

Early Election Projections, Restrictions on Exit Polling, and the First Amendment

The television networks' practice of predicting the outcomes of political contests of national significance early on Election Day has generated considerable controversy.¹ In 1980, NBC's early projection of a Ronald Reagan landslide, together with Jimmy Carter's early concession speech, was widely reported to have discouraged many voters in Western states from casting their ballots.² Similar behavior by the networks during the 1982 and 1984 elections, while yielding fewer dramatic anecdotes about voters leaving the polls without casting their ballots, likewise generated concern among politicians and the public at large.³

The legislative response to this perceived problem has been varied. Congress, for its part, has adopted a concurrent resolution condemning the use of early projections.⁴ Having received a commitment from the networks not to "call" or "characterize" presidential election results in a particular state until that state's polls have closed, Congress is now considering whether to close the "projection gap" between the East and the West Coasts by mandating a uniform national poll-closing time.⁵

Several states, reacting at least in part to concerns over early projections, have restricted the "exit polling" that produces much of the raw data on which the projections are based.⁶ The constitution-

1. The 1980 presidential election was not the first one in which early network projections played a controversial role. In particular, the Johnson landslide of 1964 and the Nixon landslide of 1972 witnessed the use of early projections that elicited much disapproving comment. See, e.g., Note, *Tom Swift and His Electric Electorate: Legislation to Restrict Election Coverage*, 40 NOTRE DAME LAW. 191 (1965); In re request by Hon. Ronald Reagan, Gov. of Calif., for uniform time concerning national election results, 38 F.C.C. 2d 378 (1972).

2. See N.Y. Times, Nov. 6, 1980, at A32, col. 1.

3. See, e.g., Committee for the Study of the American Electorate, Non-Voter Study '83-'84: Report on 1982 Network Election Night Projections (July 21, 1983) [hereinafter cited as Non-Voter Study '83-'84]; N.Y. Times, April 5, 1984, at A22, col. 1; Henry, *Another Rush to Judgment*, TIME, Nov. 19, 1984, at 146; N.Y. Times, Nov. 15, 1984, at A30, col. 1; Schneider, *Early Returns*, NEW REPUBLIC, March 26, 1984, at 7.

4. H.R. Con. Res. 321, 98th Cong., 2d Sess. (1984).

5. N.Y. Times, Jan. 18, 1985, at A1, col. 1. A network "calls" an election when it announces that a candidate has won; it "characterizes" an election when it suggests that one candidate is winning or is likely to win, or when it otherwise describes a "trend" in the voting.

6. See WASH. REV. CODE ANN. § 29.51.020(1)(e) (Supp. 1985); WYO. STAT. § 22-26-113 (Supp. 1984); MINN. STAT. ANN. § 204C.06, subd. 1 (West Supp. 1985).

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ality of one such statute⁷ has been challenged in federal court. In *Daily Herald v. Munro*,⁸ the U.S. Court of Appeals for the Ninth Circuit overturned the district court's ruling that Washington's exit-polling statute did not violate the first amendment.⁹ A petition for rehearing *en banc* by the Ninth Circuit is currently pending.

This Comment will discuss the perceived problems of early election projections. It will consider the feasibility of a variety of proposed solutions to the problem, including the approach currently being considered by Congress. Finally, it will examine the practical and constitutional implications of the hitherto most substantial legislative response—restraints on the taking of “exit polls”—and conclude that such restraints do not contravene the first amendment.

I. *The Scope of the Early Projection Problem*

The early projections that generated such controversy in 1980 were made possible by increasing technological sophistication in the collection, analysis and reporting both of early election returns and of “trends” based on interviews with voters leaving the polls. By 1980, at least one network (NBC) had shifted emphasis from projections based on early returns from “key precincts”—a practice that had by 1962 enabled the networks to “call” states and entire elections on the basis of a limited number of returns¹⁰—to projections based on data adduced by exit polls.¹¹ This technological shift has

7. WASH. REV. CODE ANN. § 29.51.020(1)(e) (Supp. 1985).

8. 747 F.2d 1251 (9th Cir. 1984).

9. District Judge Jack Tanner had ruled *sua sponte* on plaintiffs' motion for summary judgment that the Washington statute was fully constitutional and granted summary judgment to the defendants (*Daily Herald v. Munro*, 10 Media L. Rep. (BNA) No. 35 at 2144 (July 21, 1984)). On expedited appeal, the Court of Appeals ruled that summary judgment had been inappropriate and remanded the case to the district court for resolution of eight specified factual issues. The court's articulation of these issues made it clear that it regarded identification of Washington's “legislative motive” in enacting the statute crucial to a determination of its constitutionality. See *infra* text accompanying notes 73-77. Dissenting in part, Judge Norris strenuously argued that no material issues of fact remained unresolved, and that summary judgment should have been awarded—but to the plaintiffs, whose first amendment rights, he asserted, had been plainly violated. 747 F.2d at 1253-64.

10. See G. GATES, *AIR TIME: THE INSIDE STORY OF CBS NEWS* 132-33 (1978).

11. For a brief description of NBC's system of projections in 1980, see *Early Election Returns and Projections Affecting the Electoral Process: Hearings Held Jointly Before the Committee on House Administration and the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce*, 97th Cong., 1st Sess. 16 (1981) [hereinafter cited as *Hearings*] (testimony of William J. Small, President, NBC News). See also *Daily Herald v. Munro*, 747 F.2d 1251, 1257-59 (Norris, J., dissenting in part); AMERICAN BAR ASSOCIATION SYMPOSIUM, *EXIT POLLS AND EARLY ELECTION PROJECTIONS* 3-4 (August 1984) (panel discussion published in pamphlet form) [hereinafter cited as *ABA SYMPOSIUM*] (remarks of George Watson, Vice President for News, American

proved far-reaching in its effects. Predictions based on early returns cannot be made until the voting places that produced those returns have closed in the evening; however, exit polls can be completed, and then used to make projections, as early as the morning of Election Day.

In 1980, NBC “knew” (or could have predicted) quite early—some say as early as noon Eastern time¹²—from its exit polls that Reagan would win the 270 electoral votes required for election to the presidency. NBC chose not to “call” any state that comprised this electoral majority until at least some of that state’s polls had closed. The network was nevertheless able to award the election to Reagan at 8:15 p.m. EST, an hour at which a projection based solely on actual returns would have been nearly impossible.¹³ As a result, many Western voters heard of Reagan’s “victory” before they had voted and, in some cases, almost three hours before their polling places would close.¹⁴

The networks did modify their practices somewhat after 1980. They announced in 1982 that they would not “call” any state until *some* of the polls had closed there; in 1984, they announced that they would wait until *all* of the state’s polls had closed. Their coverage of those elections nonetheless served to further refine and systematize their techniques of exit polling and projecting election results. For example, CBS projected Reagan the winner in 1984 at 8 p.m. Eastern time—the minute the polls closed in the state accounting for his 270th electoral vote.¹⁵

Broadcasting Company). By the 1982 congressional elections, all three major networks were using exit polls routinely in making early projections. Non-Voter Study '83-'84, *supra* note 3, at 8.

12. *Hearings*, *supra* note 11, at 59 (testimony of Dr. Austin Ranney, Resident Scholar, American Enterprise Institute).

13. It should be noted, however, that very early projections are possible even when based on returns from strategically selected “key precincts.” CBS projected Lyndon Johnson the winner in 1964 at 9:03 p.m. EST on just such a basis. *See* ABA SYMPOSIUM, *supra* note 11, at 12 (colloquy between George Watson and Curtis Gans, Director, Committee for the Study of the American Electorate).

14. The networks make early projections only when the outcome is clear. The landslide dimensions of Ronald Reagan’s victories in 1980 and 1984 therefore contributed to the speed with which these elections were projected. *See* ABA SYMPOSIUM, *supra* note 11, at 16 (remarks of George Watson). Furthermore, a relatively *unexpected* landslide, such as in 1980, is likely to magnify the disorienting effects of early projections, which may account for the relatively vocal outcry after the 1980 elections. *See* Jackson, *Election Night Reporting and Voter Turnout*, 27 AM. J. POL. SCI. 615, 631-32 (1983) [hereinafter cited as Jackson].

15. *See* N.Y. Times, Nov. 15, 1984, at A30, col. 1.

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A. *The Case for Regulation*

Many observers argue that regulation of network projection practices is essential. They assert that the 1980 projection of Reagan's victory (followed shortly thereafter by Carter's concession), broadcast well before the polls had closed in a number of states, convinced many voters that their votes were not worth casting and thus artificially diminished the turnout. They contend that this diminution not only may have altered the dimensions (if not the result) of the presidential vote, but also may have affected the vote for state and local candidates and initiatives. These local elections may have been more sensitive to the effects of reduced turnout because they involved smaller electorates and were often more closely contested than the presidential race. It has also been asserted that early projections engender a sense of political powerlessness that causes voters to become disillusioned with our democratic process. These effects are thought to be most profound in the West (though felt also in other regions of the country). Many critics of projections argue that the integrity of the vote is even more central to our system of government than is the right of free expression on the part of the press or the public. Consequently, they may be willing to restrain the news media, either directly or incidentally, in order to protect the most basic civic right of a free people.¹⁶

The networks have opposed significant modification of their projection practices, whether through government regulation or through their own voluntary controls. They claim that any evidence that early projections persuade people not to vote (or to vote differently from the way that they otherwise would) is anecdotal, meager and difficult to quantify. Those who have been discouraged from voting, say the networks, are so few in number and so disengaged from the political process that their absence from the voting booth will hardly be noticed. Most significantly, the networks reject coercive or voluntary action directed at "postponing" election projections as contrary to the first amendment and to their professional obligation to report the news as soon as it becomes available.¹⁷

The networks' position merits serious consideration. Statistical

16. Rep. Al Swift of Washington, member of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, has been perhaps the most articulate spokesperson for this point of view. See, e.g., ABA SYMPOSIUM, *supra* note 11, at 2-3 (remarks of Rep. Swift).

17. See, e.g., *Hearings*, *supra* note 11, at 7-9 (testimony of William A. Leonard, President, CBS News); Cobb, *Sneak Previews*, COMMON CAUSE MAGAZINE, July/Aug. 1984, at 54-55; ABA SYMPOSIUM, *supra* note 11, at 3-4 (remarks of George Watson).

evidence as to the number of voters persuaded not to vote by early projections has been both tentative and scarce.¹⁸ Furthermore, those studies that do exist offer few conclusions about the effects of any reduction in turnout: It has not been established how voter diminution may affect local races, or whether such diminution is more advantageous to the the projected "winner" or to the projected "loser," or whether a given person's decision not to vote, or to change her vote, after hearing a projection is a product of alienation.¹⁹ It is also difficult to distinguish, either theoretically or empirically, the effects of election day projections from the effects of traditional public-opinion polls that predict the outcomes of national elections up to the minute the polls open and even after.²⁰

These questions notwithstanding, the broad support²¹ for regulation of early projections suggests that the problem is real and that a solution is desirable. The sources for this support may be more deep-seated and complex than they appear at first glance. Of course, the views of a few cynics aside,²² the desire not to reduce voter turnout unnecessarily is generally conceded to be a valid rationale for regulation. Why, though, is a network practice that may keep no more than two percent of the electorate away from the polls singled out for considerably more scrutiny than the general phenomenon of non-voting among forty-five percent or more of the eligible population? One answer may be that early projections dramatize a disparity between the theory and the reality of our national elections. That disparity might be termed the "illusion of simultaneity."

18. See Jackson, *supra* note 14, and studies cited therein.

19. The suggestion here is that a decision not to vote or to change one's vote may be more or less a matter for public concern depending on the reasons for that decision. "Conscientious abstention" may import something entirely different from indifference or despair. In this context, one may wish to distinguish those voters who in 1980 abstained from voting altogether after hearing that Reagan had "won" from those who switched their vote from Jimmy Carter to John Anderson as a "vote of conscience" or to enable Anderson to qualify for federal matching funds. Such distinctions at least qualitatively enter the calculus for determining what, if any, regulation is appropriate.

20. The effects of pre-election polls have been distinguished, albeit unpersuasively, by Rep. Swift. See ABA SYMPOSIUM, *supra* note 11, at 7. In a sense this issue is but one contained in a Pandora's box of "slippery slopes" and "distinctions without differences." The most troublesome of these is the networks' practice of "characterizing" elections or describing "trends" even as they refrain from making explicit projections. It is difficult, in fact, to distinguish at all between harmless and unduly influential remarks on the part of Election Night reporters.

21. See *Hearings*, *supra* note 11, at 2 (statement of Hon. Timothy E. Wirth, Chairman, House Subcommittee on Telecommunications, Consumer Protection and Finance).

22. See *id.* at 276 (testimony of Ancil H. Payne, President, King Broadcasting Co.).

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B. *The Illusion of Simultaneity*

Most of us would be less troubled if an eligible voter did not vote than if a person voted twice, or chose her candidate by flipping a coin, or sold her vote to the highest bidder. In short, our desire for fair and rational elections probably exceeds our desire for universal participation.²³ The “illusion of simultaneity” embodies some of these aspirations to rationality. Many elections attempt to guarantee voter autonomy, anonymity and fairness through mechanisms such as secret ballots that are not counted until the end of the voting period. A vacuum is thereby created that makes all votes functionally simultaneous.²⁴ For example, forty students in a classroom might vote on a proposition by putting their heads down and their hands up so that one vote is in no sense dependent on another. Pollsters recognize the same sampling principle by conducting surveys over a limited time period and by declining to inform later respondents of the replies of earlier respondents.

Our use of secret ballots in state and national elections attempts to capture the “illusion of simultaneity” on a larger scale. This illusion is inevitably defeated by numerous realities—some structural, some technological, some personal: the electoral college, which institutionalizes a discrete state-by-state approach to presidential elections; the disparity among the states as to poll-closing times; the technologies that facilitate early projections; and, not least, the very fact that early voters can communicate their choices to later voters in any number of ways. Thus, a presidential election is actually less like a true secret ballot than like an informal canvass in which later voters can observe the behavior of earlier voters. That the “illusion of simultaneity” is increasingly difficult to maintain, however, is not a reason for forsaking it entirely. It is a recognition of this fact that accounts in large part for the persistent calls for regulation in the context of early projections.

II. *Solutions Involving Reform of the Electoral System*

There are two approaches to the problem of early projections.

23. *But cf.* the comments of Kenneth J. Lenihan, Associate Professor of Sociology, John Jay College of Criminal Justice: “People vote out of a sense of social obligation, possibly to register political views, but most important to participate in a solemn ritual. Those reasons will not change with projections. . . . [V]oting. . . is a symbolic act, of considerable personal significance, not directed toward an outcome.” *N.Y. Times*, Nov. 27, 1984, at A30, col. 5 (letter to the editor).

24. Of course, voice and roll-call votes (frequently employed in Congress) and other types of less formal canvassing do not follow this pattern.

The first type focuses less on network behavior than on those features of the electoral system itself that exacerbate the effects of early projections.²⁵ While the means varies from proposal to proposal, the end is frequently to create national uniformity in poll-closing times. For example, now that the networks have agreed not to project the results in a state until that state's polling places have closed, Congress is considering legislation that would require that polls close simultaneously throughout the continental United States.²⁶ Under such a law, ballots could not be tallied in the East while ballots were still being cast in the West. The influence of early projections would thus be minimized.²⁷

On the surface, this approach seems a simple, fair and comprehensive solution to a national problem. However, it would also create a new set of problems, resulting largely from the three-hour time difference between the East and West Coasts. A uniform poll-closing hour will require some states to close their polls earlier or later than they otherwise would. This may impose new costs upon certain states or certain voters. For example, New York polls now would have to remain open until 11 p.m. if California polls were to continue to remain open until 8 p.m. This solution might increase the costs of elections for New York by requiring additional poll workers and security measures. On the other hand, if West Coast polls were instead to close several hours earlier than they do today, some working people might find it difficult, if not impossible, to cast their ballots.²⁸

These difficulties might be reduced under proposals to conduct elections on Sundays²⁹ or national holidays³⁰ so that working people could vote earlier in the day. Congress, however, has been understandably reluctant to enact such provisions. Voter turnout might actually decrease under these plans because people would have recreational or, in the case of Sunday voting, religious reasons to refrain from voting. In addition, the designation of a new national

25. One such solution is the elimination of the electoral college. See, e.g., ABA SYMPOSIUM, *supra* note 11, at 4 (remarks of George Watson).

26. For an earlier example of such proposed legislation, see H.R. 3557, 97th Cong., 1st Sess. (1981). Alaska and Hawaii would likely have to be excepted from an otherwise national requirement.

27. Most of the proposals described in the text are concerned not only with the problem of early projections but also with the more general issue of low voter turnout.

28. See Non-Voter Study '83-'84, *supra* note 3, at 14. Note also that such a sweeping national law concerning local election practices might raise constitutional questions of federalism. See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

29. See H.R. 84, 97th Cong., 1st Sess. (1981).

30. See H.R. 1813, 97th Cong., 1st Sess. (1981).

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holiday would result in the loss of much public and private revenue. Other proposals would conduct elections over periods of 24 hours or two days,³¹ or would allow voting by mail.³² These proposals have liabilities all their own. For example, a significant extension of the voting period would, again, increase the costs of elections as well as the opportunities for vote fraud, since ballots would be held for a longer time before they could be tabulated.

Nevertheless, uniformity in poll-closing times appears to be the most effective and realistic option, given the networks' recent agreement to refrain from projecting the results from any state where polls remain open. It is the tentative nature of the networks' concession, however, that casts some doubt on the lasting effectiveness of this approach. Uniform voting hours will succeed in preventing early projections only if the networks abide by their promise. There would otherwise be nothing—in either present law or the proposals before Congress—to prevent early projections based upon exit polls conducted early on Election Day. (The proposals would, of course, mitigate the evils of the earlier type of projections based on results from sample precincts.) One wonders how long the networks will resist competitive pressure to exploit their increasingly sophisticated projection capabilities, especially when faced with the prospect of reporting no election news until after prime time on the East Coast. Moreover, no independent broadcaster or cable network is a party to the agreement among the three networks. Thus, it is as yet uncertain whether uniform voting hours will be a workable solution to the problem of early projections.

III. *Solutions Involving Restrictions on the Media*

A second type of solution is to restrain the networks directly or indirectly in their projections of election results.³³ One might, for

31. See H.R. 184, 97th Cong., 1st Sess. (1981).

32. See *Peterson v. City of San Diego*, 666 P.2d 975 (Cal. 1983); Peck, Warhurst & McDowell, *Recent Developments in Election Law*, 16 URB. LAW. 765 (1984).

33. Of course, the simplest and happiest of such solutions would be for the networks to go even farther with their policy of voluntary restraint and refrain from making any projections until all polls have closed in a national election. See, e.g., Committee for the Study of the American Electorate, Non-Voter Study '80-'81 (May 4, 1981) (letter from Ruth J. Hinerfeld, President, League of Women Voters of the United States, and Curtis Gans, and co-signed by 32 other individuals and organizations, to 12 major media network organizations urging restraint in the use of early projections). The advantages of such a solution are obvious; it would be tantamount to wishing the problem away entirely. It is frequently pointed out that the media do refrain occasionally from publicizing newsworthy items when publication would endanger national security or cause unnecessary embarrassment to private persons. See ABA SYMPOSIUM, *supra* note 11, at 6-7 (Remarks of Curtis Gans); *Hearings*, *supra* note 11, at 77 (testimony of Curtis Gans).

example, postpone the tabulation of votes, or the release of results by election officials, until all polls have closed nationwide.³⁴ These solutions can be rejected, however, for two reasons. First, delaying the tabulation or release of election results would increase the potential for vote fraud. As one network executive observed, "[A]t least in my growing up in Chicago, if the politicians I knew were told that they have 6 or 8 hours before a single vote has to be known publicly, they would be delighted."³⁵ Fraud, or the perception of fraud, could undermine confidence in the democratic process even more than do early projections. A second objection to solutions of this type is that they apply only to actual returns and would therefore not prevent projections based on exit polls.

More draconian measures would directly restrain the networks from broadcasting election returns and projections. For example, a "news blackout" might be imposed while polls remain open anywhere in the nation. A variation of this plan is in effect in Canada, where no election results or projections may be broadcast in time zones where polls remain open. This approach would eliminate all early projections but only by violating the first amendment's command that "Congress shall make no law . . . abridging the freedom . . . of the press. . . ."³⁶ The measure would thus have the undesirable—and probably unconstitutional—effect of allowing "government to insinuate itself into the editorial rooms of this Nation's press."³⁷

A less drastic and more indirect approach would be to inhibit the networks in their collection, rather than their dissemination, of exit-poll data. This has been the tactic of those states that have prohibited the taking of exit polls within a specified distance from any polling place. This approach allows a state effectively to eliminate an important source of early projections without imposing the drastic prior restraint represented by a news blackout. Three states have

Two networks have in fact already committed themselves not to issue projections until all polls have closed. See 130 CONG. REC. H6849 (1984) (letters from Westinghouse Broadcasting and Cable, Inc., and Turner Broadcasting System, Inc.). The end of this story is that the networks have politely declined the invitation to commit themselves to such extensive self-censorship. See ABA SYMPOSIUM, *supra* note 11, at 17 (remarks of George Watson). Such an agreement among the networks might in any case raise serious questions under the antitrust laws.

34. See, e.g., H.R. 3556, 97th Cong., 1st Sess. (1981); H.R. 3595, 97th Cong., 1st Sess. (1981).

35. *Hearings*, *supra* note 11, at 35 (testimony of William J. Small).

36. U.S. CONST. amend. I.

37. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

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enacted statutes that specifically restrict exit polling within a prescribed distance from voting places.³⁸ In addition, many other states purport to regulate exit polling through application of older statutes, most of which prohibit electioneering or loitering near voting places without specifically mentioning exit polling.³⁹ The networks have, for the most part, complied willingly with these new applications of old statutes, since most of them do not require poll-takers to remain so far from the voting site that their activities become impractical.⁴⁰

IV. *The Washington Statute*

The Washington statute is the only one of these measures to have been challenged thus far on constitutional grounds. Its fate in court may well have far-reaching consequences, both for the validity of other existing statutes and for the enactment of new ones.⁴¹ The statute was amended in 1983 to provide: "On the day of any primary, general or special election, no person may, within a polling place, or in any public area within three hundred feet of [any entrance to] such polling place . . . [c]onduct any exit poll or public opinion poll with voters."⁴² The statute's 300-foot limit is significantly longer than the limits of 100 feet or less provided by most of the older anti-electioneering, anti-loitering statutes. This is important because 100 feet is considered sufficient to prevent most attempts to influence voters improperly or to disrupt order at the polls. However, 100 feet, unlike 300 feet, is considered insufficient to discourage exit polling, since poll-takers can still identify depart-

38. See WASH. REV. CODE ANN. § 19.51.010(1)(e) (Supp. 1985); WYO. STAT. § 22-26-113 (Supp. 1984); MINN. STAT. ANN. § 204C.06, subd. 1 (West Supp. 1985).

39. See, e.g., ARIZ. REV. STAT. ANN. § 16-1018(1) (1984) (electioneering prohibited within 150 feet of the entrance to a polling place); CAL. ELEC. CODE § 29470 (West 1977 & Supp. 1985) (electioneering, solicitation, and "speak[ing] to voter on the subject of marking his ballot" prohibited within 100 feet of a polling place); MO. ANN. STAT. § 115.637(18) (Vernon 1980 & Supp. 1985) (electioneering prohibited within 25 feet of a polling place). According to Committee for the Study of the American Electorate, Non-Voter Study '84-'85: State Polling Place Laws Concerning Exit Polls (July 30, 1984), as many as 19 states "interpret" their electioneering and solicitation prohibitions to encompass exit polling. Whatever the vigor with which these statutes are actually enforced against poll-takers, such statutes have clearly not hindered exit polling substantially. See *infra* text accompanying note 40.

40. According to Curtis Gans, limits of less than 200 feet, even if strictly enforced, will not preclude exit polling. Of the older statutes that do not specifically address exit polling, only two prescribe distances of more than 200 feet. Non-Voter Study '84-'85, *supra* note 39, at 3. See also N.Y. Times, Nov. 4, 1984, at 39, col. 1. The author wishes to thank Curtis Gans for the information in this and the preceding footnote.

41. See Non-Voter Study '84-'85, *supra* note 39, at 5.

42. WASH. REV. CODE ANN. § 29.51.020(1)(e) (Supp. 1985).

ing voters from that distance.⁴³

The Washington statute is evidently quite effective in preventing exit polling.⁴⁴ For those who regard early projections based on exit polls as a serious problem, therefore, legislation such as Washington's may be an effective solution if enacted throughout the country. Such statutes nevertheless raise serious questions. For example, a comprehensive prohibition on exit polling would eliminate a rich source of data concerning voter demographics, trends and political alignments.⁴⁵ A more formidable barrier to statutes such as Washington's, however, is the first amendment to the Constitution.⁴⁶

V. *The First Amendment: Categorization vs. Balancing*

No provisions of the Constitution have been as passionately invoked or as thoroughly expounded as the first amendment's protections of speech and press. These protections serve varied and ambitious purposes. Commentators have stressed that the first amendment serves the individual's search for self-fulfillment as well as society's search for political truth;⁴⁷ some have discerned in the amendment an expression of philosophical relativism as well as a yearning for the good, democratic society.⁴⁸ But, as Justice Black once observed, "[w]hatever differences may exist about interpretations of the first amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."⁴⁹ The framers of the Bill of Rights, declared Justice Brandeis, knew that "the fitting remedy for evil counsels is good ones," rather than coerced silence.⁵⁰ This conception of the first amendment as a bulwark against state-imposed orthodoxy, essential to the creation of a politically enlightened citizenry, is particularly germane with respect to the press, whose unhappy experiences at the hands of censors, licensors and

43. See *supra* notes 39-40.

44. N.Y. Times, *supra* note 40; Affidavit of Adam Clymer, *quoted in* Daily Herald v. Munro, 747 F.2d 1251, 1257-58 (Norris, J., dissenting in part).

45. Affidavit of Everett Carl Ladd, Director of The Roper Center for Public Opinion Research at the University of Connecticut, *quoted in* Daily Herald v. Munro, 747 F.2d 1251, 1258-59 (Norris, J., dissenting in part).

46. U.S. CONST. amend. I.

47. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

48. See Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983). Bollinger rightly contrasts the First Amendment jurisprudence of Alexander Meiklejohn with that of Oliver Wendell Holmes, Jr.: "While Meiklejohn viewed tolerance as an affirmation of belief, Holmes viewed it as a necessary consequence of self-doubt." *Id.* at 463.

49. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

50. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

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other state-sponsored agents of prior restraint in seventeenth-century Britain were well-known to the framers of the amendment.⁵¹

It is by now axiomatic, however, that the first amendment does not absolutely bar all laws that abridge freedom of expression in some way.⁵² The Supreme Court has employed two theories for distinguishing permissible from impermissible restrictions on speech. The Court has, over time, characterized certain categories of expression—such as “fighting words,”⁵³ obscenity⁵⁴ and libel⁵⁵—as “unprotected” by the first amendment and thus susceptible to pervasive regulation. The standard rationale for such “exceptions” to the first amendment was described by the Supreme Court in a famous passage from *Chaplinsky v. New Hampshire*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*⁵⁶

The “categorization” approach, if somewhat factitious, preserves some of the spirit of first amendment absolutism: The approach carefully confines any departures from absolutism to clearly articulated categories and focuses the inquiry on the nature of the speech, not the nature of the governmental interest in suppressing it.

The Court, however, has resorted increasingly in recent years to a more diffuse “balancing” approach, whereby expression of any kind may be abridged if the restriction serves a sufficiently compelling

51. “Prior restraint,” which generally involves *pre-publication* restraints on expression, is commonly regarded as the most noxious form of infringement on First Amendment freedoms, although it is not clear what enduring significant difference there is between pre-publication restraints and post-publication punishment. The answer is historical rather than operational: Burdensome British licensing and censorship schemes were well within the recent memory of the framers of the First Amendment. See *Near v. Minnesota*, 283 U.S. 697, 713-19 (1931). See generally L. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

52. The most famous invocation of this truism is Justice Holmes’s observation that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

53. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

54. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

55. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

56. 315 U.S. at 571-72 (emphasis added).

state interest and is sufficiently narrowly drawn to avoid, so far as possible, abridging protected speech.⁵⁷ This "balancing" test is obviously far less determinate than the "categorization" test. State interests simply cannot be weighed objectively against one another to determine which is more compelling. It is also difficult to set out any general theory for distinguishing between restrictions that are sufficiently narrowly drawn and those that are not.

"Categorization" analysis in first amendment cases has nevertheless become rare, because one cannot characterize an unlimited number of types of speech as "unprotected"; the first amendment particularly abhors governmental distinctions, whether legislative or judicial, among types of speech on the basis of their "value." It is still possible, however, to posit a role for "categorization" analysis in first amendment cases and to determine what circumstances should trigger the courts' deployment of the principle.

The criterion frequently used, if not expressed, by the Supreme Court for determining whether to apply "categorization" or "balancing" analysis is the *motive* of the government for enacting the measure that restricts speech.⁵⁸ In general, if the restriction is primarily intended to suppress speech (as when a legislature prohibits promulgation of the doctrine of syndicalism), the rigorous categorization test will be applied; if the "governmental interest is unrelated to the suppression of free expression"⁵⁹ (as when the government

57. Though the statement of this "balancing" test varies, in general a government regulation will pass the test if it advances a "compelling state interest" and is the means of advancing that interest that is the "least restrictive" of First Amendment rights. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977). See generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). The "least restrictive means" requirement may be restated as a requirement that regulations must not be "overinclusive" in that they must not abridge more speech than is necessary to achieve the legislative end. There is at times another component, unpredictably applied and articulated by the Supreme Court, that may be termed an "underinclusiveness" inquiry: a requirement that the means appear likely to succeed or be sufficiently well matched to the end it seeks to achieve. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565-67 (1976). But cf. *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968). For general remarks concerning the confusion created by these requirements, see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-90 (1975) [hereinafter cited as Ely]. The doctrine of "overbreadth" is primarily a jurisdictional issue and will not be addressed here. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

58. The approach suggested in the text for distinguishing the "categorization" and "balancing" approaches in First Amendment cases has been adumbrated most clearly by Dean John Hart Ely. See Ely, *supra* note 57.

59. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The paradigm of such a regulation is the so-called "time, place, and manner" regulation which, for example, justifies restraints on the use of sound trucks even though an infringement on expression is involved. *Kovacs v. Cooper*, 336 U.S. 77 (1949). Ordinarily, however, such regulations must be "content neutral"—that is, they must not be designed to prohibit

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prohibits the burning of draft cards so that proper records can be maintained), the Court will apply the “balancing” test. Identification of the legislative motive in each case determines not whether the measure is constitutional but only which test is to be used.⁶⁰

Freedom of the press has similar doctrinal underpinnings to freedom of speech. If anything, the protection given the media under the press clause is even more closely related to the “structural role” of the first amendment.⁶¹ That is because the press may be viewed as an *institutional* actor, and not merely as an *individual* actor, in the theater of constitutional law.⁶² It has been asserted that the courts have vigilantly protected press freedom not because the press *qua* press deserves special privileges, but because the press performs an invaluable role in informing the public and in assuring heterogeneity in political discourse.⁶³ The fact that the “publishing business is . . . the only organized private business that is given explicit constitutional protection”⁶⁴ does not give the press immunity from all regulation that may hamper its gathering and reporting of the news. So, for example, the media are not constitutionally exempted from duties devolving upon the public at large—such as giving testimony to a grand jury—even though to perform these duties would incidentally hamper their ability to report the news.⁶⁵

expression on a particular subject or subjects. *See* *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). *But cf.* *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 544-48 (1980) (Stevens, J., concurring).

60. A *caveat* must be appended to the Ely approach as proposed here. The Supreme Court has rarely, if ever, indicated explicitly its commitment to a clear “balancing”-“categorization” distinction. Nor is it always simple to distinguish the two in theory. For example, is the classic “clear and present danger” doctrine an example of “balancing” or of “categorization”? Compare *Brandenburg v. Ohio*, 395 U.S. 444 (1969), with *Dennis v. United States*, 341 U.S. 494 (1951).

More generally, even in 1975 Ely had to concede that “the effort at explicit systematization [by the Supreme Court, in a manner following Ely’s suggestions] seems to have been suspended, and the more recent decisions therefore do not figure prominently in this discussion.” Ely, *supra* note 57, at 1483 n.8. Ten years later that remark has assumed the character of wry understatement. Compare the approaches suggested in the text with those elucidated in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Nevertheless, the proposed distinctions still seem worthwhile as a means by which to bring early projections into the constitutional order.

61. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

62. *See* Stewart, “*Or of the Press*,” 26 *HASTINGS L.J.* 631, 633 (1975) (“Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals. . . . In contrast, the Free Press Clause extends protection to an institution.”).

63. *Gannett v. DePasquale*, 443 U.S. 368, 397-98 (1979) (Powell, J., concurring).

64. Stewart, *supra* note 62, at 633.

65. *See* *Branzburg v. Hayes*, 408 U.S. 665 (1972). *See also* *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945). The freedom of the *broadcast* media has been further restricted on the theory that their lim-

Furthermore, it has been recognized that the activities of the press may at times conflict with other fundamental individual rights or compelling government interests; in such cases, the rights of the press may have to yield. A good illustration is those cases in which the rights of the press (amplified by the public's concomitant "right to know") conflict with the rights of an accused to a fair trial and society's interest in an orderly judicial process. Judicial gag orders directed at press coverage of judicial proceedings are unlikely to pass constitutional muster,⁶⁶ but the Supreme Court has been more equivocal in cases involving the general exclusion of press and public from judicial or quasi-judicial proceedings. While the Court has generally disapproved such exclusions—primarily because of the Anglo-American tradition of open criminal trials⁶⁷—in one recent case it upheld the exclusion of press and public from a pretrial hearing, ostensibly because such hearings historically have not been open to the community.⁶⁸ In this context, the right of the accused to a fair trial outweighed the first amendment rights of the press and public.

VI. *The First Amendment and the Washington Statute*

How does Washington's anti-exit-polling law fit into this constitutional framework? The statute clearly abridges speech, if only in an indirect way. Furthermore, in *Mills v. Alabama*,⁶⁹ a case whose facts are somewhat analogous to those in *Daily Herald*, the Supreme Court held that speech cannot be stifled on Election Day merely because it might have a persuasive influence on potential voters. The Court overturned in *Mills* a state statute that made it a crime "to do any

ited spectrum and pervasive reach necessitate significant regulation. See *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *But cf.* *FCC v. League of Women Voters of California*, 104 S.Ct. 3106 (1984).

66. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977). In *Nebraska Press Ass'n*, a case seemingly calling for "categorization" analysis, the Court spoke nonetheless in "balancing" terms:

However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

427 U.S. at 569-70. Note, however, the observation of Justice White, whose concurrence was crucial to the formation of a majority in the case: "[T]here is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." *Id.* at 570-71 (White, J., concurring).

67. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

68. *Gannett v. DePasquale*, 443 U.S. 368 (1979).

69. 384 U.S. 214 (1966).

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electioneering or to solicit any votes . . . for or against the election or nomination of any candidate or in support or opposition to any proposition” on the day of the election. The editor of the Birmingham *Post-Herald* had been convicted under the statute for publishing an Election Day editorial that urged voters to adopt a mayor-council form of governance for the city. Wrote Justice Black for the majority:

Whatever differences may exist about interpretations of the first amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective.⁷⁰

Like the statute in *Mills*, the Washington statute inhibits “political” speech in a manner that is scarcely “content neutral.”⁷¹ Washington’s statute is not necessarily saved by the fact that it restricts news-gathering rather than expression *per se*.⁷² Nevertheless, the peculiar characteristics of early projections and exit polling suggest that Washington’s statute may not violate the first amendment.

A statutory provision aimed ultimately at restricting projections should be examined according to “categorization” principles. While the legislative history of the 1983 amendment of Washington’s statute is sparse, it is clear that officials and voters in Washington were highly exercised after the 1980 election by what they regarded as the pernicious effects of early projections.⁷³ It is true that some Washington legislators were also concerned with confu-

70. *Id.* at 218-19.

71. *See* note 59 *supra*.

72. *Cf.* *Branzburg v. Hayes*, 408 U.S. at 681; *see also* *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) (“Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”).

73. The remarks of Ralph Munro, Secretary of State of Washington and a named defendant in *Daily Herald*, make this concern clear. *See Hearings, supra* note 11, at 182 (“The people are very, very angry at the fact that before they had a chance to go to the polls here in the West they knew the outcome of the presidential race”); Transcript of Portions of a Hearing of the Washington House Committee on Constitution, Elections and Governmental Ethics on February 9, 1983 Regarding Two Proposed Bills Regulating Exit Polling, introduced in *Daily Herald v. Munro, supra* note 8, as an attachment to Affidavit of Don Whiting, at 5 [hereinafter cited as Transcript] (“there is no doubt that network projections that come into the state before our polls close do have an impact on our voter turnout”). *See also* the statement of Sam Reed, Thurston County Auditor, *id.* at 26 (“I think [obstruction at voting places] is dreadful. But no, the real concern is the exit polls, *per se*”). The irony, of course, is that exit polling in Western states such as Washington has heretofore made relatively little contribution to the projections that Washington claims have constructively disenfranchised its voters. The author wishes to thank Daniel Waggoner for making the transcript cited in this footnote available.

sion and harassment of voters by poll-takers.⁷⁴ The new prohibition on exit polling would seem redundant if enacted solely for that reason, however, because an older, unrepealed section of the statute addresses the problem of "disruption" specifically.⁷⁵ Significantly, the 1983 legislation expressly extended the prohibition on all such activities (now including exit polling) from 100 feet (arguably an ample protection against "disruption") to 300 feet.⁷⁶ In short, it is difficult to quarrel with Judge Norris's conclusion in the Ninth Circuit that "[i]n the final analysis, Washington's ban on exit polling is not a regulation aimed primarily at disruptive behavior, but rather is one aimed at the use to which information is put"⁷⁷—i.e. early projections.

Nevertheless, a court might either accept Washington's claim that it has legislated to protect order at voting sites or ignore, as the Supreme Court has often done, any analytic distinction between incidental and purposeful restrictions on speech.⁷⁸ In such a case, a "balancing" approach might be applied. "Balancing" analysis is so *ad hoc* that it is difficult to predict how the *Daily Herald* case might be resolved. It is possible that the Washington statute could be upheld under such an approach if the state interest were found sufficiently compelling and the restriction sufficiently narrow.⁷⁹

74. See, e.g., Transcript, *supra* note 73, at 1-2, 9-10 (testimony of State Reps. James Mitchell and Paul Zellinsky).

75. WASH. REV. CODE ANN. § 29.51.020 (1965) (prohibiting, *inter alia*, electioneering within 100 feet of any building in which an election is being held). The amended § 29.51.020 prohibits not only exit polling but also "any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place." WASH. REV. CODE ANN. § 29.51.020(1)(d) (Supp. 1985).

76. Note Munro's statement during legislative consideration of the 1983 amendment that "exit polling can take place 100 feet back from the building where the polls are located. We don't have any problem with that. We can't argue with exit polling as long as it is moved out of the polls. That's our concern." Transcript, *supra* note 73, at 13. At least one representative of the media testified at these hearings that the major networks "could live with" a ban on exit polling as long as it applied only within 100 feet of voting places. *Id.* at 17 (testimony of Mark Allen, representing the Washington State Association of Broadcasters). David S. Broder, columnist for the Washington Post, writes that "Munro tells me that the ban was first to be applied within 100 feet of the polls, but the legislators got so angry at the networks' lobbying that they extended it to 300 feet." Washington Post, Dec. 18, 1983, at C7, col. 1.

77. 747 F.2d at 1262 (Norris, J., dissenting in part).

78. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). See also *Brown v. Hartridge*, 456 U.S. 45, 53-54 (1982) ("When a State seeks to restrict *directly* the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression") (emphasis added).

79. The state surely serves a compelling interest when it acts to vindicate an individual's right to vote and to assure a fair and dignified election process. Compare the facts in *Gannett v. DePasquale*, 443 U.S. 368, where the Court, confronted with a judicial

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The Washington statute is therefore more appropriately evaluated under the “categorization” theory, which permits the government intentionally to abridge only speech that falls into one of a few carefully defined classes. Election projections do not fit into any of the established categories such as “fighting words,” obscenity, or libel.⁸⁰ But projections do have something in common with those types of speech. They, like the other categories described in *Chaplinsky*, “are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth.”⁸¹ Of course, assessments as to the “social value” of a type of speech should not give the courts *carte blanche* to expand the list of classes of “unprotected” speech. But election projections fail to serve the fundamental values that underlie the first amendment. They are un rebuttable, proactive expressions that contribute little to the public debate from which the first amendment presumes will emerge the political truth. Justice Holmes observed that the first amendment would not prevent a man from being punished for shouting “Fire!” in a crowded theater. Projections likewise invite no synthetic exposition of ideas, and thus constitute no “step to truth.” The “truth” about what the outcome of an election is, or should be, will emerge not from a battle of projections, no matter how prolonged, but only from the

order that a pretrial hearing be closed to the press and public, determined that a defendant’s fair trial rights and the societal interest in a fair and dignified judicial process outweighed any first amendment interests at stake. The interests served here seem no less compelling, while the countervailing public interest in the “right to know,” a crucial factor in such cases as *Richmond Newspapers*, is more attenuated. Additional testaments to the importance of protecting the franchise are to be found not only in numerous Supreme Court opinions, *see, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional districts must be as equal in population as is practicable), but also in congressional enactments, *see* The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, amending the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)), and in five amendments to the Constitution itself, *see* U.S. CONST. amends. XV, XIX, XXIII, XXIV, XXVI.

The Court’s application of the “least restrictive means” test has never been consistent. For example, application of the test might be perfunctory, *see* *United States v. O’Brien*, 391 U.S. 367, 381-82 (1968), and the statute upheld. The Court might perform a more searching inquiry, but a state’s failure to satisfy the test would in any case involve a value judgment that the state had been careless or lazy or irrational in its exercise of legislative powers—or that the state’s motive was really quite different from its asserted one. *See* *Schneider v. State*, 308 U.S. 147, 162 (1939); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-39 (1980). A judge finding that Washington had failed the “least restrictive means” test would likely do so for the reasons expressed in dissent by Judge Norris in the Ninth Circuit. 747 F.2d at 1262-63 (Norris, J., dissenting in part).

80. It seems doubtful as well that one could invoke “clear and present danger” doctrine to justify inhibition of election projections. Similarly, the “national security” considerations discussed in *New York Times v. United States*, 403 U.S. 713, 727-40 (Stewart, J., and White, J., concurring), appear to have no application here.

81. 315 U.S. at 572.

counting of the ballots and the debate over their possible consequences for society. Compare Justice Brandeis's succinct statement of his first amendment faith: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁸² Early projections do not meet this test; their effects are experienced, perhaps irrevocably, before they can be counteracted by "time" or "education" or anything else.⁸³ One can scarcely envision a "marketplace" of "competing projections," and not only because considerations of time and money would make one impractical. Thus, early projections not only violate the "illusion of simultaneity," which assumes that individuals should vote with limited knowledge of an election's outcome;⁸⁴ they also constitute an exception to the general principle that expression fosters societal enlightenment and therefore should be broadly protected.

Similar considerations concerning the "value" of speech influenced the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*,⁸⁵ which held that the FCC could constitutionally regulate a radio broadcast that was indecent but not obscene:

Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the first amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.⁸⁶

Like the present case, *Pacifica* involved a class of speech not previously categorized as "unprotected" by the first amendment. The Court was clearly influenced, however, by the essentially "unrebuttable" character of the speech at issue. The temporary nature of the restraint on speech (the opinion suggested that the material could have been broadcast at a later hour or could have been obtained from other media) and the fact that the broadcast medium was involved were also important ingredients in the Court's holding. All

82. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

83. One might, of course, hypothesize a television or radio message to the following effect: "The projection you have just heard is inaccurate. Don't let it keep you from voting." The vision is more Orwellian than reassuring.

84. See *supra* text accompanying notes 23-24.

85. 438 U.S. 726 (1978).

86. *Id.* at 748-49.

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of these factors are present where regulation of exit polling and early projections is concerned.

VII. *Conclusion*

The foregoing analysis poses substantial risks to first amendment protections. It is dangerous, of course, to expand the classes of “unprotected” speech; one may well regard the societal interest in a free press generally to be paramount, regardless of how individual exceptions might be justified. The issue of “early projections,” however, illustrates two problems in first amendment theory that demand resolution. The first is the distinction between modes of analysis depending on the motive behind the regulation at issue. The “balancing”-“categorization” dichotomy is necessary to maintain the distinction between state action that incidentally infringes speech and state action that intentionally removes a point of view or an entire subject from public discourse. The “balancing” process, however, requires more explicit theoretical content from the Supreme Court. The second problem is that certain communications—in this case, election projections—may cause undesirable effects without the countervailing benefits that normally justify comprehensive first amendment protection. Early projections require creative first amendment treatment because they implicate the pervasive and unidirectional influence of the electronic media, constitute un rebuttable statistics-oriented speech, and occur too close to poll-closing time to evoke real dialogue. Such treatment can be firmly grounded in the classical free-speech notions that emphasize the marketplace of ideas and the synthesis of knowledge.

As a solution to the problem of early projections, Washington’s approach has advantages and disadvantages when evaluated against a uniform national voting period. Unless adopted nationally or by many states, laws against exit polling are unlikely to have a pervasive effect on early projections. In addition, such laws rob political analysts of a uniquely informative tool, while leaving open the possibility that the media will use other sources (such as “key precincts”) for such projections. Still, laws such as Washington’s may be less costly and disruptive than measures that would alter the electoral system itself. They do not rely for their effectiveness on the networks’ adherence to their own nonbinding promises of forbearance, as does the current proposal for uniform voting hours. They certainly do less damage to free speech interests than laws directly inhibiting the reporting of news. While better solutions remain

unimplemented, the courts should consider statutes such as Washington's in light of the principle that free speech proceeds not from absolutes but from the notions of dialogue and synthesis. It would be ironic if a paramount goal of the first amendment—broad-based and intelligible democratic participation—were thwarted by rigid application of the first amendment itself.⁸⁷

— *Clyde Spillenger*

87. The same First Amendment analysis that justifies restraints on exit polls might justify more direct, even draconian restraints on the networks' broadcasting of "projections" and "trends." While no recommendation is made here respecting such a severe remedy, it should be noted that a similar restraint is applied in Canada. *See* Canada Election Act, CAN. REV. STAT. ch. 14, § 105 (1st Supp. 1970).