics demands reporters be “honest, fair and courageous in gathering, reporting and interpreting information.” SPJ \textit{CODE OF ETHICS} (1996), available at http://www_SPJ.org/ethics_code.asp (last visited Jan. 21, 2004). The Code also requires journalists to “[r]ecognize a special obligation to ensure that the public’s business is conducted in the open and that government records are open to inspection.” Id. The ASNE Statement of Principles requires that journalists make efforts “to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly.” ASNE \textit{STATEMENT OF PRINCIPLES}, art. IV (2002), available at http://www.asne.org/kiosk/archive/princip.htm (last visited Jan. 21, 2004). The Statement also encourages journalists to ensure that “an independent scrutiny [is brought] to bear on the forces of power in the society, including the conduct
adoption of multiplicity. Despite their inherent limitations, ethical codes, self-regulation, and public scrutiny can effectuate behavioral changes that ensure the public's overall benefit.

One vivid example of voluntary behavior modification was media's broadcasts of election returns subsequent to its embarrassing coverage of the Florida polling results in the 2000 Bush-Gore presidential contest.182 Blatan errors in those projections and the ensuing public consternation prompted many broadcast sources to change their procedures for reporting the results in the 2002 midterm election contests.183 In fact, I had the opportunity to test the reality of this behavioral change. As a specially invited guest of the Cable News Network (CNN) on the night of the 2002 midterm election returns, I personally witnessed CNN's (and, to a more limited extent, other networks') cautious deliberations on when to call contests on the November 5, 2002 election night. That experience confirmed, at least in the context of election reports, media's proclivity for self-imposed behavior modification.184

Moral codes and affirmations as self-policing mechanisms do not, however, ensure media's full embrace of multiplicity. For these codes of conduct to have genuine utility, media sources must focus more broadly on the rather holistic benefits associated with the dissemination of diverse viewpoints. Multiplicity's tendency to enhance the size of an audience might be the catalyst that encourages its embrace. Dissemination of various perspectives on matters of public importance creates a natural curiosity that attracts an audience. Multiplicity, therefore, optimizes media's achievement of a larger audience. Reports that include more diverse views create a synergy of contrary expression that virtually guarantees a sizable audience. For example, broadcast sources generally secure better ratings, and a commensurately larger and more diverse audience, when their programming

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of official power at all levels of government." Id. at art. I. See also Erwin Chemerinsky & Laurie Levenson, The Ethics of Being a Commentator II, 37 SANTA CLARA L. REV. 913, 915 n.8 (1997) (noting that the journalistic codes of ethics are voluntary).

182. See generally Bush v. Gore, 531 U.S. 98 (2000); Morant, supra note 49 (describing media's erroneous projections of the 2000 election); Susan E. Seager & Laura R. Handman, Congress, the Networks, and Exit Polls, 18 COMM. L.J. 1 (2001); see also 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").

183. See generally Morant, supra note 49 (describing media's voluntary restraint in reporting results in the 2002 midterm elections).

184. Id.
presents various perspectives and opinions. A discernable nexus exists between debate, controversy, and audience interest. Reporting a variety of views that appeal to a diverse populace, therefore, heightens the probability of a sizable audience and contributes to profit maximization.

Media's possible voluntary adoption of multiplicity does not eliminate the need to regulate control of media ownership. The basis for voluntary adoption of multiplicity remains largely theoretical. Moreover, it does not, alone, ensure that media sources will report divergent viewpoints on all matters of societal interest. The marked uncertainty of volunteerism underscores the need for continued content-neutral regulations. A minimalist approach to regulatory control of ownership would ensure viewpoint diversity and secure a pluralistic and deliberative form of democracy that values participatory discourse.

IV. Conclusion

Media operates uniquely within a contemporary, pluralistic democracy. On one hand, it enjoys the autonomous right of choice and, as a

185. See Roland F.L. Hall, The Fairness Doctrine and the First Amendment: Phoenix Rising, 45 Mercer L. Rev. 705, 766 (1994) (noting that stations can secure better ratings and appeal to larger audiences by providing programming with diverse opinions, such as following a conservative talk show host's program with one featuring a liberal host).

186. Reality programming, which has had its share of controversy and criticism, has generally garnered high ratings. See Kimberlianne Podlas, Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenship, 39 Am. Bus. L.J. 1, 6-7 (2001) (discussing the popularity of courtroom reality television show, such as Judge Judy, which topped the Nielson ratings index for daytime television shows); Francesca Ortiz, Zoning the voyeur dorm: Regulating Home-Based voyeur Web Sites Through Land Use Laws, 34 U.C. Davis L. Rev. 929, 931 (2001) (noting the new wave of reality television shows, and the accompanying boost in ratings); Michael M. Epstein, Judging Judy, Mablean and Mills: How Courtroom Programs Use Law to Parade Private Lives to Mass Audiences, 8 UCLA Ent. L. Rev. 129 (2001) (noting that the rating success of shows reality television shows have changes the landscape of primetime programming). Perhaps reality programming has become such a media staple because of its propensity for high ratings, rather than its quality or informational utility. See Angelique M. Paul, Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?, 58 Ohio St. L.J. 655, 668-69 (1997) (opining that Court TV has a propensity for televising sensational trials which garner higher ratings); Lincoln Caplan, Sport TV, New Republic, Oct. 23, 1995, at 18, 20 (noting that CNN's rating increased quintupled when it televised the O.J. Simpson proceedings); see also Philip Pettit, Is Criminal Justice Politically Feasible?, 5 Buff. Crim. L. Rev. 427, 433-34 (2002) (noting that increased readership of newspapers provides incentive for the print media to "home in on" crimes of a shocking variety); Colleen T. Seelander, Standing Behind Government-Subsidized Bipartisanship, 60 Geo. Wash. L. Rev. 1580, 1624 n.392 (1992) (noting that televised debates are a great opportunity for candidates to reach the voting public, namely because they overcome viewers' partisan interest and result in "increased viewership from members of opposition parties").

187. See supra note 59, 77-79 and accompanying text (discussing the intersection of viewpoint diversity and pluralistic democracy).
consequence, disseminates information with the goal of pecuniary gain. This more self-serving objective constitutes only a minor facet of media’s function. The industry also has an equally compelling and essential duty to foster the democracy that sustains its very existence. To this end, media must continually strive to enrich public discourse and cultivate what Steven Brill, former owner of Court TV, calls the “marketplace of ideas.”\textsuperscript{188} Creation of this utopian dialogue requires an increased appreciation of the various perspectives and views of an increasingly diverse constituency. As a consequence, multiplicity of voice must become a paramount consideration in the industry’s decisions to disseminate news and information.

Efforts to advance multiplicity must be holistic and multifaceted. Programs designed to maximize the ownership of media sources by those who will serve underrepresented groups constitutes one strategy. Media acquisition, however, is expensive and increasingly more elusive.\textsuperscript{189} Systemic oversight of media source ownership must, therefore, be supplemented by societal catalysts that heighten the industry’s sensitivity to diverse viewpoints and perspectives. Accordingly, scholars, consumers, and other critics of the industry must encourage, if not demand, that media sources become more sensitive to diversity and its relevance in public discourse.

Mr. Brill is quoted in Bernard Goldberg’s best seller, \textit{Bias}, as saying that “when it comes to arrogance, power, and the lack of accountability, journalists are probably the only people on the planet who make lawyers look good.”\textsuperscript{190} While one might challenge Mr. Brill’s generalization of journalists and lawyers, his tacit indictment of journalistic decision making remains significantly probative. The public must diligently scrutinize media’s responsiveness to the totality of its constitu-

\textsuperscript{188} \textit{See supra} note 178 (noting Steven Brill’s speech at the Washington and Lee University’s Ethics in Journalism Lecture Series October 3, 2003). Of course, Mr. Brill is not the only commentator to promote the “marketplace of ideas.” Professor Krotoszynski and A. Richard M. Blaiklock have thoroughly discussed the concept. \textit{See} Krotoszynski & Blaiklock, \textit{supra} note 20.

\textsuperscript{189} \textit{The recently promulgated change in the FCC rules governing media ownership signifies the current, less-compelling approach to the promotion of governmental programs that foster minority participation in broadcasting. In fact, recent history has shown a progressive termination of these programs. See} Marcelino Ford-Livene, \textit{The Digital Dilemma: Ten Challenges Facing Minority-Owned New Media Ventures,} 51 \textit{Fed. Comm. L.J.} 577, 578 n.1 (1999) (noting that the 1995 repealing of the FCC-backed Minority Tax Certificate Program and the deregulation of media associated with the passage of the Telecommunications Act of 1996 added to the growing lack of diversity in media ownership). \textit{See also} Allen S. Hammond IV, \textit{The Telecommunications Act of 1996: Codifying the Digital Divide,} 50 \textit{Fed. Comm. L.J.} 179, 191 (1997) (opining that Supreme Court decisions, such as \textit{Adarand}, have undermined the FCC’s efforts at correcting the under-representation of minorities in media ownership).

\textsuperscript{190} \textbf{BERNARD GOLDBERG,} \textit{Bias: A CBS Insider Exposes How the Media Distort the News} (2002).
ency. Public vigilance, in tandem with prudent governmental oversight, not only heightens media's sensitivity to diversity, but also secures the industry's role as a guarantor of democracy.