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Stephen M. Leonardo
University of Dayton

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RESTRICTING THE BROADCAST OF ELECTION-DAY PROJECTIONS: A JUSTIFIABLE PROTECTION OF THE RIGHT TO VOTE

I. INTRODUCTION

On Tuesday, November 4, 1980, voters went to polling places across the United States to elect their fortieth president. That same day, at 8:15 P.M. eastern standard time, from its New York City election headquarters, the National Broadcasting Company "called" the election based on its own computer projections,¹ declaring Ronald Reagan the president of the United States. While hailed for its quick accuracy, this projection also produced a controversy unparalleled in the brief history of network television coverage of national elections.²

Almost immediately after the 1980 elections were over, criticism surfaced surrounding the effect of NBC's early projection. Articles, reports, and letters were written describing how voting lines outside polling places disappeared, how turnout decreased over prior years, and how voters stayed home after it became apparent that their favored candidates had already won or lost.³ Common to most of the objections condemning the broadcast of early projections was the desire to eliminate any future reoccurrences of this asserted impairment of the right to vote.⁴

In response to this reaction, congressional hearings were held, private studies were conducted, and remedial bills were proposed by members of Congress.⁵ However, as time passed and the fervor quieted, the

1. *The Race to 'Call' Elections*, Nat'l L.J., Nov. 8, 1982, at 11, col. 1; N.Y. Times, Nov. 6, 1980, at A32, col. 1.

2. *Light, Effect of Media Projections on Pacific Coast Voting under Congressional Study*, 39 CONG. Q. WEEK. REP. 1437 (1981). "The television networks have been projecting winners for presidential races since 1964. But no media election calls have spawned this much controversy." *Id.*

3. *Election Day Practices and Election Projections: Hearings Before the Task Force on Elections of the Comm. on House Administration and the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st & 2d Sess's 123-25, 130-32 (1982) [hereinafter cited as *Hearings, Election Day Practices*]; *Early Election Returns and Projections Affecting the Electoral Process: Hearings Before the Comm. on House Administration and the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 61-66, 195-217 (1981) [hereinafter cited as *Hearings, Early Election Returns*]; Rowen, *Turning off the Tube*, NEW REPUBLIC, Dec. 13, 1980, at 6; Turner, *How the West Was Made to Feel That Its Votes Would Not Count*, N.Y. Times, Nov. 6, 1980, at A32, col. 1.

4. See *supra* notes 1-3.

5. *Hearings, Election Day Practices*, *supra* note 3; *Hearings, Early Election Returns*, *supra* note 3.

bills before Congress were allowed to die; no further action was ever taken.⁶

This comment will examine the controversy created by early projection broadcasts, focusing on the conflict between the networks' claimed first amendment right to broadcast the projections versus the voters' right to exercise the franchise free from impairment. While several suggested solutions to the problem will be explored, this comment will conclude that a legislative restriction on the broadcast of election projections while polls remain open is the necessary remedy.

II. EARLY PROJECTIONS—METHOD AND EFFECT

NBC arrives at the election results it projects through the use of exit-polling,⁷ "intensive preelection information gathering, . . . key precinct vote tabulations, and county-by-county vote comparisons. This information is examined and analyzed by a 'decision desk' team from the NBC News election unit. Making extensive use of computers, skilled and experienced persons ultimately decide what that information means."⁸ In this manner, NBC was able to project the results of the 1980 presidential election while the polls were still open in at least twenty-three states.⁹

The major concern about these early projections was later expressed by Representative Timothy E. Wirth during congressional hearings on the subject of early broadcasting of election results. Mr. Wirth, the presiding chairman, stated that "election night projections can take on a life of their own that has a potentially disruptive and

6. At the time this comment was submitted for publication, it appeared that all of the legislation proposed in Congress to address the problem of the broadcast of early election projections remained in or had died in committee. For a discussion of such proposals, see *infra* notes 73, 89 and accompanying text.

7. Because NBC was the first network to broadcast presidential election projections in the 1980 election, further explanation of election projection procedures will focus on the techniques used by NBC. NBC makes extensive use of "exit-polls." Exit-polling involves the questioning of voters as they leave the polls concerning how they voted. *Hearings, Early Election Returns, supra* note 3, at 16-18. Through the careful interviewing of small numbers of voters in statistically meaningful precincts, projections can be made before the polls close and the vote is tabulated. See Weinraub, *Networks in Dispute on Fast Projections*, N.Y. Times, Nov. 6, 1980, at A32, col. 1. It should also be pointed out that the other two networks, ABC and CBS, have not used exit-polling in making projections. See *Hearings, Early Election Returns, supra* note 3, at 17 (statement of William A. Leonard, president of CBS News). CBS has used exit-polling for demographic study, relying almost entirely on an analysis of selective precincts for its estimation procedure. See *also id.* at 11 (statement of Richard C. Wald, senior vice president of ABC News) (ABC did not use exit-polling to project races, but for purposes of analysis).

8. *Hearings, Early Election Returns, supra* note 3, at 16 (statement of William J. Small, president of NBC News).

9. *Race to 'Call' Elections, supra* note 1, at 11.

long-term influence beyond viewer's living room."¹⁰ To a significant extent, the "disruptive" influence Mr. Wirth alluded to was in fact documented during the 1980 elections. Several studies have shown that, of those areas exposed to the early projection while polls remained open, actual decline in voter turnout was 2 to 3%.¹¹ Other studies place the percentage of voter decline at a much higher level, perhaps as high as 11%.¹² This 11% figure is not unbelievable if one considers that an average of up to 25% of the persons who vote do so after 6:00 P.M.¹³

Even if the 11% figure is rejected, however, some examples from the 1980 elections reveal that a mere 2% decline in voter turnout can have significant effects. For example, in the United States House of Representatives race for the twenty-first district in California, Democratic incumbent James Corman lost to the Republican challenger Bobbi Fielder by a margin of 864 votes out of a total of 145,440 votes cast.¹⁴ If the total vote had been increased by only 2% and Corman could have obtained 65% of those additional votes, he would have won by nine votes.¹⁵

Another example is found in the Oregon congressional race between Democrat Al Ullman, who had been a member of Congress for twenty-four years, and the challenger, Republican Denny Smith. Smith won the election, but by a margin of less than 2% of the votes cast.¹⁶ Thus, even a 2% decline in voter turnout can have significant effects on election results.¹⁷

By far, the greatest amount of evidence available regarding early projections concerns how the projections were perceived and interpreted by individuals who had not yet voted. The prevalent reaction was that

10. *Hearings, Early Election Returns*, *supra* note 3, at 2 (statement of Rep. Timothy E. Wirth, chairman of the Subcommittee on Telecommunications, Consumer Protection, and Finance).

11. *Id.* at 151-56 (statement of Prof. Wolfinger); *id.* at 156-61 (statement of Prof. Percy H. Tannenbaum); *id.* at 303-05 (statement of Laura L. Appleton and John R. Dugan).

12. *Hearings, Election Day Practices*, *supra* note 3, at 117-22 (statement of Prof. John E. Jackson).

13. Light, *supra* note 2, at 1437.

14. *Hearings, Early Election Returns*, *supra* note 3, at 55 (statement of Dr. Austin Ranney).

15. *Id.* This argument is not merely conjectural. There is evidence showing that in the 21st district in California, there may have been up to 5900 Democrats that did not vote while the number of Republicans who refrained from voting was only 1500. *Id.* at 126 (statement of Rep. Jerry Lewis).

16. *Id.* at 217 (statement of Raymond A. Phelps).

17. The reason for this is that the electoral vote of each state is cast as a unit and the victorious presidential and vice presidential candidates in each state win the state's entire electoral vote. *See generally* U.S. CONST. art. II, § 1 & amend. XII; Annot., 153 A.L.R. 1066 (1944). Consequently, since 2% of the vote or less could be the margin of victory in a given state, the early projections could be responsible for the placement of a state's electoral vote.

upon hearing the early projection, the individual voter felt that his or her vote no longer counted.¹⁸ People standing in lines, waiting to vote, turned and left upon hearing the projection that Reagan had won.¹⁹ As one speaker at the hearings stated, "Commonsense [sic] tells you it would affect some people, and I can't imagine a network executive anywhere who would not fight to the bitter end to prevent the final score of a football game from being flashed on the screen during the first quarter."²⁰ It is apparent that the early projections actually caused some voters to refrain from exercising their right to vote.²¹ Thus, the claim of some of those voters who resided in states where polls remained open after election projections were made is that the projections infringed upon their right to vote.²²

III. THE CONFLICTING INTERESTS

Despite claims that early election projections infringed upon the rights of certain voters to cast their ballots, television networks claim that the first amendment guarantees them the right to make such projections.²³ Thus, the controversy surrounding early election projections is based on a confrontation between two of this country's most valued and protected freedoms. On one side stands freedom of speech,²⁴ regarded as fundamental and traditionally accorded the highest degree of protection by the courts.²⁵ On the other side of the controversy stands

18. For example, a survey by the Los Angeles Times showed that 71% of those interviewed felt that they had been deprived of the right to an effective and meaningful vote. *Hearings, Early Election Returns*, *supra* note 3, at 2 (statement of Rep. Timothy E. Wirth).

19. See, e.g., *id.* at 175 (statement of B. Teri Burns); *id.* at 115 (statement of March Fong Eu, secretary of state, State of California); *id.* at 225 (statement of C. Lynn Smith).

20. *Id.* at 3 (statement of Rep. Al Swift).

21. See *supra* notes 11-12 and accompanying text. The most recent and comprehensive study was conducted by the Center for Political Studies at the University of Michigan. Specific findings from the study indicate that overall voter turnout declined by 6 to 11% as a result of the early projections. *Hearings, Election Day Practices*, *supra* note 3, at 18 (statement of Rep. Mario Biaggi) (citing research of the Center for Political Studies, Institute for Social Research, University of Michigan, *excerpted in id.* at 117-22).

22. One should note that the claim that the early broadcast of election projections infringes upon the right to vote is not based on conjecture nor is it unfounded. Those who would suggest that there is no infringement on the right to vote when election projections are broadcast before all the polls are closed have misconstrued the essence of elections. The fundamental purpose of an election is to allow the voters a meaningful choice of a candidate to serve them. Under our democratic system, the outcome of an election, by necessity, should not be projected during the election, but should await the accurate tabulation of the votes cast after all of the polls have closed. However, because the accuracy of these projections is almost always correct, once the projection is made the selection of the winning candidate has been made and there might be no further felt need for postprojection voting. This comment will show that this is what happens and that early projections effectively disenfranchise the voter.

23. *Hearings, Early Election Returns*, *supra* note 3, at 348-49.

24. U.S. CONST. amend. I.

25. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S.

the right to vote, an indisputably essential element of any democratic society.²⁶

A. *The Right to Vote*

1. Judicial Protection of the Right to Vote

The right to vote is considered one of this nation's most important rights.²⁷ Our democratic government is based upon the precept that the decisionmakers are under effective popular control.²⁸ Because this goal can only be maintained through the use of the vote, courts and legal scholars have repeatedly recognized that elections are a fundamental element of our democracy.²⁹

The Framers of the Constitution evidenced their belief in the importance and necessity of the right to vote when they provided in the Constitution that Congress and the President shall be elected,³⁰ and a republican form of federal government shall be guaranteed.³¹

As such, the government must derive all its powers directly or indirectly from the people.³² Against this background, the United States Supreme Court has recognized the right to vote as fundamental. The Court has stated that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."³³ Consequently, the Court has repeatedly emphasized that the right to vote must be protected,

1 (1976); *Near v. Minnesota*, 283 U.S. 697 (1931). Justice Cardozo characterized freedom of speech as fundamental to liberty because our history, politics, and law recognized freedom of thought and speech as the "indispensable condition of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

26. *Race to 'Call' Elections*, *supra* note 1, at 11. The Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964), stated that:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id.

27. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Court, in describing the right to vote stated: "No right is more precious in a free country than that of having a choice in the election of those who make the laws under which as good citizens, [they] must live." *Id.* The Court went on to say that "[o]ther rights, even the most basic, are illusion, if the right to vote is undermined." *Id.*

28. H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 60 (1960).

29. "Free and honest elections are the very foundation of our republican form of government." *McDougall v. Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting); *see also infra* notes 32-35 and accompanying text.

30. U.S. CONST. arts. I, § 2 & II, § 1.

31. U.S. CONST. art. IV, § 4.

32. THE FEDERALIST NO. 39, at 241 (J. Madison) (C. Rossiter ed. 1961).

33. *Wesberry*, 376 U.S. at 17.

upholding the right in cases dealing with ballot access,³⁴ restrictions on candidates,³⁵ and dilution of the vote through apportionment.³⁶

At the very least, an examination of some of the cases in the area of voting indicates the importance of being free to exercise the right. More importantly, the cases reveal the Supreme Court's underlying concern that people not only be allowed to vote, but be free to do so in an effective and unimpaired manner. It is this important concern that is at stake in the controversy surrounding early election projections.

2. The Right to Vote—A Nonjudicial Approach

Evaluating the importance that the right to vote plays in our society requires an understanding of the reasons individuals value such a right. Most importantly, a recognition of the motives of voters is necessary to accurately analyze the effect of early projections upon the voter.

One of the acknowledged reasons for voter participation is that it establishes the legitimacy of the ruling body by allowing the public to give its consent to rule.³⁷ Political theorists have tried to show that the legitimacy of any government is the result of popular elections.³⁸ It has been suggested that political participation fosters legitimacy by "giving the citizen a sense of proprietary interest in the outcomes of the political process,"³⁹ since the citizen who votes does so to ensure that his or her candidate is elected, and his or her interests are thereby protected.

Another reason advanced for voter participation is the desire of the individual to exert some control over his or her environment⁴⁰—that is, to possess influence and achieve political efficacy.⁴¹ Political partici-

34. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

35. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Storer v. Brown*, 415 U.S. 724 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1969).

36. *See, e.g.*, *Reynolds*, 377 U.S. 533 (1964); *Wesberry*, 376 U.S. 1 (1964).

37. *See generally* S. RENSHON, *PSYCHOLOGICAL NEEDS AND POLITICAL BEHAVIOR* 83-86 (1974).

38. G. POMPER, *ELECTIONS IN AMERICA* (1972). "The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth . . ." *Id.* at 26 (quoting 2 J. LOCKE, *OF CIVIL GOVERNMENT* 127 (1943)). "To the framers of the Constitution, elections were unavoidable. Given the English tradition, no government could be considered legitimate unless popularly chosen. While many delegates to the Philadelphia convention were distrustful of popular wisdom, they also saw the practical necessity of popular elections. The franchise brought consent even if not ideal policies." G. POMPER, *supra*, at 26.

39. S. RENSHON, *supra* note 37, at 84.

40. *Id.* at 86.

41. For support of the theory that voter participation stems from perceived voter influence, see G. POMPER, *supra* note 38, at 64-67. For a general discussion of political efficacy, see S. RENSHON, *supra* note 37, at 31, 32. *See also* J. MANHEIM, *THE POLITICS WITHIN* 130, 131 (1975).

pation—most commonly in the form of voting—may fulfill an individual's need to control certain events that affect his or her life.⁴² Control, however, is more than mere participation. A voter must believe that in exercising his or her right to vote, he or she has acted in an efficacious manner; in other words, he or she must have engaged in some action perceivable as successful.⁴³ In this sense, political efficacy refers to a feeling of individual "political potency"—a belief that as an individual one can have an impact upon political events.⁴⁴ Conversely, a person who does not believe that his or her vote counts, or will be effective, is unlikely to cast it.⁴⁵

Though many theories have been proposed to explain why people vote,⁴⁶ it is apparent that an individual votes in order to satisfy desires of legitimacy, control, influence, and effectiveness. When an individual is made to feel that his or her vote is meaningless, no such reason to vote exists. As a result, those responsible for creating such a feeling within the voter have constructively disenfranchised the voter.

B. *Freedom of Speech and Press*

Balanced against the fundamental right to vote lies the equally fundamental guarantee of free expression. The first amendment protects freedom of speech and of the press.⁴⁷ The right of freedom of expression is undisputably another essential element of our society.⁴⁸ One political scientist has commented that "freedom of speech, a genus of which a free press is one species, is rightly called the 'first freedom' for political purposes, and in the discussion of public policy it comes near to being absolute as it is possible to get in human society."⁴⁹

The protection accorded speech and the press in our society is generally justified by three theories of the function of free expression.⁵⁰

42. S. RENSHON, *supra* note 37, at 43.

43. *Id.* at 86.

44. J. MANHEIM, *supra* note 41, at 115. Thus, the election of a candidate that one has supported can prove a source of political efficacy. *Id.* at 130.

45. *Id.* at 115. See also *Hearings, Election Day Practices*, *supra* note 3, at 40–42 (statement of Rep. Pat Williams).

46. Other theories offered as reasons why people vote include: A) That it offers the voter protection because it acts as a check on power, see G. POMPER, *supra* note 38, at 28, B) That it is part of personal development, see *id.* at 27, and C) That it increases a person's self-respect and individual worth, see *id.* at 11. See also J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 203 (1883) (political participation is valuable because it enhances personal growth and self-realization).

47. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

48. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Smith v. California*, 361 U.S. 147 (1959); *Marsh v. Alabama*, 326 U.S. 501 (1946).

49. H. MAYO, *supra* note 28, at 143.

50. For the purposes of this comment, the term freedom of expression will include both
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One theory emphasizes the function of freedom of speech in individual self-expression and development of individual potential.⁵¹ A second theory is that freedom of expression is valuable in our system of representative democracy and self-government.⁵² In *Mills v. Alabama*,⁵³ the United States Supreme Court reasoned that "[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."⁵⁴ This "free discussion" theory was evident in a number of the early opinions that laid the groundwork for development of the law surrounding the freedom of expression.⁵⁵ The third theory justifying the protection accorded free expression emphasizes the value of free expression in the search for the truth.⁵⁶ In a concurring opinion in *Whitney v. California*,⁵⁷ Justice Brandeis stated:

Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people, that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁵⁸

Because of such weighty justifications, some authorities have

freedom of speech and freedom of the press.

51. The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971). *Accord* Roth v. United States, 354 U.S. 15 (1957). See also Miller v. California, 413 U.S. 476 (1973); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1108 (10th ed. 1980).

52. The freedoms of speech and press are fundamental personal rights and liberties, the exercise of which "lies at the foundation of free government by free people." Marsh v. Alabama, 326 U.S. 501, 509 (1946). See also Time, Inc. v. Hill, 385 U.S. 374 (1967); Terminiello v. Chicago, 337 U.S. 1 (1949).

53. 384 U.S. 214 (1966).

54. *Id.* at 218.

55. See, e.g., Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Wood v. Georgia, 370 U.S. 375 (1962).

56. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail rather than to countenance monopolization of that market, whether it be by the government itself or by a private licensee." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). See also Thornhill v. Alabama, 310 U.S. 88 (1940).

57. 274 U.S. 357 (1927), *overruled*, *Brandenburg*, 395 U.S. at 447.

58. 274 U.S. at 375 (Brandeis, J., concurring).

claimed that absolute protection of free expression is the only way to protect the first amendment guaranty.⁵⁹ Absolute protection of free expression, however, has been expressly rejected.⁶⁰ Throughout its history, the Supreme Court has consistently recognized areas where free speech is not given unlimited protection. Certain forms of speech have been recognized as being outside the scope of constitutional protection.⁶¹ Also, general regulatory statutes which are not intended to control the content of speech, but which incidentally limit its unfettered

59. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 577 (1978) (citing A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948)). See also *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (Black, J., dissenting) ("[T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done . . .").

60. *Konigsberg*, 366 U.S. 36 (1961). In *Konigsberg*, the Court was faced with a constitutional challenge to the admission requirements of the California Bar that necessitated the applicant's responses to questions concerning Communist party membership. The petitioner claimed that such questions unconstitutionally impinged upon his rights of speech and association. *Id.* at 49. In disallowing the petitioner's challenge, the Court stated: "At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes'. . . ." *Id.* The Court noted that "[w]henver, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interest involved." *Id.* at 51.

61. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (obscene material); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (libelous utterances); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Schenck v. United States*, 249 U.S. 47 (1919) (words which create a clear and present danger). One should also note the approach of courts in the area of labor law and collective bargaining. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court recognized that the determination of whether particular utterances fall within the scope of the first amendment must be made in light of the setting within which the expression is made. *Id.* at 617. In holding that employer communications which contain a threat of reprisal, force, or promise of benefit are not within the scope of the first amendment's protection, the Court stated:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

Id. See also *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515, 516, 517 (8th Cir. 1981) ("This court has noted that under the *Gissel* analysis the employer's constitutionally protected right of free speech may be circumscribed when in addressing employees he opposes unionization. The reason for this is that the employees' relationship with their employer is such that the employee is more likely to pick up intended implications of the latter.").

The same may be said of the voters. Television has come to play such an important part in the lives of so many that the relationship has become one where the suggestions or projections of the broadcaster carry with them implications of truth and accuracy likely to influence the viewer. When the viewer is a voter who has yet to cast his or her vote, the influence becomes every bit as harmful as the speech of the employer in the labor setting. Therefore any assessment of the precise scope of television media's expression must be made in the context of the national election setting.

exercise by restricting the time, place, or manner in which it may be exercised, have been upheld upon a proper showing of valid governmental interests.⁶²

Because the first amendment's free expression guaranty retains a cherished position in our constitutional system, but has not been deemed absolute, it must be subject to a balancing process.⁶³ For example, there are certain areas where compelling governmental interests will suffice to outweigh an individual's freedom of expression.⁶⁴ Therefore, despite the apparently absolute language of the first amendment, the government may assert interests sufficient to uphold a restriction on expression.⁶⁵ Although the government may be required to show a "compelling interest"⁶⁶ or to "overcome a heavy presumption against constitutional validity"⁶⁷ or to "draw its statutes narrowly,"⁶⁸ it may, nevertheless, regulate speech in certain instances. Consequently, it can be argued that speech in the form of the networks' early election projections has such a drastic effect on the right to vote that it creates an instance where regulation would be appropriate.⁶⁹

IV. PROPOSED SOLUTIONS

Action to resolve the problem of early election projections must be

62. See, e.g., *Young v. American Mini Theatre, Inc.*, 427 U.S. 50 (1976) (upholding an ordinance limiting the places where adult movie theaters may be located); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding an ordinance prohibiting picketing near a courthouse); *Breard v. Alexandria*, 341 U.S. 622 (1951) (no first-amendment protection against ordinance prohibiting door-to-door distribution of commercial advertising); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding an ordinance forbidding the use of raucous sound trucks).

63. *Konigsberg*, 366 U.S. 36 (1961). See also *Pennkamp v. Florida*, 328 U.S. 331 (1946) (Court noting that it need weigh the right of free speech against the danger that such speech would coerce and intimidate). See generally *Frantz, The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); *Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

64. See the cases cited *supra* note 62.

65. *Id.*

66. *Cohen*, 403 U.S. 15 (1971).

67. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

68. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

69. Even if the argument can be made that the infringement on the right to vote is merely a constructive infringement because the voters are not physically prevented from voting, the infringement is nevertheless a real one. See *supra* note 22. Three alternative arguments can be made in support of imposing a ban on the broadcast of election projections before the polls are closed: 1) The protection of the right to vote in this situation rises to the level of a compelling interest so as to justify the ban on election projections; 2) Such a ban on the broadcast of election projections is merely a time, place, and manner restriction and not a prior restraint on speech; and 3) Election projections do not constitute protected speech within the meaning of the first amendment. These arguments will be set forth in more detail in the third section of this comment. However, in light of these arguments, one should remember that the proposed ban on broadcasting relates to election projections and not election results, which would arguably present a more persuasive countervailing argument against any attempt to impose restrictions.

taken soon, because history supports the conclusion that the problem is likely to worsen as technological advances make earlier forecasts feasible. In 1964, the Columbia Broadcasting System projected Lyndon B. Johnson president at 9:03 P.M. eastern standard time.⁷⁰ An extensive study of the 1964 election showed that the projection had no direct effect on voter turnout and no significant effect on voter perception of the worth of the vote.⁷¹ However, in the 1980 election, adverse effects on voter turnout due to a projection made just one hour earlier have been documented. Indeed, congressional testimony has indicated that both NBC and ABC could have predicted the winners by noon on election day in 1980.⁷² Due to the race for network ratings and the advertising dollar, it is apparent that networks will in the future be competing for earliest projection honors.⁷³ As they do so, the projections will have an increasingly stronger effect since they will reach voters at an earlier time.

A. *Legislative Ban on Early Projection Broadcasts*

The simplest and most apparent solution would be to ban the broadcasting of early projections until all the polls are closed.⁷⁴ For various reasons, this appears to be a solution Congress has refused to adopt,⁷⁵ choosing instead to request that the networks voluntarily re-

70. Light, *supra* note 2, at 1437.

71. See K. LANG & G. LANG, VOTING AND NONVOTING (1968).

72. The prediction could have been made based on the exit-polling done by the networks. However, it was suggested that in order to avoid public criticism, NBC waited until later in the day before making the projection. *Hearings, Early Election Returns*, *supra* note 3, at 59 (statement of Dr. Austin Ranney).

73. "This competition between the networks is further enhanced by the public relations value of calling the winner early and accurately. 'Advertisers are often eager to sign up with the winning network in future elections.'" *Quoted in Hearings, Election Day Practices*, *supra* note 3, at 155.

74. See S. 762, 97th Cong., 1st Sess., 127 CONG. REC. S2489 (daily ed. Mar. 23, 1981). This bill if enacted would amend the Communications Act of 1934 to prohibit the broadcasting of election results or projections until all polling places in the United States are closed. This bill was sent to committee, and, as of September of 1983, there was no further action taken on it.

A survey of public opinion by the Field Institute of San Francisco shows that 74% of those questioned do in fact favor a prohibition against broadcasting any projections until the polls are closed. *Hearings, Early Election Returns*, *supra* note 3, at 3.

75. "I want to be quick to add that in our efforts to reform the election process we must guard against any infringement of the first amendment guarantees of the freedom of the press.

"We should in no way muzzle the media either by preventing the reporting of the election results or by preventing the reporting of projections based on so-called exit polls." *Hearings, Election Day Practices*, *supra* note 3, at 42 (statement of Rep. Pat Williams). While reasons like the one given above by Representative Williams are the most common explanations for refusing to ban the broadcast of early projections until all polls are closed, one can only wonder what effect the strong, well-funded television lobbyists have played in that congressional decision.

frain from broadcasting projections of election results until the polls are closed.⁷⁶ Yet a ban on the broadcast of early projections appears to be the only truly viable solution—one which arguably could withstand judicial muster.

On its face, a ban on early projections appears to be prohibited by the first amendment to the United States Constitution as an unlawful prior restraint on free speech.⁷⁷ Because the Supreme Court has said that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,"⁷⁸ it is clear that a total ban on early projections could survive only if the government could show a compelling interest warranting it.⁷⁹ A strong argument can be made that banning the broadcasting of early projections does meet the compelling interest requirement.⁸⁰ It can be persuasively argued that this type of speech—the early projections—impairs the right of an individual to vote. Although the early projections do not amount to an actual denial of the franchise, a constructive denial exists when voters are encouraged not to vote because they are made to feel their votes do not count.⁸¹ Because the United States Supreme Court has recognized the right to vote as fundamental,⁸² protecting that right is a compelling governmental interest which would justify the limited restraint imposed on free expression by prohibiting the broadcast of early projections until the polls have closed in at least a majority of states.

This argument, of course, cannot be merely theoretical. It must be supported by sufficient empirical evidence revealing the significant adverse effect early projections have on the right to vote.⁸³ Without such

76. H.R. Con. Res. 227, 98th Cong., 1st Sess. (1983). See 129 CONG. REC. E5633 (daily ed. Nov. 16, 1983) (statement of Rep. Al Swift).

77. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

78. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

79. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978).

80. This type of argument was in fact suggested at the congressional hearings on the subject of early election returns, where it was stated:

The first amendment . . . is not absolute. You cannot howler [sic] 'fire' in a movie theater. The first amendment is, 'yes, but,' if there is a countervailing policy to limit it somewhat . . . during a particular dozen or so hours once every 4 years when we are going through a national election, I don't think anybody could construe that as an attack on the electoral process. It would only be justified as a countervailing argument justifying some limitation on the power of the press to report a result while the polls are open.

Hearings, Early Election Returns, *supra* note 3, at 29 (statement of Rep. James H. Scheuer).

81. See *supra* note 22.

82. See the cases cited *supra* notes 34–36.

83. The United States Supreme Court has relied heavily on the use of empirical data. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (counsel for the respondent made extensive use of empirical evidence to show that the Amish children could function effectively if they left school at

evidence, governmental legislation banning projections could not withstand the strict scrutiny that would be applied to it in the courts.⁸⁴ This empirical evidence does exist, and can be found in the legislative hearings concerning the problem of early projections.⁸⁵ History has shown that the Court has given significant weight to the legislative findings that have led to a particular enactment.⁸⁶ Therefore, the Court might find a legislative ban on early projections, enacted to protect a valid compelling governmental interest, constitutional.

In this manner Congress can give some assurance that early projections of election results, if they are in fact "speech" for first amendment purposes, will not threaten the foundation of our democratic form of government—the right to vote. Certainly, in balancing these two interests it would seem reasonable to protect the right to vote since to deny or even undermine this right poses a threat to our democratic society far greater than would legislation requiring the networks to delay the broadcast of their election projections until the polls are closed.

A further argument in support of legislation banning broadcast of election projections until all polls are closed is that such a statute would be a reasonable time, place, and manner restriction rather than a prior restraint.⁸⁷ Whereas a prior restraint seeks to limit the content of

age 14 instead of the required age of 16); *Roe v. Wade*, 410 U.S. 113 (1973) (the Court relied on empirical evidence in deciding when the state's interest in prohibiting abortion will be sufficient to outweigh a woman's right to have one); *Muller v. Oregon*, 208 U.S. 412 (1908) (in sustaining an Oregon law that prohibited a female from working more than 10 hours a day in any factory or laundry, the Court relied heavily on a brief Louis D. Brandeis prepared, which detailed the physical ability of a woman).

84. See *First Nat'l Bank*, 435 U.S. 765 (1978).

85. See *supra* note 3.

86. See, e.g., *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Whitney v. California*, 274 U.S. 357 (1927), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

87. A valid restriction under a time, place, and manner approach must be determined in light of four basic considerations: (1) "the interest deemed to require the regulation of speech"; (2) "the method used to achieve such ends as a consequence of which public speech is constrained"; (3) the "mode of speech regulated"; and (4) where the regulated speech takes place. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1199 (10th ed. 1980). Applying these factors, prohibiting early election projections could be a valid time, place, and manner restriction. The interest deemed to require the regulation of speech is that of protecting, encouraging, and upholding the importance of the right to vote. The method used would most likely be a prohibition against making any broadcast of election results until the polls are closed. The mode of speech regulated is that broadcast over the national airwaves, a mode already subject to regulation in the public interest. See *supra* note 86; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Finally, the speech takes place over the national airwaves, where its reach is of an extraordinary magnitude. It was reported that approximately 150 million Americans watched some of the television networks' coverage. *N.Y. Times*, Nov. 6, 1980, at A25, col. 2. There is a strong argument that this is a valid time, place, and manner restriction because the aim of legislation here would be merely to delay the broadcast of election projections until the polls are closed. In this respect, the legislation would not impermissibly be concerned with the content of the broadcast but rather with

speech, a time, place, and manner restriction merely imposes limits on the way it can be expressed. The United States Supreme Court has held that ordinances regulating the use of a public forum for communicating views on national questions is valid if it serves a countervailing public interest.⁸⁸ This public interest concept underlies the regulation of broadcasting as it stands today.⁸⁹ Thus, it can be argued that until all ballots have been cast, the prevailing interest of protecting the right to vote justifies a reasonable regulation on the broadcast of election-day projections. Finally, another possible argument justifying a restriction on such projections focuses on the categorization of speech and the reasons for protecting various types of speech. Historically, certain types of speech have not warranted the great protection accorded speech generally.⁹⁰ The argument supporting a legislative ban on early election projections, then, is that the projections are not a type of speech which warrants the highest protection.

It is generally accepted that one of the major purposes of the first amendment was to protect free discussion and debate of governmental affairs.⁹¹ Central to this proposition is the notion of free exchange of ideas—that persons not only have a right to speak, but also to hear and to reply. Therefore, speech which leaves room for reply can be distinguished from (and is more likely to be protected than) speech which triggers action or causes harm without the time or opportunity for response.⁹²

Because open dialogue and free trade of ideas are the premises of

the reaction it engenders. *Feiner v. New York*, 340 U.S. 315 (1951). It has been recognized that "when the interests of the public are found to outweigh the private journalistic interests of the broadcasters" the government will be acting within its power to institute regulation. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973). However, it is clear that any such restriction would have to be pursuant to a specific legislative enactment because the Federal Communications Commission has expressly refused to enforce such a restriction in two specific instances. *In re Regan*, 38 F.C.C.2d 378 (1972); *In re Zeigler*, 24 F.C.C.2d 434 (1970).

88. *Hague v. CIO*, 307 U.S. 496 (1939). In *Hague*, the Court invalidated an ordinance forbidding all public meetings in streets and other public places. In doing so, however, the Court stated that although such ordinances cannot "in the guise of regulation" abridge or deny the right to use a public forum for the communication of ideas, "[t]he privilege to use the streets and parks for communication of views on national questions may be regulated in the interest of all." *Id.* at 515-16. As a corollary to this line of reasoning, one could argue that the airwaves, like streets and parks, should be regulated to further the best interests of all.

89. 47 U.S.C. § 303(f) (1976); *See also* *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

90. *See supra* notes 61, 62.

91. *Buckley v. Valeo*, 424 U.S. 1 (1976). This type of expression is protected because of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Central to this "national commitment" is the notion of the free exchange of ideas—that persons have not only the right to speak, but to hear and reply. *See supra* notes 51-56 and accompanying text.

92. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 605 (1978).

protected speech, early election projections do not command the high degree of protection accorded other types of speech. Indeed, in this sense the projections more resemble Justice Holmes's illustration of the man shouting fire. Network projections of election results do not encourage or even provide an opportunity for debate. Rather, they negatively impact upon the fundamental right to vote without providing a counterbalancing need for protection. The projections should therefore be banned.

B. Other Proposed Solutions

Several solutions which do not involve placing a restriction on the broadcast media have been suggested to resolve the problem of early projection broadcasts. It does not appear, however, that any of the other proposed solutions would adequately protect voters. One suggestion, proposed by former Senator Hayakawa,⁹³ would prohibit the release of results from any polls until all polls are closed. Theoretically, this would mean that the networks could not make projections while some citizens have not yet voted. However, by using exit-polling and relying on voter interviews, projections could still be made.⁹⁴ It therefore does not appear that this approach would solve the problem.⁹⁵

Another suggestion for dealing with the problem of early election projections is to have two-day voting. Under this proposal, voting in the western states would begin on the eve of the traditional voting day. The polls would be open for several hours Monday evening. Then on Tuesday, the rest of the country could vote as usual with polls in the western states closing several hours earlier than normal.⁹⁶ This proposal, however, presents two major problems. One problem is the potential for overnight tampering with those votes already cast,⁹⁷ and the other is the cost of having two election days. It is estimated that such a procedure would add \$2 million to the cost of elections in California alone.⁹⁸

Still another suggestion is to hold elections on Sunday or to make

93. S. 58, 97th Cong., 1st Sess., 127 CONG. REC. S106 (daily ed. Jan. 6, 1981). This bill would have prohibited the broadcast of presidential election projections until all polls have been closed. It appears that the bill died in committee. See also H.R. 3595, 97th Cong., 1st Sess., reprinted in *Hearings, Election Day Practices*, *supra* note 3, at 12.

94. See *supra* note 72.

95. Some states have enacted laws prohibiting the taking of surveys within specified distances from polling places in an effort to place voters beyond the reach of exit-pollers. *E.g.*, FLA. STAT. ANN. § 104.36 (West 1982). Such statutes, however, seem likely only to make exit-polling more difficult without eliminating the practice.

96. Light, *supra* note 2, at 1438.

97. *Id.* See also *Hearings, Early Election Returns*, *supra* note 3, at 119 (statement of March Fong Eu, secretary of state, State of California).

98. *Hearings, Early Election Returns*, *supra* note 3, at 119.

the regular Tuesday election day a national holiday.⁹⁹ It is thought that this would encourage a greater frequency of voting earlier in the day, thereby eliminating or reducing the effects of early projections. However, while this may encourage earlier voting, it will not alleviate the problem of early projection broadcasts. Because the networks are becoming more sophisticated in their methods and are more able to make projections earlier in the day,¹⁰⁰ increasing the percentage of early voters will not resolve the problem of early projection broadcasts.

Finally, two other widely recommended suggestions are to have uniform closing times at the polls¹⁰¹ or to extend daylight savings time in the western states for two extra weeks in order to lessen the time difference between states by one hour.¹⁰² These proposals assume that the networks will not be able to make projections until some of the polls are closed and that, therefore, given the uniform closing time, all the polls will be closed. However, the networks' capability of making projections by midday¹⁰³ via their continued use of exit-polls¹⁰⁴ would still result in projected results being broadcast before the polls are closed, especially as the networks aggressively compete for advertising dollars.¹⁰⁵

Additionally, all of the proposed remedies which fall short of prohibiting early projection broadcasts in effect sacrifice the voters of Alaska and Hawaii. These states have time differences of four and six hours respectively from the east coast. If the solution were to be uniform poll closing times, then both of these states would have to start voting at an absurdly inconvenient hour and before most voters were out of work, thus creating an equally distressing problem. Furthermore, to the extent that any projections can be made in the continental United States before all the polls close, they will be made that much earlier in Alaska and Hawaii.

V. CONCLUSION

The broadcast of early projections does have a negative impact on

99. Light, *supra* note 2, at 1438. See also H.R. 84, 97th Cong., 1st Sess.; H.R. 1813, 97th Cong., 1st Sess., reprinted in *Hearings, Election Day Practices*, *supra* note 3, at 21, 7.

100. See *supra* notes 7, 72.

101. Light, *supra* note 2, at 1438. See also H.R. 3557, 97th Cong., 1st Sess., reprinted in *Hearings, Election Day Practices*, *supra* note 3, at 47. For a discussion of the effect of adopting uniform poll closing times, see *Hearings, Election Day Practices*, *supra* note 3, at 53, 60.

102. *Hearings, Early Election Returns*, *supra* note 3, at 120, 121 (statement of March Fong Eu, secretary of state, State of California).

103. See *supra* notes 7, 72.

104. *Hearings, Early Election Returns*, *supra* note 3, at 49 (statement of Rep. Timothy Wirth).

105. See *supra* note 73.

the right to vote. The procedures for testing and measuring the actual effect the early projections had on the 1980 elections are sufficient to show that the projections lessened voter turnout. Furthermore, even if one discounts the statistical studies relating to the effect of early projections, there still remains a significant problem in that many persons *perceive* that early projections nullify their vote. Voter apathy is the unfortunate result.

Action must be taken to decrease voter apathy and to positively nurture faith in our democratic system. Given the importance of the right to vote, the adverse effect of early projections on the exercise of that right, and the fact that early projections are not the type of speech which has traditionally received the highest protection, it appears that the government has a strong interest in restricting the media's ability to broadcast early projections. However, obtaining any effective legislation will require a strong, concerted effort by Congress. Given the large, well-funded media lobbyists on Capitol Hill, it will likely be a difficult battle. Indeed, that Congress in its most recent action on this issue has decided to refrain from enacting an outright prohibition in favor of a resolution calling for voluntary restraint on the part of the broadcast media evidences the difficulty inherent in obtaining a legislative prohibition in this area.

Nevertheless, to the extent that this voluntary restraint fails to materialize on election day in 1984, Congress will have its back to the wall. A repeat of election night 1980 can only serve as the most blatant catalyst for legislative action. Congress cannot allow the broadcast media to operate in such a way as to ignore the public interest and undermine that which we value so greatly—the right to vote.

Stephen M. Leonardo

