"AND THE WINNER IS . . ." ELECTION DAY PROJECTIONS AND THE FIRST AMENDMENT

I. INTRODUCTION

The National Broadcasting Company's network news telecast projected a winner in the 1980 Presidential election at 8:15 p.m. Eastern Standard Time (EST)[1] when the polls were still open throughout the United States.[2] This projection generated much criticism.[3] The critics complained about the media's lack of restraint in using the results of its voter polls, which are known as exit polls because they are conducted with voters as they leave the polling place.[4] The critics contended that in the competitive race to be first, the networks created their own story[5] by making

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[1] N.Y. Times, Nov. 6, 1980, at A32, col. 1.

[2] The polls in Alabama, Florida, Indiana, and North Dakota in the Central Time Zone, South Dakota, and Texas in the Mountain Time Zone, and all of the states in the Pacific Time Zone remained open at the time of this projection.

[3] Those critical of the early projections include many Members of Congress, who voiced their criticisms at four separate subcommittee hearings on this subject. *Early Election Returns and Projections Affecting the Electoral Process: Hearing Held Jointly Before the Task Force on Elections of the Comm. on House Admin. and the Subcomm. on Telecoms. Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings: Returns and Projections*]; *Election Day Practices and Election Projections: Hearings Held Jointly Before the Task Force on Elections of the Comm. on House Admin. and the Subcomm. on Telecoms., Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st & 2d Sess. (1981-82) [hereinafter cited as *Hearings: Practices and Projections*]; *Broadcast Media in Elections: Hearings Held Jointly Before the Task Force on Elections of the Comm. on House Admin. and the Subcomm. on Telecoms., Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Hearings: Broadcast Media in Elections*]; *Early Election Projections: The Iowa Experience: Hearings Before the Subcomm. on Telecoms., Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. (1984) [hereinafter cited as *Hearings: Iowa Experience*].

In addition, many journalists took a dim view of the projections. *See, e.g.*, Waters, *Peacock's Night to Crow*, NEWSWEEK, Nov. 17, 1980, at 82; Castro, *Election Night Razzle-Dazzle*, TIME, Nov. 3, 1980, at 75; Rowen, *Turning Off the Tube*, NEW REPUBLIC, Dec. 13, 1980, at 6; Guillen, *Determining the Vote*, PSYCHOLOGY TODAY, July 1984, at 70; *TV Rekindles An Election Controversy*, U.S. NEWS & WORLD REP., Nov. 12, 1984, at 12; Nadler, *The Latest on Early Returns*, HARPER'S, July 1984, at 62.

Other criticisms came from the League of Women Voters and the Committee for the Study of the American Electorate in their REPORT ON 1982 NETWORK ELECTION NIGHT PROJECTIONS NON-VOTER STUDY 1983-84 [hereinafter cited as 1983-84 NON-VOTER STUDY]; *Hearings: Broadcast Media in Elections, supra*.

[4] *Hearings: Broadcast Media in Elections, supra* note 3, at 14, 20, 24 (statements of the network representatives). Through analysis and statistical extrapolation, experts are able to use the data obtained in this polling to make general statements about the issues voters feel are most important in the election, for instance, the reasons certain demographic groups voted for certain candidates. *See id.* But by far, the most controversial impact of exit polling has been its use by the networks to aid in making early projections of election winners.

[5] *Id.* at 30 (question of Rep. Swift to George Watson, Vice President, News Division

projections based on exit poll results, and then broadcast that story at an hour so early that the news of a projected winner disenfranchised potential voters.[6]

In both the 1982 Senate races and the 1984 presidential election season (nominating primaries and caucuses), the networks' use of early projections remained a source of controversy.[7] In the general presidential election of 1984, projections were irrelevant because of the overwhelmingly large margin of President Reagan's victory.[8] However, because so large a margin of victory is atypical, the policy of projecting winners is still at issue; and since data for the projections is based on exit polls, they too remain the subject of controversy. Looking ahead to the general presidential election of 1988, regulation of early projections is still desired by those critical of these projections,[9] even though none were technically made the night of the 1984 general election.

During four separate house subcommittee hearings,[10] media representatives debated with those opposed to the practice of projecting election winners whether control of the early projections was necessary at all, and if so, how to achieve such control. Congress sought to restrict the projections in its capacity to legislate on matters relating to the national airwaves.[11] Several solutions were proposed by various Members of Congress but none resulted in legislation. However, any legislative solution must effect a change without abridging the first amendment. The solutions which have been proposed by Congress indicate that some of the country's legislators believe first amendment freedoms

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of the American Broadcasting Company). The use of projections is characterized by critics as the creation of news because the networks actively engage in the collection and analysis of the data. They then use that data to derive their own conclusions which are reported as projections. This is in contrast to the typical reporting function.

6 N.Y. Times, *supra* note 1; N.Y. Times, Jan. 1, 1981, at A24, col. 1; N.Y. Times, Jan. 18, 1985, at A1, col. 1; *see also Hearings: Practices and Projections, supra* note 3, at 40-43 (testimony of Rep. Pat Williams); *Hearings: Iowa Experience, supra* note 3, at 1-3 (statement of Rep. Timothy Wirth, Subcomm. Chairman).

7 *See, e.g.*, 1983-84 NON-VOTER STUDY, *supra* note 3, at 3; *see generally Hearings: Broadcast Media in Elections, supra* note 3; *Hearings: Iowa Experience, supra* note 3.

8 *See infra* text accompanying notes 43-44.

9 This may be deduced from the fact that the latest proposal from Congress attempting to regulate projections was made after the 1984 general election. H.R. 348, 99th Cong., 1st Sess., 131 CONG. REC. H103 (daily ed. Jan. 7, 1985).

10 *See supra* note 3.

11 *See, e.g.*, S. 3191, 96th Cong., 2d Sess., 126 CONG. REC. 29, 378-79 (1980); H.R. 5472, 97th Cong., 2d Sess. (1982); H.R. Res. 395, 98th Cong., 2d Sess. (1984). These bills and resolutions either seek the media's voluntary restraint or impose sanctions on those disclosing and/or broadcasting election results prior to the closing of all polls. For a further description of the contents of these legislative proposals, see *infra* text accompanying notes 119-33.

should be infringed upon when the conflicting interest is the right to vote.[12] Therefore, this Note will discuss the constitutional validity of the type of legislation under consideration in Congress.

While the debate continued over possible solutions on the national level,[13] the Legislature of the State of Washington chose its own solution.[14] In seeking to prevent the exit polling, and thereby cutting off the media's supply of raw data from which to extrapolate projections,[15] Washington, in 1983, amended its election statutes to prohibit exit polling within 300 feet of polling places.[16]

The validity of this statute became the controversial issue in the case of *Daily Herald v. Munro*.[17] Anticipating the 1984 presidential election, the three major television networks[18] tried to clear the way for continued exit polling in Washington by challenging the constitutionality of that statute in *Daily Herald*. This Note will examine that challenge in an effort to determine whether regulation of election projections is desirable, and if so, what viable method is available. First, the elemental conflict between free speech and a free press and the need for protection of the voter's franchise will be discussed. An analysis of the solution sought at the state level and its challenge by the networks will follow. This Note will conclude that the networks' constitutional challenge to the Washington statute is valid and that reform, if any, should be instituted at the federal level.

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12 *See infra* text accompanying notes 119-33.

13 Debate has effectively been ended by the latest congressional proposal, discussed *infra* at notes 142-43, 153-54 and accompanying text. Previously, debate has occurred before several subcommittees in the House of Representatives. *See supra* note 3.

14 Other states have passed similar legislation, see, *e.g.*, MINN. STAT. ANN. § 204C.06(1) (West Supp. 1985); WYO. STAT. § 22-26-113 (Supp. 1984), but the focus of this Note is on Washington because of the media's challenge to the statute in that particular state.

15 This point is heatedly contested by the State of Washington. Brief for Appellee at 20-23, Daily Herald v. Munro, 747 F.2d 1251 (9th Cir. 1984). Washington claims that its only purpose in amending the statute to specifically prohibit exit polls was to maintain order and decorum at the polls. This is refuted by the media in its brief. Brief for Appellants at 28, *Daily Herald*. Although the legal implications of this point remain in dispute, see *infra* notes 104-06 and accompanying text, the practical implication is that the statute bars the media from collecting the data necessary for its statisticians to compile newsworthy reports, including the projections.

16 WASH. REV. CODE § 29.51.020(1)(c) (Supp. 1984). Three hundred feet is the length of a football field. The networks contend that from this distance no accurate polling is possible.

17 10 MEDIA L. REP. (BNA) 2144 (W.D. Wash.), *rev'd*, 747 F.2d 1251 (9th Cir. 1984).

18 The three major television networks are the American Broadcasting Company (ABC), the Columbia Broadcasting System (CBS), and the National Broadcasting Company (NBC).

II. The Background

Media coverage of our elections has been under unusually strong attack since the 1980 presidential election.[19] The competitive race among broadcasters for prestige and high ratings has sent that media in search of election day scoops.[20] The rewards for making an accurate call of a race as early as possible are substantial. Advertisers invest their dollars where viewing is greatest on the assumption that returns on their dollars are highest where more viewers see their ads.[21] If a network makes the earliest call of a race in a given year, advertisers are likely to seek it out as a forum during the next election. Networks promote themselves by broadcasting the fact that they were first to call a previous race. Advertisers, in turn, expect viewers to tune in to the network that tells them that it has been earliest in pronouncing the outcome of an election, with the expectation that it will be earliest again.[22] If the network thereby creates a demand among advertisers for the use of its airwaves as their forums, it can charge higher prices and thus increase revenues.[23]

In their zeal to achieve a jump on the competition, the networks have employed the technique of questioning voters as they exit the polling place.[24] This is only one portion of a total system the networks use to project winners and cover the election for their viewers.[25] Other components of this system include the analysis of the exit poll results in conjunction with representative vote tabulations from key precincts. This analysis is done by various journalists, statisticians, and other experts in the employ of

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19 Attacks have come from many sources. For a detailed description of the sources of criticism, see *supra* note 3.

20 Castro, *Election Night Razzle - Dazzle*, Time, Nov. 3, 1980, at 75; *Hearings: Practices and Projections, supra* note 3, at 92 (reprinting Thomas, *The Primaries.—The Weary Refrain: We Were First*, The Boston Globe, Sept. 15, 1982, at 15, col. 1).

21 Blake and Blum, *Network Television Rate Practices*, 74 Yale L.J. 1339, 1346 (1969).

22 *Hearings: Practices and Projections, supra* note 3, at 146 (statement of Rep. W.J. Tauzin); *id.* (reprinting K. Calegari, L. Ullman, & S. Walters, Public Interest v. The Broadcast Industry, Election Night 1980). Since advertisers are eager to sign up with the winning network in future elections, promotions hailing a network as first in the "race to call the race" are persuasive to both advertisers and viewers. This is precisely because advertisers know the value of their own medium. While promoting themselves to the viewers, the networks are building up an audience for their advertisers through the use of advertising itself. This is an audience that advertisers are eager to reach with their own promotions.

23 *See* P. Samuelson, Economics 59, 242 (10th ed. 1976); *see also Hearings: Broadcast Media in Elections, supra* note 3, at 65 (testimony of William Murphy, President, Media Management Services).

24 *Daily Herald*, 747 F.2d 1251, 1254 (9th Cir. 1984) (Norris, J., dissenting).

25 *Hearings: Broadcast Media in Elections, supra* note 3, at 14-15 (statement of George Watson, then Vice President, ABC News); *see also* statement of Reuven Frank, then President of NBC News. *Id.* at 24.

the networks.[26] These conclusions are then reported to viewers. They may consist of projections of winners or of other reports deemed newsworthy. For example, the identification of trends in voting patterns that might inform the viewer as to a given candidate's constituency and position on the issues could be reported.[27]

NBC's early projection of the 1980 victory of President Ronald Reagan illustrates the advantage achieved by the networks when using exit polls. That NBC projected the victory a full hour and thirty-seven minutes ahead of the same projection by the ABC, and two hours and seventeen minutes ahead of CBS, is generally attributed to NBC's then exclusive use of exit polls.[28] By the 1982 Senate elections, however, all three networks were using the exit polling technique.[29]

Members of Congress have a vested interest in trying to increase turnout if they believe it will help to get them elected. Traditionally, the heaviest voter turnout is from 5:30 p.m. to poll closing, after most people have left work. It is during these hours that the effects of the projections are most strongly felt on the West Coast because of the three hour time difference between EST and Pacific Standard Time (PST). When projections are made, state-by-state congressional races are as equally affected by decreased turnout as are national races. Perhaps because the projections are perceived to have the potential to affect congressional campaigns, as well as national ones, interest in Congress has been great.

As a result of congressional hearings which inquired into the early projections in the 1980 race, the networks voluntarily agreed to refrain from making projections about an election's progress in a given state until all the polls were closed in that state.[30] Although all three networks made this policy statement on the air the night of the 1982 election, they did not all uni-

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[26] *Hearings: Broadcast Media in Elections*, *supra* note 3, at 24 (statement of Reuven Frank).

[27] *Hearings: Practices and Projections*, *supra* note 3, at 95 (testimony of Mitch Farris, Atkinson-Farris Communications). This type of reporting, where analysts use data gathered from the exit polls to aid in the interpretation of the election's progress and its implications, is not in controversy. However, because the projections, which are controversial, stem from the same pool of exit poll data, any attempt at exit poll regulation as opposed to regulation of projections will cut off the data used to make the non-controversial and even beneficial reports on election interpretation.

[28] *See* N.Y. Times, Nov. 6, 1980, at A32, col. 1; Walters, *Peacock's Night to Crow*, NEWSWEEK, Nov. 17, 1980, at 82.

[29] Walters, *supra* note 28, at 82.

[30] 1983-84 NON-VOTER STUDY, *supra* note 3, at 3.

formly adhere to the policy in states where there is more than one time zone.[31] For example, ABC projected the winner of the Michigan gubernatorial race at an hour when the polling places operating on EST in that state were closed but those operating in the Central Standard Time (CST) were to be open for another full hour.[32] Additional deviations from stated network policy were noted in other states where there is more than one time zone.[33]

Because of such deviations, the League of Women Voters[34] concluded in a 1983-84 Non-Voter Study that "network practice has not changed, despite the furor created by the early 1980 election projections . . . . If anything, exit polling has proliferated and the potential for inter-network competition to project the results progressively earlier has increased."[35] The report found that in projecting winners of various congressional races, the networks in states with more than one time zone had not faithfully carried out their newly stated policy of not projecting winners until all polls were closed in the state in question.[36] At the conclusion of their report, the League of Women Voters noted that "[t]he networks seem unwilling to make appropriate changes in their method of reporting elections to protect the integrity of the political process."[37]

ABC, in 1980, announced a policy of not making projections in any state until all polls were closed in that state.[38] This was followed by the 1982 on-air statement of this same policy by all three networks. Notwithstanding these statements, the practice of early projection was continued not only through the 1982 elections, but also into the 1984 primary season.[39]

The Iowa caucuses were the opening event of the 1984 primary and caucus season.[40] The participants were to choose delegates to the Democratic nominating convention through the expression of candidate preferences which were not to begin un-

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31 *Id.* at 4.

32 *Id.*

33 *Id.* at 4-5.

34 The League of Women Voters of the United States is a group of 125,000 members founded in 1920 to "promote political responsibility through informed and active participation of citizens in government and to act on selective governmental issues." 1984 ENCYCLOPEDIA OF ASSOCIATIONS 1204-05, (18th ed.).

35 1983-84 NON-VOTER STUDY, *supra* note 3, at 6.

36 *Id.*

37 *Id.* at 7.

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

39 Los Angeles Times, Nov. 2, 1984, § IV, at 1, col. 2.

40 *Hearings: Iowa Experience, supra* note 3, at 8 (statement of Rep. Timothy Wirth).

til 8:30 p.m.[41] As the participants signed in at 8:00 p.m., some noted a preference voluntarily. Using these notations, CBS, at 8:12 p.m., projected the victor and the finishing order of the candidates. NBC followed shortly, and ABC reported its projections at 8:46 p.m.[42] The first two projections were made at an hour when the Iowa voters could not possibly have *begun* to vote. This led to the incongruous effect of results being reported before a single ballot was actually cast.

Although based on polling done as voters entered rather than exited from the polling place,[43] the media once more demonstrated evidence of a contradiction between policy and practice. The network policy quoted on the air during election night of 1982 was not having the effect that media critics hoped it would in this type of caucus election.

It should be noted, however, that the networks did adhere to the letter of their policy, if not to its spirit, with respect to the presidential election reporting in November of 1984. At that time, in compliance with their policy, the networks made no projection of the winner in any state until all polls were closed in that state. However, President Reagan's lead was large enough in states whose polls were already closed to enable him to collect sufficient votes to win December's election in the electoral college, even though many states' polls remained open. Therefore, the situation was such that the report of a national winner was still possible at a time when polls were open in several states. It follows, therefore, that in situations where no candidate has a large enough lead to accumulate the necessary number of electoral college votes at an early hour, the networks' policy would be effective. The networks claim that so large a lead is unusual and that their policy is therefore a valid reform measure which will ensure that exit polling and early projections will not negatively affect voter turnout. Were the polls to close throughout the country at the same time, the networks' policy would be even more effective. In that case, voters in the later time zones would not be affected by this non-projection method of reporting landslide winners.

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[41] *Id.*

[42] *Id.* at 9.

[43] This type of projection, based on entry polling rather than exit polling, is arguably an even more egregious breach of the voters' ability to exercise the franchise simply because the projection can be made before *any* votes have been cast.

III. The Constitutional Nature of the Controversy

A. *First Amendment Concerns*

Against this background, Congress believed it necessary to resolve the conflict between the media's right of expression and the voter's increasing sense of disenfranchisement.[44] While serving as President of NBC News, Reuven Frank stated before the congressional subcommittee investigating this matter that "I would suggest with all respect that you consider carefully what you are asking when you say information should be put out or withheld because of a presumed effect at the receiving end."[45]

Mr. Frank's suggestion merits consideration since it brings the crux of the conflict to the fore: whether withholding information out of a concern for its presumed effect on voters is merited given the conflicting first amendment rights of free speech and press. Speech about the political process is singled out as deserving the widest latitude of protection,[46] because, as the Supreme Court has noted, the framers of the Constitution believed that free speech is a precondition for the maintenance of freedom in our society.[47] "There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs."[48]

An example of a situation in which the Supreme Court has given wide latitude to the exercise of the right of expression[49] in

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[44] Examples of voters' complaints were described by Senator McClure in his statement of introduction to S. 3191. *See infra* note 117 and accompanying text.

[45] *Hearings: Broadcast Media in Elections, supra* note 3, at 47 (testimony of Reuven Frank).

[46] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 52 (1982); Mills v. Alabama, 384 U.S. 214, 218-19 (1966). That the speech sought to be regulated by the prohibition against exit polling within 300 feet of the polling place is in fact a prohibition on political speech is beyond debate. Aside from the political speech involved when the projections are broadcast, the viewer is being made aware of the winner of an election, the reasons people voted for that winner, the reasons the opposing candidate lost, which segments of the population voted for which candidate and why, plus a broad spectrum of other information of infinite political value, see *Daily Herald*, 747 F.2d 1251, 1254 (9th Cir. 1984) (Norris, J., dissenting)), there is political speech taking place at the very time the pollster is questioning the voter. *See* Nadler, *The Latest on Early Returns*, Harper's, July 1984, at 62 (reprinting an ABC News exit poll). The exit poll reprinted indicates the political nature of the speech between the voter answering the poll and the pollster. For example, one question in this survey is "Which ONE of the statements below BEST DESCRIBES why you voted for the candidate of your choice in the Presidential primary today?" *Id.* at 63. This conversation between voter and pollster consists of the same type of information that is so beneficial when collated on a large scale, except that it is on a one to one basis. Political speech between individuals deserves the same protection from this statute's attempt at its preclusion.

[47] *See* Mills v. Alabama, 384 U.S. 214, 218 (1966).

[48] *Id.*

[49] As used in this context, freedom of expression denotes the right of free speech, both through the use of actual speech in words and actions.

a political context is *Stromberg v. California*.[50] In that case the Supreme Court overturned the defendant's conviction for the display of a red flag as a symbol of opposition to organized government.[51] Explaining that the symbolic act of displaying a red flag constituted expression, the Court noted that the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."[52]

The philosophical and historical underpinnings of the first amendment may conflict with the concept of fully participatory democratic elections when the population is faced with early election projections. On one side, every citizen of this democracy has an interest in an unfettered choice among candidates. On the other side, if the first amendment gives the media the right to project winners when polls may still be open, the citizen's choice may no longer be unfettered. The franchise may become a victim of the misconception that some candidate is already victorious and that there is no need for further voting. If this is so, regulation of the media may be in order, albeit in a manner consistent with the protections guaranteed by the first amendment.

There have been other situations in which a state's legitimate interest in the conduct of elections and freedom of expression have clashed. These cases are helpful for their analysis of the conflict between the legitimate state interest in the proper conduct of elections[53] and the media's interest in freedom of expression. For example, in *Brown v. Hartlage*,[54] the election winner had made a campaign promise to reduce his salary if elected. The loser challenged the validity of his opponent's victory, relying on that state's corrupt practices act, which made it illegal to offer material benefits to voters in consideration for their votes. The election winner claimed the preeminence of his first amendment right of expression over the election law interest. The Supreme Court agreed and held the statute inapplicable for the purpose of forfeiting the election, based on the preeminence of the first

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[50] 283 U.S. 359 (1931).

[51] *Id.* at 368-70.

[52] *Id.* at 369.

[53] The State of Washington claimed to be protecting this interest in enacting the legislation prohibiting exit polls. *See supra* note 15 and accompanying text. The motive of the state for legislating is important in this area of the law, because motive also determines the proper constitutional analysis to apply. *See infra* notes 60-70 and accompanying text.

[54] 456 U.S. 45 (1982).

amendment right in this situation.[55] The Court reasoned that prohibiting the open debate of any political issue, even politicians' salaries, goes against the "fundamental premises underlying the First Amendment as the guardian of our democracy."[56]

In *Mills v. Alabama*,[57] a statute that made it illegal to conduct electioneering or to solicit votes on election day was held unconstitutional.[58] The local voters were to decide between maintaining the city commission format of government or adopting a mayor and council system. The action was brought when a newspaper published an editorial on election day advocating one form over the other. The newspaper's editorial was accused of violating the statute. The Court found, however, that the undisputed interest of the state in the proper conduct of elections was subordinate to that of the free exchange of ideas.[59]

In both *Brown* and *Mills*, although election projections were not involved, the interest in freedom of expression conflicted with the state's interest in protecting the voters' franchise, and in both cases the first amendment was held to be the stronger interest.

B. *Applicable Standards of First Amendment Review*

When discussing the regulation of election projections, an initial determination must be made of the proper mode of constitutional analysis. Historically, regulations directed at the content of speech have been regarded as highly suspect. Known as content based restrictions, such regulations classify speech according to the subject matter expressed.[60] However, certain very narrowly drawn exceptions to this historical rule have evolved. Those exceptions form the categorization doctrine. Under this doctrine, the content of the speech being regulated is found by the courts to have so little social value as to be utterly undeserving of first amendment protection.[61] The categories of speech

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55 *Id.* at 60.

56 *Id.*

57 384 U.S. 214 (1966).

58 *Id.* at 220.

59 *Id.* at 218-19.

60 *See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972). "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.' " (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

61 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

determined by the Supreme Court to be outside the scope of the protection of the first amendment based on this doctrine have been few and discrete. They included libel, obscenity, and fighting words.[62] Obviously, maintaining these categories as a limited and narrowly defined group is vital. The propensity to easily classify certain categories of speech as being utterly valueless and unworthy of protection is merely a short step away from making *any* undesirable speech unprotected. The dangers of this method of evaluating regulations aimed directly at the subject matter of speech are severe. For this reason, there should be a reluctance on the part of the courts to expand the number of categories in which regulations aimed at the content of speech are exempt from further inquiry.

Where a determination is made that the regulation is not aimed at the content of the speech, but only at the time, place, or manner[63] of the speech, or that the free flow of communication suffers only incidentally[64] as a result of the regulation, the Supreme Court has offered a different standard of constitutional review. In assessing these restrictions, the Court balances the first amendment interest, which is only incidentally being infringed upon, against the regulatory body's legitimate interest in

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> 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.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnotes omitted). One commentator has suggested that election projections are of so little value that they fall within *Chaplinsky*'s statement of the categorization doctrine. *See* Note, *Early Election Projections, Restrictions on Exit Polling, and the First Amendment*, 3 YALE L. & POL. REV. 210 (1984).

[62] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); *Chaplinsky*, 315 U.S. 568 (fighting words).

[63] For an example of the application of constitutional scrutiny to a time, place, or manner regulation affecting speech, see Consolidated Edison Co. v. Public Serv. Comm., 447 U.S. 530, 536 (1980):

> A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's view." . . . As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech irrespective of content."

Id. (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951)) (Frankfurter, J., concurring); Erzhoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

[64] For an example of a court's determination that a regulation has only an incidental effect on speech, and application of constitutional review to an incidental regulation, see Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

regulating the vice which was the purpose for the statute.[65] This standard has been expressed by the Court several times.[66] For example, in the context of speech with political implications, the Court in *First National Bank of Boston v. Bellotti*[67] held that:

> [e]specially where . . . a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," . . . . Even then, the state must employ means "closely drawn to avoid unnecessary abridgement . . . ."[68]

The speech under discussion in the exit polling situation is the give and take between network pollsters and volunteer voters. This speech takes the form of an exit poll—questioning which candidate the voter chose, what issues motivated the voter to choose that candidate, and other items of an inherently political nature. In terms of the network projections, the relevant speech is the *broadcast* of the results of the exit polls, also inherently political in nature. In either case, to analyze any potential legislation which seeks to eliminate either exit polls or the broadcast of projections that stem from them requires an initial inquiry into the state's interest in that legislation. The speech cannot be considered valueless,[69] and therefore does not fall into one of the categorical exceptions to the general first amendment rule. Further, since the speech is of a political nature, any content-based and content-motivated regulation banning it must fail. Rather than attempt to regulate against exit polling or

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65 *See, e.g., Home Box Office*, 567 F.2d at 49-50.

66 *See* First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 25-27 (1976); Bates v. Little Rock, 361 U.S. 516, 524 (1960).

67 435 U.S. 765 (1978). In *Bellotti*, a bank challenged the constitutionality of a statute which prohibited corporations engaged in certain businesses from trying to influence the outcome of an election. The bank attempted to publicize its views on a personal income tax referendum. The statute required that a corporation which did spend its money to try to influence the election could do so only if the matter being voted on was of material interest to the business of the corporation. The lower court held that because the issue in the election was personal income tax, the bank had no material interest in the outcome of the referendum and was in violation of the statute by spending money to publicize its views. The Supreme Court held that the statute was unconstitutional because it curtailed speech about the political process. For an application of this same constitutional standard in the Ninth Circuit, see Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied sub nom.* Leipzig v. Baldwin, 431 U.S. 913 (1977).

68 435 U.S. at 786 (citations omitted).

69 *See supra* notes 25-27, 95-96, and accompanying text; *see also* Fischer, *Network "Early Calls" of Elections: An Analysis of the Legality of Proposals to Keep the Voting Process from Becoming an Academic Exercise*, 14 SW. U.L. REV. 427, 450-51 (1984). This Article points out the informational value which may be derived from the projections, especially when a third party candidate is in the presidential race. In that situation, voters may actually use the projections in deciding whether to give the third party candidate their vote, or switch to the preferred candidate from a major party.

projections through a statute directly motivated by content regulations, a legislature would thus attempt to show the incidental nature of the regulation against speech. This could be done by regulating traffic or littering, for instance. Once the determination is made that the burden on speech was incidental to the regulation's primary motivation, the balancing test would be applied.[70]

Any balancing test is, by definition, somewhat nebulous. Because the subjective reactions of those doing the balancing must enter the equation, a result cannot always be predetermined. In addition, in the context of the broadcast media, the Supreme Court has articulated an additional level of scrutiny of regulations in conflict with the first amendment.

In *Red Lion Broadcasting Co. v. FCC*,[71] the Supreme Court formulated a constitutional test for prohibition of regulations in conflict with the first amendment where the broadcast media is involved. Unlike the *Bellotti* test, which is applicable generally to situations where speech about governmental affairs is restricted in contravention of the first amendment, the *Red Lion* test is applicable only to restrictions affecting the broadcast media. The latter test requires that the regulation under discussion be scrutinized less strictly. That is, the state must show an important governmental motive for the statute (not a "compelling" government interest as required by *Bellotti*) and that the statute is substantially related to that important governmental objective (unlike *Bellotti*'s stricter requirement that the statute adopt "means closely drawn to avoid unnecessary abridgement . . . .").[72]

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[70] For a recent application of this method of constitutional scrutiny see Quincy Cable T.V., Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). It should be noted that the Supreme Court has articulated a level of scrutiny (sometimes called two-tier) for restrictions on speech, which falls somewhere between the categorization doctrine and the application of a balancing test. In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), Justice Stevens' plurality opinion described a level of review which, like the categorization doctrine, looks to the value of the speech. If the speech carries low social value, such as the George Carlin monologue described in the case, and the regulation meets a much weakened balancing test, the regulation will be held constitutional. For an analysis of the reason that this standard should not apply to election projection regulations, see Fischer, *supra* note 69 at 464.

[71] 395 U.S. 367 (1969).

[72] "Although broadcasting is clearly a medium affected by a First Amendment interest, . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.* at 386 (footnote omitted). This reflects the rationale of the Court for applying different standards to different modes of expression. *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Miami Herald*, a right of reply regulation for newspapers, similar to the FCC's right of reply regulation upheld in *Red Lion*, was challenged. The Court struck down the statute in *Miami Herald*. This discrepancy is a result of the application of the stricter level of scrutiny described in *Bellotti* to the statute in *Miami Herald*.

The Supreme Court in *Red Lion* explained the reason that regulations relating to the broadcast media, as opposed to the print media, for instance, are not subject to the strict scrutiny described in *Bellotti*. The Court determined that the scarcity of broadcast frequencies mandated a higher level of regulatory intervention to ensure that scarce airwaves are used for the public benefit. Therefore, the Court was willing to look less harshly at a regulation which worked to ensure access to the limited airwaves for those who wished to reply to attacks made on them via those airwaves.[73] This reasoning, however, applies only to the broadcast media since it is only that medium which is affected by the spectrum scarcity of which the Court in *Red Lion* spoke. Other technologies, not using scarce airwaves, such as cable television, caller dial-it services, and the print media, would not be subject to the same reasoning.[74] In fact, in its recent opinion in *Quincy Cable Television, Inc., v. FCC*,[75] the Court of Appeals for the District of Columbia faced the issue of which level of scrutiny to apply in constitutional review of Federal Communications Commission regulations affecting cable television. The court's opinion, relying on the absence of spectrum scarcity in cable television, found that it was possible to apply a standard other than that described in *Red Lion*.[76] In reaching that determination, the court first had to decide that the regulation in controversy was only an incidental speech restriction.[77] The court then had to determine how strict a balancing test to apply, a step it found unnecessary because of the determination that the regulation would fail even under the less harsh analysis of *Red Lion*.[78]

Any legislation aimed at preventing projections from being broadcast would also have to apply to technologies in addition to the broadcast media. This is because it is feasible that projections can be made through sources other than the broadcast media, which is charged with *Red Lion*'s less harsh level of constitutional review.[79]

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[73] *See Red Lion*, 395 U.S. at 396.

[74] Projections could theoretically be made in many ways other than over the major networks' news services. New technologies such as home computer services, teletext, and videotex could be used to disseminate data to homes across the country. See generally Note, *Videotex: A Welcome New Technology or an Orwellian Threat to Privacy?*, 2 CARDOZO ARTS & ENT. L.J. 287 (1983) for a description of some of these new technologies. In addition, the telephone lines could be the forum for dial-an-update services.

[75] 768 F.2d 1434 (D.C. Cir. 1985).

[76] *Id.* at 1448-50.

[77] *Id.* at 1451. If the court had decided that the regulation was motivated by the content of the speech sought to be regulated, it would then determine whether that speech fit any of the traditional categories of speech unworthy of constitutional protection.

[78] *See id.* at 1450.

[79] *See supra* text accompanying note 72.

Quincy Cable makes clear that the possibility exists for a stricter review if cablecasts are affected by legislation which incidentally prevents projections.

If the rationale for preventing projections is content based, then regulations in this area would surely fail. Therefore, the appropriate level of constitutional scrutiny is the strict balancing test expressed by the *Bellotti* Court.

IV. The State Solution and its Challenge: *Daily Herald v. Munro*

A. *Washington State's Approach to Restricting Exit Polling*

Until the recent action in Congress[80] the congressional response to the problem of election day projections had been almost nonexistent. Although various proposals had been suggested,[81] the only congressional action on this matter had been a non-binding House Concurrent Resolution which:

> [e]xpressed the sense of Congress that (1) the news media should voluntarily refrain from projecting election results before the polls close; and (2) the news media and industry, trade and professional organizations should voluntarily adopt guidelines to assure that exit interview data is not used to project election results before the polls close.[82]

Due to the void left by the lack of congressional action satisfactory to them, some states have enacted legislation of their own.[83] In 1983, the Washington legislature revised a section of its Code to include in pertinent part the following provision: "[o]n the day of any primary, general or special election, no person may, within a polling place, or in any public area within 300 feet of any entrance to such polling place . . . conduct any exit poll or public opinion poll with voters."[84]

The Daily Herald Company, ABC, CBS, NBC, and The New York Times Company filed suit in December of 1983,[85] seeking an order declaring the above-quoted section of the Revised Code of Washington unconstitutional and enjoining its enforcement.[86] On

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[80] *See infra* notes 142-43, 153-54 and accompanying text.
[81] *See infra* notes 119-33 and accompanying text.
[82] H.R. Con. Res. 227, 98th Cong., 1st Sess. (1983).
[83] In addition to Washington, Minnesota and Wyoming are examples. *See supra* note 14 and accompanying text.
[84] Wash. Rev. Code § 29.51.020(1)(c) (Supp. 1984).
[85] Daily Herald v. Munro, 10 Media L. Rep. (BNA) 2144 (W.D. Wash. 1984) (subsequent history omitted).
[86] *Id.*

June 29, 1984, in *Daily Herald v. Munro*,[87] the Western District Court of Washington issued a declaratory judgment ruling that the statute was constitutional.

The plaintiffs appealed from this ruling, and in an opinion by the Ninth Circuit,[88] the declaratory judgment was reversed and remanded. In effect, this reversal of a declaratory judgment that had upheld the statute's constitutionality was sufficient legal support for the conduct of exit polls on election day of 1984 within 300 feet of any polling place. The appellate court's reversal of the district court's declaratory judgment was based on a finding that unresolved factual issues rendered the summary judgment order entered in the court below inappropriate.[89] These unresolved issues were found to be: (a) the definition of an exit poll; (b) whether exit polls would be disruptive to decorum at the polls; (c) whether the polls would be reliable if conducted outside the 300 foot area;[90] (d) the room around the polling place that would be necessary to ensure the proper conduct of the election; (e) whether the presence of pollsters would discourage voters from exercising their franchise; and (f) whether the true purpose of the statute was to preserve maintenance of decorum at the polls.[91]

As a result of this procedural posture in which the district court's opinion was reversed, no trial was ever conducted on the constitutional merits of the issues in the case.[92] In the court of appeals, an opinion concurring in result but dissenting in part was filed. The dissent saw no remaining triable issues of fact.[93] Instead, the dissent based its decision to vacate summary judgment on the constitutional merits, which it alone reached.[94]

In their arguments, the parties took opposite sides in the constitutional battle. The media claimed they were trying to protect speech used in the furtherance of political choice.[95] This view im-

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87 *Id.*

88 Daily Herald v. Munro, 747 F.2d 1251 (9th Cir. 1984).

89 *Id.* at 1251-52.

90 A certain degree of the reliability of the projections stems from the fact that those polled have actually voted. This contrasts these polls from the pre-election opinion polls. If network pollsters have no access to those voters because they are kept at such great distances from each other, the benefits of exit polling in making accurate projections may be lost. The networks contend that at a distance of 300 feet from the polling place, they will not be able to distinguish voters from mere pedestrians.

91 *See supra* notes 63-70 and accompanying text for a discussion of how a determination of the statute's purpose can be dispositive of its constitutionality.

92 A petition has been made for a rehearing *en banc* in the Court of Appeals for the Ninth Circuit.

93 *Daily Herald*, 747 F.2d at 1254 (Norris, J., dissenting).

94 *Id.*

95 Brief for Appellants at 22, *Daily Herald*, 747 F.2d 1251.

pressed the dissent, which cited several affidavits in support of this claim by the media.[96] On the other hand, Washington contended that the primary objective of the statute was to maintain decorum at the polls.[97] In support of this proposition, the state referred to the statute's legislative history. The bill's prime sponsor, when introducing the legislation, cited the disorientation felt by his constituents when confronted with exit polls.[98] His constituents, he said, thought that the polls were part of a new voting process.[99]

If the maintenance of order and the dispelling of voter confusion were the goals of the Washington statute, then the confusion can be readily resolved. The Supreme Court has held that in situations where a regulation is aimed at expression, "the preferred First Amendment remedy" is additional, explanatory speech.[100] Therefore, explanatory speech must be the state's initial avenue of remedy. More readily visible identification of network pollsters or disclaimers of any official affiliation would be helpful in this context. If these measures were implemented, and if Washington sought to prevent only the disruption of decorum at the polls, restriction of communication about current political issues between the voter and the pollster would no longer be necessary. Instead, the journalists, those best equipped to translate that communication into information for the public's edification, would be given access to it.

B. *Applying the Constitutional Standards to the Washington Statute*

Although the controversy in *Daily Herald* was never resolved on the constitutional merits, the reversal by the Court of Appeals for the Ninth Circuit, in effect, held the Washington statute unconstitutional. However, in the slightly different context of solicitation of petition signatures, a Florida law prohibiting the solicitation of signatures within 300 feet of the polling place[101]

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[96] The speech is gathered and collated into information which is made available to the academic community, finds it way into the newspapers in the way of post-election reporting on the nation's priorities, and is used to generally study voter behavior. One of the affidavits cited by the dissent, that of Everett Carl Ladd of the Roper Center for Public Opinion Research at the University of Connecticut, explains that "[e]xit polls are a priceless resource in the study of voter behavior and elections. There exists no other polling technique that provides as reliable a source of information on voters and voting behavior." *Daily Herald*, 747 F.2d at 1257 (Norris, J., dissenting).

[97] Brief for Appellees at 19-22, *Daily Herald*, 747 F.2d 1251.

[98] *Id.* at 20.

[99] *Id.*

[100] Whitney v. California, 274 U.S. 357 (1927). Where the possibility exists for the avoidance of regulation that could possibly conflict with the first amendment, obviously, avoidance is preferred. If this avoidance can only be achieved by explaining the speech that is sought to be regulated, then that explanation is a small price to pay for avoiding a constitutional conflict.

[101] FLA. STAT. § 104.36 (1984).

was struck down as unconstitutional in *Clean-Up '84 v. Heinrich*.[102] The District Court for the Middle District of Florida held that the state's acknowledged purpose of maintaining order of the polls was not best served by this statute: "[t]he State has made no showing that the statute is a necessary or even a reasonable means to insure order at the polls. The court cannot uphold a law that substantially infringes First Amendment protections based only upon a vague specter of future disorder."[103]

The similarities between the situation in Florida and the one in Washington are substantial. Both concern the conflict between the state interest in the proper conduct of elections and the interest in free expression. In addition, neither the Florida nor the Washington statute seeks to regulate the content of expression, but only the place in which the information can be gathered.

If for no other reason than the one discussed in *Heinrich*, it would seem that the Washington statute could not survive constitutional scrutiny. Even the majority opinion in the Court of Appeals for the Ninth Circuit discusses the lack of factual resolution on whether the polling was disruptive to the decorum of elections in Washington.[104] The dissent's support of the media's claim that the real purpose of the statute was to prevent projections and not to maintain decorum lends further support to the hypothesis that the Washington statute could not survive constitutional scrutiny under the standard used in *Heinrich*. The state could not prove to either the majority or to the dissent that its statute was a necessary or even reasonable means to insure order at the polls.[105] More closely drawn legislation is possible, involving clearer identification of network pollsters or dissemination of information about their activities before election day. Simply eliminating the pollsters from the entire area is not the least intrusive method of maintaining decorum.

As in *Heinrich*, a first step in the constitutional analysis of the

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[102] No. 84-245-Civ-T-15, slip op. (M.D. Fla. July 19, 1984).

[103] *Id.* at 5.

[104] *See supra* notes 90-91 and accompanying text.

[105] Additionally, an analysis ascribing a content-based motivation to the Washington statute would mean that under the admonitions of the Supreme Court in Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) and New York Times v. Sullivan, 376 U.S. 254, 270 (1964), which prohibit the restriction of expressive activity based on its content, the statute would fail. This is because the speech being regulated fits none of the traditional categories described by the Court as undeserving of protection. Therefore, the only possible way of constitutionally validating the statute is to find that its purpose was not to burden speech directly, but to do so only incidentally. In that case, a balancing analysis could be applied.

statute would be to determine the appropriate standard of review to apply. Among the balancing tests,[106] the stricter level of scrutiny outlined in *Bellotti* and applied in *Heinrich* would seem to be the appropriate standard of constitutional review. This is because the statute is not aimed specifically at the broadcast media. Rather, all parties who might seek to conduct exit polls and make projections are affected. For example, cable organizations, such as Cable News Network, obviously have an interest in gathering the same data as do the broadcast networks. Therefore, even if the statute's supporters seek to invoke the *Red Lion*[107] standard, claiming that the statute is aimed exclusively at the broadcast media, opponents of the statute can persuasively argue that the statute is equally aimed at cable television. As discussed in *Quincy Cable Television, Inc. v. FCC*,[108] the Supreme Court has not yet decided on the appropriate standard of constitutional review for regulations in conflict with the first amendment that affect cable television. The *Quincy* Court, however, has implied that such a standard could be different from the one applied to the broadcast media.[109] As explained above, the potential difference in standards applied to cable television stems from the fact that the number of cable channels is not as limited as is the number of airwaves available for broadcasting. Because of the limited spectrum for broadcast, more intrusive regulation is tolerated to safeguard the important government interests in access to the medium.[110]

Since the Washington statute bans all exit polling within 300 feet of the polls, its effect is not restricted merely to the broadcast media. In fact, members of the print media were parties to the networks' challenge to the statute.[111] Because of the potential

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106 One commentator has suggested that the balancing tests need never be reached because the statute is not an incidental burden on speech but a direct content-based regulation. *See* Note, *Early Election Projections, Restrictions on Exit Polling, and the First Amendment*, 3 YALE L. & POL. REV. 210, 227 (1984). The argument is then made that although the speech is sought to be regulated by a direct content-based regulation and the speech does not fall into any of the established unprotected categories such as obscenity and fighting words, a new category should encompass this speech to keep it unprotected. The commentator suggests that the projections, like obscenity and the other unprotected categories, have no social value. *Compare* this view *with* the dissenting opinion in the Court of Appeals for the Ninth Circuit. *Daily Herald*, 747 F.2d at 1255-56 (Norris, J., dissenting), where several affidavits are cited in support of the benefits derived from the exit polling data. The Washington statute seeks regulation of exit polling, not projections, regardless of its purpose.

107 *See supra* notes 71-79 and accompanying text.

108 768 F.2d at 1443 (D.C. Cir. 1985); *see supra* notes 75-78 and accompanying text.

109 *See id.* at 1450.

110 *See supra* notes 71-74 and accompanying text.

111 The Daily Herald is a Washington newspaper. The New York Times was also a

effect of the statute on various media in addition to the broadcast media, the standard of review espoused by the Court in *Red Lion* would not encompass all of the statute's applications. If, for example, Cable News Network were to conduct exit polls, the rationale for applying a less exacting level of scrutiny would not be applicable since there is no scarcity of broadcast spectra where cable television is involved. As technology changes, so must the level of scrutiny applied to alleged governmental interference with first amendment rights.[112]

The potential for this statute's conflict with the first amendment can be approached in two ways. It could be argued that the restriction on exit polling is merely regulation of information gathering and not dissemination. However, it does appear that without the gathering of this type of information, the projecting is impossible. The State of Washington argues that its legitimate interest in the maintenance of decorum at the polls is what is in conflict with the first amendment.[113] The dissenting opinion in the appellate court rejects this contention,[114] noting that the statute's legislative history indicates that the motivation for its passage was concern over the projections and their impact on voters. If the legislative history shows that motivation for the regulation was either to directly prohibit speech of a certain type, in this case, election projections, or to prohibit that type of speech in a certain place, namely, within 300 feet of the polling place, then the restriction is content-based and not a result of incidental regulation. Since the speech is political, has inherent value, and does not fall within any of the unprotected categories, this regulation must fail.

If it is accepted, however, that the statute's purpose is to promote the maintenance of decorum at the polls, then a balancing test is proper since the speech regulation then becomes incidental. The statute's effect, no matter what its purpose, is to restrict speech. Since it has this effect on media other than those affected by spectrum scarcity, the middle level scrutiny of *Red Lion* is inappropriate. Rather, the stricter *Bellotti* test applies. While simply protecting the polling place and maintaining decorum is a state's right,[115] *Heinrich*, applying *Bellotti*'s test, makes it clear that the

plaintiff in the constitutional challenge to the Washington statute. The fact that these newspapers sought a challenge to the ban on exit polls is evidence of their interest in continuing the practice.

112 *See supra* note 72.

113 *See supra* note 97 and accompanying text.

114 *Daily Herald*, 747 F.2d at 1262 (Norris, J., dissenting).

115 *See* Mills v. Alabama, 384 U.S. 214 (1966).

state's power over elections is limited by the first amendment when such considerations are appropriate.

Since the recent developments in Congress show some signs of resolving the problem that early projections arguably cause the western states, the Washington statute will probably be supplanted by national legislation making local solutions unnecessary. However, the statute emphasizes the result of a state's attempt at regulation of the nationwide press.

V. Congressional Proposals for the Protection of the Voter's Rights

Either in response to constituents' entreaties[116] or their personal feelings about early projections,[117] several Members of Congress have joined the media critics in decrying the practice. Despite the fact that the projection of the victory of President Reagan in both 1980 and 1984 was nothing more than the confirmation of a landslide, several close congressional races were yet to be decided.[118] Voters are often drawn to the polls to vote for the President and other high profile candidates, but once there, they vote on many other races. Even though the projections may not affect the election of candidates with national, high profile stature when there is a landslide victory, they can affect other elections that are closer calls because, as a practical matter, decreased turnout is a factor only in a close race.

Members of Congress seem to be concerned with protecting the voters' right to exercise their democratic choice free from the encumbrances of early projections. This intent is evidenced by Senator McClure of Idaho's statement, when he introduced a bill[119] that would make it illegal for the networks to project a winner while any polls were still open. Senator McClure explained that by the time he got to the polling place at 5:30 p.m. PST:

> [t]he networks had determined the election was decided and President Carter was ready to concede defeat . . . . I am . . . concerned that the right of every American voter to cast a ballot assured that his or her vote makes a difference is important, is worth making the effort for, is protected. I believe people should be free to make a choice based on their own

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116 *Hearings: Broadcast Media in Elections, supra* note 3, at 31 (statement of Rep. Al Swift).

117 Statement of Senator McClure introducing S. 3191, 96th Cong., 2d Sess., 126 Cong. Rec. 29, 378-79 (1980).

118 N.Y. Times, Sept. 13, 1984, at B15, col. 1.

119 S. 3191, 96th Cong., 2d Sess. (1980).

> convictions and judgment without the undue influence of what the networks say is going to be the result. I can think of no better way to reduce voter turnout or to discourage participation in the election process than to allow this practice to continue.[120]

Senator McClure's bill was not the only one which was motivated by these concerns. Almost immediately after the 1980 election, other bills were introduced with similar goals.[121] The sponsors of such legislation were mostly Members of Congress from the western states,[122] which is understandable given the time difference between the coasts and the arguably greater effect of the projections because of that difference. Other efforts at solutions to this perceived problem include the 1982 proposal of Representative Grisham of California that would amend the Federal Criminal Code to prohibit disclosure of election results before all polls have closed in a state.[123] In 1983, Representative AuCoin of Oregon proposed an 11:00 p.m. EST poll closing time for the entire country.[124] Also in 1983, Representative Swift of Washington proposed legislation that would have the networks voluntarily refrain from projecting election results before the polls close.[125] In 1984, Representative Edwards of California proposed a similar voluntary restraint bill.[126] Considering the fact that the bills cited are only representative of congressional outcry on this issue, it is interesting to note that throughout the 1984 presidential election primary season (but not the general election) early projections were still being broadcast.[127]

Congressmen from the West were not the only ones to urge reform. Representative Mario Biaggi of New York has been seeking passage of a bill that would change election day to Sunday or a consecutive twenty-four hour period.[128] The purpose of this bill is to draw more people to the polls at an earlier hour in order to limit any possible impact of the projections, and to generally increase voter turnout. In editorials in both 1981[129] and 1982,[130] as well as in a

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120 *See supra* note 117.

121 *See supra* notes 11-12 and accompanying text.

122 These were, for example, Senator McClure of Idaho, Representative Grisham of California, Representative AuCoin of Oregon, and Representative Edwards of California.

123 H.R. 5472, 97th Cong., 2d Sess. (1982).

124 H.R. 4140, 98th Cong., 1st Sess. (1983).

125 H.R. Con. Res. 227, 98th Cong., 1st Sess. (1983).

126 H.R. Con. Res. 395, 98th Cong., 2d Sess. (1984).

127 *Hearings: Iowa Experience, supra* note 3, at 7.

128 H.R. 84, 98th Cong., 1st Sess. (1983).

129 N.Y. Times, Jan. 19, 1981, at A24, col. 1.

130 N.Y. Times, Aug. 21, 1982, at A22, col. 1.

recent commentary on the reporting of the 1984 presidential election,[131] the *New York Times* has supported such measures, calling them a "reasonable remedy" to the "infection" of projections.[132] Senator McClure, however, believes that the networks should be the ones who change their ways, not the voters.[133]

Criticism of the Sunday/twenty-four hour voting period plan and the uniform poll closing plan has also been voiced by the League of Women Voters, which raises what it considers to be the four shortcomings of such plans.[134] The first is that there is a traditional stratification of American classes and the hours in which they vote.[135] For example, it is typical that working class Americans vote in the later hours.[136] Therefore, it might be discriminatory to working class Americans to close all polls at an hour on the East Coast which is after standard working hours, but which would eliminate the ability to vote in the after work hours in the West.[137]

The second objection voiced by the League is the cost of any changes in the voting schedule and the accompanying burdens involved.[138] Third, and most challenging to any voting schedule switch, is that to make any of these plans work requires some measure of media cooperation, a commodity that is not in any way guaranteed. Cooperation is required because merely changing election day to Sunday or providing for a uniform poll closing time does not ensure that exit polling results will not be used to make early projections.[139] In a hypothetical uniform poll closing situation, where polls close at 10:00 p.m. EST, it would be 7:00 p.m. in those areas of the country operating on PST. If at 9:00 p.m. EST, enough data had been collected to enable the networks to make any projections, the uniform poll closing would have had no effect on the problem of early projections. This is because the potential remains for data from earlier voters to have an impact on later voters. While the disparity in effect between the eastern and western portions of the country would no longer be an issue, the projections would still be possible. This is especially true given the increasingly early hour at which projections can accurately be made.[140] Therefore, uniform

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131 N.Y. Times, Nov. 15, 1984, at A24, col. 1.
132 N.Y. Times, Nov. 6, 1980, at A32, col. 1.
133 *See supra* notes 117, 120, and accompanying text.
134 1983-84 NON-VOTER STUDY, *supra* note 3, at 7.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Hearings: Practices and Projections*, *supra* note 3, at 101 (testimony of Mitch Farris of Atkinson-Farris Communications).

poll closing times cannot resolve the problem without the imposition of voluntary or involuntary broadcaster restraint.

Similarly, a mere imposition of broadcaster restraint, whether voluntary or not, will not be sufficient to avoid duplication of early projections, such as that of President Reagan's victory in 1984. In the absence of an outright prior restraint on the projections, critics and legislators sought the networks' voluntary cooperation in not broadcasting the projected winner of any state's electoral votes until all the polls had closed in that state.[141] The networks adhered to that voluntary system of restraint. Even so, the Reagan victory became apparent at a very early hour. When the polls did close in each state, the number of electoral votes allocated to that state were added to the electoral votes already in the pool of each candidate. When Reagan had achieved victory in the minimum number of states necessary to reach the electoral vote total needed to elect him in the electoral college, the election was essentially over for voters in states where polls were still open, even though the networks had adhered to the policy that was requested by those opposed to the projections. If the solution to early projections is still seen as embodied in the network policy of not projecting the outcome of any state's voting until all polls have closed in that state, it is apparent that a union of this policy with a uniform poll closing time is the appropriate solution to the problems left unresolved by the policy when it stands alone.

Recently, an agreement was reached by the three major networks and the House Task Force on Elections.[142] The agreement provides that the broadcasters will discontinue use of exit polls in making projections or "characterizations" of a race while polls are still open.[143] This leaves the way clear for a uniform national poll closing by rendering moot the objections raised above. The House Task Force has therefore agreed to hold a new set of hearings with the idea of resolving to institute legislation calling for such a uniform poll closing time. While this solution is workable, appropriate, and effective, it should be noted that it depends heavily on the cooperation of the networks. Although this cooperation is forthcoming at the present time, it can also be withdrawn at the networks' whim.

The fourth objection of the League mirrors that of Senator McClure. The League states that "[i]n a larger sense, there simply is not need for such disruptive remedies . . . . [I]t is arrogance on the

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141 *See supra* note 31 and accompanying text.
142 N.Y. Times, Jan. 18, 1985, at A1, col. 1.
143 *Id.*

part of the networks to suggest that our entire electoral system should be revised for their convenience . . . ."[144]

Nevertheless, solutions are still sought because of legislators' perceptions that projections will continue, and that they affect the election process as a whole by reducing voter turnout. However, this assumption is not necessarily accurate. In the course of the previous hearings,[145] many experts have testified to the effects, or lack thereof, of projections on voting patterns and turnout.[146] Statistical evidence of the possible effects of projections was introduced,[147] as well as Subcommittee Members' subjective descriptions of people walking away from the polling places after hearing the projections.[148]

During the course of the hearings, many references were made to a study conducted by the University of Michigan which supports the proposition that voter turnout decreased by six to eleven percent as a result of the early projections.[149] However, as with any set of statistics, some interpret the results of this study differently because of supposed flaws in the research methodology. A University of California at Berkeley study found that projections were not the key to the low turnout recorded in the 1980 election.[150] The Michigan study has been criticized as using too small a statistical sample.[151]

Whether projections cause lower turnout and/or disenfranchisement of voters has not been answered definitively. In this battle between Congress and the media, each side has sufficient statistical ammunition to draw upon so that a definitive answer is unlikely.[152] Therefore, the statistics become irrelevant, and it can only be the intuitive idea that projections must affect turnout that remains as the motivation for potential legislation.

As set out above,[153] the latest proposal by Congress to address this issue involves a Congressional promise to work on a uniform poll closing hour in exchange for a network promise to voluntarily refrain from projecting winners while polls remain open. This pro-

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144 1983-84 NON-VOTER STUDY, *supra* note 3, at 7.
145 *See supra* note 3.
146 *Id.*
147 *Hearings: Practices and Projections, supra* note 3, at 110-23 (testimony of John E. Jackson, Center for Pol. Studies, Institute for Social Research).
148 *See supra* note 117.
149 27 AM. J. OF POL. SCI. 615-33 (1983).
150 *Hearings: Broadcast Media in Elections, supra* note 3, at 26-27; *see also* N.Y. Times, Sept. 13, 1984, at B15, col. 1.
151 N.Y. Times, *supra* note 150, at B15.
152 *See supra* notes 149-51 and accompanying text.
153 *See supra* notes 142-43 and accompanying text.

posal seems to meet the constitutional test of validity as set out in *First National Bank of Boston v. Bellotti*.[154] In addition, it protects the voters' franchise without abridging first amendment rights. The joint remedy provides a symbiotic solution to a complicated problem. Because the proposal does not prohibit the media from making projections at a time when the potential for infringement of the voters' rights no longer exist, it keeps to a minimum the media's need to restrict information. Therefore, even the stricter test of constitutional scrutiny set out in *Bellotti* is met by this remedy. Enacting a uniform poll closing hour is necessary to further a compelling governmental interest in preserving the right to vote and is as closely drawn as possible to avoid unnecessary abridgement.

Arguably, this solution depends heavily on the media's voluntary restraint from announcing early projections. However, since the controversy began, the media has been seeking statutory change of the election laws to create a uniform national poll closing time. Whether this is due to a desire by the media to absolve itself from possible implication in reducing voter turnout, or for some other reason, such as ease in reporting on elections, the fact that the House Task Force on Elections is considering this revision in election law in *exchange* for the media's continued voluntary abstention from early projections indicates a stronger motive for compliance. Without this voluntary compliance, it is unclear that potential national level media regulation is possible under the first amendment constraints of *Bellotti*. Given that other proposals exist, such as uniform poll closing times and twenty-four hour voting, and that voluntary restraint has the potential to be an effective solution that would square the competing interests, a prior restraint on this political speech seems superfluous. Restraining the content of speech in a manner that prohibits the networks from announcing the results of a *political* campaign cannot possibly be the least restrictive means of protecting the electorate's right to vote. Further, the compelling force of the government's interest cannot be proven on more than an intuitive level. Any statistics attempting to prove that voter turnout actually had been reduced as a result of the projections have not been definitive. Remedies on a state-by-state basis, such as Washington's, cannot be as effective as a national solution given the national scope of the broadcast media. State-by-state regulation subjects the media, which is national in scope, to running the gauntlet of fifty sets of rules when seeking to gather data. When dealing

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[154] 435 U.S. 765 (1978).

with a problem on a national level, the appropriate solution is on a national level.

VI. Conclusion

Because of the competitive nature of the news media, particularly the competition among the three major broadcast networks, the race to be number one is fierce. Given the present state of technology, election winners can be projected not only before the voting ends, but surprisingly before it even heavily develops in some states.[155] In order to make these projections, and to make them accurately, the networks use what are known as exit polls.[156] Because these voter polls contribute greatly to the capability of the networks to make early projections, and, as some critics contend, infringe on the voters' franchise, they have become the source of controversy.

Many Members of Congress as well as others[157] are critical[158] of early projections and the exit polls that make them possible. These critics contend that the early projections cause voters to feel that their vote will not count and so deter them from casting ballots.[159] However, the media seeks to uphold its first amendment rights to freely report on what is, in its perception, important news.

Throughout several congressional hearings,[160] the two sides have exchanged arguments with no result except for petitions by Congress seeking voluntary abstention by the media from using the data obtained from exit polls to broadcast early projections.[161] Recently, the media agreed to abstain from broadcasting the results of the exit polling to make projections while polls are still open, if Congress would consider legislation that would close the polls at the same time nationwide, despite the different time zones.[162] Congressional legislation of this type could replace legislation passed by some of the states, including Washington's,[163] which sought to terminate the exit polling, and therefore, the early projections which are based on the data ob-

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155 *Hearings: Practices and Projections, supra* note 3, at 101 (testimony of Mitch Farris, Atkinson-Farris Communications).
156 *See supra* note 4 and accompanying text.
157 *See supra* note 3 and accompanying text.
158 *Id.*
159 *Id.*
160 *Id.*
161 H.R. Con. Res. 227, 98th Cong., 1st Sess. (1983).
162 N.Y. Times, Jan. 18, 1985, at A1, col. 1.
163 Wash. Rev. Code § 29.51.020(1)(e) (Supp. 1984).

tained in that polling.[164]

This Note examined the media's challenge to the constitutionality of the Washington statute. Although the constitutional merits were not reached by this challenge in *Daily Herald v. Munro*, the fact that the statute sought to curtail speech about the political process in a way that was not the least possibly intrusive upon first amendment freedoms, would render a constitutional challenge by the media successful. Since the new congressional scheme of voluntary restraint[165] looms over the horizon, it is doubtful that the individual states would still deem it necessary to legislate in a manner similar to Washington's in order to prevent projections on a nationwide basis. Rather, the new national legislation, a solution amenable to both the media and its critics, should be passed to resolve the competing interests.

VII EPILOGUE

As this Note goes to press, the District Court for the Western District of Washington, on remand from the Court of Appeals for the Ninth Circuit,[166] has struck down the Washington statute banning exit polls as unconstitutional. That court held as a matter of fact that there was no evidence of disruption or disenfranchisement resulting from the exit polls.[167]

Chanie Kamenetsky

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164 *Id.*

165 *See supra* notes 142-43, 152-53 and accompanying text.

166 The petition for a rehearing en banc, discussed *supra* at note 92 has been denied. *See* Daily Herald v. Munro, 758 F.2d 350, *modifying* 747 F.2d 1251 (9th Cir. 1985).

167 N.Y. Times, Dec. 19, 1985, at A26, col. 1.