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Curtailment of Early Election Predictions: Can We Predict the Outcome?

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CURTAILMENT OF EARLY ELECTION PREDICTIONS: CAN WE PREDICT THE OUTCOME?

I. INTRODUCTION

In the 1980 Presidential election, all three major television networks predicted Ronald Reagan the winner before 8:00 p.m. Pacific Standard Time.[1] Consequently, Jimmy Carter conceded defeat before any west coast polls had closed.[2] As a result of Carter's early conces-

1. Waters, *Peacock's Night to Crow*, NEWSWEEK, Nov. 17, 1980, at 82. NBC predicted Reagan the presidential winner at 5:15 Pacific Time. At that time, only 5% of the total vote had been reported. Although ABC and CBS did not report Reagan the winner until two hours later, they still reported the outcome prior to the closing of west coast polls. *Id.*

2. *Id.* Many adversaries of early election predictions claim that President Carter, by conceding the election early, was as irresponsible as the networks. Carter was aware that his statement would be nationally broadcast. The President, therefore, should have been sensitive to

sion, many west coast voters allegedly declined to vote.[3] Congress responded by asking the media to refrain from broadcasting early election returns and predictions and by threatening to pass legislation if the request was disregarded.[4] Several states have also intervened to prohibit election predictions by restricting exit polling, the technique used to collect prediction data.[5] Claiming that these restraints would impair their first amendment rights, newscasters have voiced their intention to continue announcing predictions.[6] Whether the first

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the effect conceding early would have on voters. For most voters, President Carter's actions provided a major incentive to stay at home or even leave the polling lines. *Early Election Returns and Projections Affecting the Electoral Process: Hearings Held Jointly Before the Comm. on House Administration and the Subcomm. on Telecommunications, Consumer Protection and Finance of the Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 107 (1981) (statement of Congressman Robert Matusi) [hereinafter cited as *Hearings*].

3. November 2, 1980 has been termed the day of "uproar in the west." The news media reported people leaving the lines outside polling places and drivers on their way to the polls going home. *Hearings*, *supra* note 2, at 3 (statement of David Broder, Washington Post). Losers of close local races claimed that the broadcasts had cost them the election. For example, Representative Al Ullman (D-OR) lost in 1980 by 1% of the vote. Additionally, 20 year veteran James E. Coreman of California lost by 796 votes in a race where more than 19,000 people voted. The former candidate argued an increased voter turnout would have favored their campaigns. The early election predictions destroyed the "coattail effect," which each candidates had counted on. Friendly, *Exit Polls of Voters Pose Question of News v. Effect on Elections*, N.Y. Times, Dec. 20, 1983, § A, at 22, col. 1.

4. Broder, *TV Newsmen to Continue Exit Poll Use*, Washington Post, July 22, 1983, § A, at 3, col. 1.

Two bills aimed at eliminating early election predictions were introduced during the 97th Congress. H.R. 3556 proposed sealing the ballots in presidential elections until all polling places closed. H.R. 3557 provided for a uniform time for the closing of polling places in all regular elections of Representatives to Congress, United States Senators, and electors of the President and Vice President of the United States. Neither bill, however, was passed. *Election Day Practices and Election Projections: Hearings Held Before the Task Force on Elections of the Comm. on House Admin. and the Subcomm. on Tele-Communications, Consumer Protection, and Finance of the Comm. on Energy and Commerce*, 97th Cong., 1st & 2d Sess. 45-48 (1981-82) [hereinafter cited as *Election Hearings*].

Congress' failure to pass legislation may be, in part, an attempt to demonstrate good faith to the judiciary. Legislation aimed at curtailing early election predictions will probably face constitutional challenges. Thus Congressmen may hope the courts, when considering these challenges, will take judicial notice of the legislature's attempts to exhaust all possible alternatives before resorting to legislation.

5. Hawaii has also passed legislation aimed at preventing exit polling. HAWAII REV. STAT. § 12-52 (1976) (restricting solicitation within a 1000 feet radius from polling places). Both Washington and Idaho have passed state resolutions asking Congress to prevent early electoral returns. *Hearings*, *supra* note 2, at 185-86, 188-89. Additionally, the California legislature has proposed changing its anti-solicitation statute from prohibiting exit polling within 100 feet to prohibiting it within 500 feet. *Id.* at 180.

6. *Hearings*, *supra* note 2, at 180. *Contra* L.A. Times, Mar. 8, 1984, § VI, at 11, col. 1 (citing 16 local television and radio stations that agreed not to release election-day exit poll predictions until polls closed); telephone interview with Bob Furnand, Political Editor of the Cable News Network (July 2, 1984) (The Cable News Network [CNN] has agreed to refrain from broadcasting early election projections. CNN will, however, broadcast actual results as they become available regardless of whether all polls are closed.).

amendment protects these early predictions has become a paramount issue in recent elections years.

This note analyzes the constitutional ramifications of legislative attempts to restrict early election predictions. First, specific congressional proposals and state legislative enactments will be examined. Secondly, the various standards of review the Supreme Court applies when government regulation threatens to infringe upon first amendment free speech will be examined. Lastly, this paper will examine the competing interests involved in early election predictions and will conclude that limitations on this process would be an unconstitutional impairment of the public's first amendment rights.

II. The Impact of Exit Polling and Early Election Predictions

Network television stations base their early election predictions on data obtained from voters at polling sites.[7] Voters are questioned regarding their socio-economic background, the candidate they selected, and the reason for their selection.[8] By revealing the characteristics and electoral decisions of American voters, exit polls enable networks to predict election outcomes before any actual vote totals are available.[9]

Claiming that outcome predictions undermine national elections, many critics advocate the prohibition of exit polling.[10] In 1980, west

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Recently, the three major networks agreed not to project the results of presidential races in a state until that state's polls have closed. This agreement does not, however, preclude networks from projecting a winner prior to the closing of west coast polls. *Clouding TV's Crystal Ball*, Time, Jan. 28, 1984, at 47. Such a proposal is -not necessarily a new policy for the networks. *See Broadcast Media Hearings, infra* note 10, at 12 (statement of George Watson, Vice-President ABC News) (in 1982 ABC would not predict any race in any state until all polls had closed in that state).

7. *See generally* Levy, *The Methodology and Performance of Election Day Polls*, 47 Pub. Opinion Q. 54, 56 (1983).

CBS pollster, Warren Mitofsky, pioneered exit polling in 1967. Since then, it has become the predominate method by which networks report electoral winners. *Like a Suburban Swimming Pool*, Time, Nov. 17, 1980, at 97.

8. Levy, *supra* note 7, at 56.

9. Reid, *Exit Polls Had Pols Heading for Their Tom-Toms*, Washington Post, Mar. 1, 1984, § A, at 7, col. 1. During the 1984 New Hampshire Presidential primary, exit pollsters predicted Gary Hart the winner at 12:00 p.m. No actual vote totals had been reported at that time. *Id.*

10. *See generally Hearings, supra* note 2; *Election Hearings, supra* note 4; *Broadcast Media in Elections: Hearings Held Jointly Before the Task Force on Elections of the Comm. on House Administration and the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 98-172 (1983) [hereinafter cited as *Broadcast Media Hearings*]; *Broadcast Media and Early Election Predictions: Hearing before the Comm. on House Administration and Subcomm. on Energy and Finance*, 98th Cong., 2d Sess. 98-171 (1984).

Several government and media officials, in an effort to combat exit polling, have proposed alternative methods of conducting election day voting. Networks advocate a nationwide uni-

coast voter turnout dropped as much as two percent from the previous presidential election.[11] Following the announcement of network predictions, many of the voters standing in line at the polls left and most west coast polling sites reported a sharp decline in voter turnout.[12] Arguably, by reducing the incentive to vote, election predictions based on exit polls could have a drastic effect on the "one-man, one-vote" system of government.[13]

Conversely, many people dispute claims that exit polling deleteriously affects voter turnout. East and west coast voter turnout decreased by a roughly equal amount in the 1980 presidential election.[14] Furthermore, opponents of an exit poll ban assert that no empirical data exists to support the contentions made by proponents of legislation.[15]

III. Congressional Proposals to Curtail Exit Polling

Concerned that statutory limitations on exit polling might be un-

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form voting period. *TV Newsmen to Continue Exit Poll Use*, Wash. Post, July 22, 1983, § A, at 3, col. 3. Congressman Mario Biaggi and Senator S.I. Hayakawa propose a different alternative. The Biaggi proposal would move election day to Sunday and stagger voting hours so that polls everywhere across the nation would open and close at the same time. *Hearings, supra* note 2, at 110. Another proposal would revise voting times based on time zones, i.e., east coast polls would be open from 11:00 a.m. to 8:00 p.m. Eastern time and west coast polls would be open from 8:00 a.m. to 5:00 p.m. Pacific time. *Id.* at 131. Each of these proposals, however, is inherently flawed for several reasons. Perhaps the largest problem is that networks are able to produce election predictions within hours after the polls open. Poll closings, therefore, are irrelevant absent cooperation from networks. *See Hearings, supra* note 2, at 130-31 (statement of Daniel E. Boatright, Senator of California) (detailed discussion and critique of proposed legislative remedies).

11. *Hearings, supra* note 2, at 84-85. The "most careful" analysis of the effect of election predictions suggests a 2.7% decrease in voter turnout. *Id.* at 4.

12. *Id.* at 233-35 (reactions from election board inspectors regarding premature election reports). *See also id.* at 331, 337 (charts summarizing impacts of exposure to news coverage on the turnout of eligible voters); *Election Hearings, supra* note 4, at 122 (chart assessing the distribution of reported times of hearing projections and concession speech).

13. *See infra* notes 97-110 and accompanying text.

14. *Hearings, supra* note 2, at 84-85.

15. Broder, *supra* note 4. In 1964, Lang & Lang conducted a study of California voter reaction to media projections of a Johnson victory four hours before the polls closed. Research since then has consistently confirmed their finding that mass media broadcasts on election day, reporting both probable and actual returns, have a negligible effect on both the nonvoting rate and the outcome of Presidential elections. *Hearings, supra* note 2, at 303. *See generally* DuBois, *Election Night Projections and Voter Turnout in the West*, 1983 Am. Pol. Q. 349 (study finding exit polling does not affect voter turnout); *Hearings, supra* note 2, at 306 (statement of Professor Laura Appleton) (empirical study of exit polling has shown no discernible effects on voter turnout).

The news media claim a high degree of accuracy in their early election predictions. *See Broadcast Media Hearings, supra* note 10, at 12 (statement of George Watson, Vice President ABC News) (in 1982 ABC was 100% accurate in their prediction of 69 senatorial and gubernatorial races); *id.* at 18 (statement of Van Gordon Sauter, President CBS News) (in 1982 CBS news was 100% accurate in its prediction of 36 senatorial and gubernatorial races).

constitutional,[16] Congress has not yet passed restrictive legislation. Instead, a joint house committee[17] recently passed several resolutions asking networks to voluntarily refrain from projecting election results prior to poll closings.[18] House of Representatives Concurrent Resolution 227 specifically calls upon the television and radio industries to refrain from predicting election results until all polls throughout the country have closed.[19] Additionally, House of Representatives Resolution 395 forcefully urges the news media to adopt guidelines to ensure that data from exit polls will not be used prior to poll closings.[20]

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16. *Hearings, supra* note 2, at 247 (statement of Mark Gaede, Field Representative of Congressman Les AuCoin) ("These proposals clearly avoid a First Amendment confrontation."). *See* Columbia Broadcast Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1972) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligation."). *See generally Hearings, supra* note 2; *Election Hearings, supra* note 4; *Broadcast Media Hearings, supra* note 10.

17. The joint committee is formally titled The Committee on House Administration and the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce.

18. To date, Congress has passed over eight resolutions and proposed more than six bills aimed at curtailing exit polling. Gainesville Sun, June 27, 1984, § A, at 7 col. 1. *See Election Hearings, supra* note 4, at 7-8, 12-13, 21-23, 35-36, 45-46, 47-48.

19. H.R. CON. RES. 227, 98th Cong., 1st Sess. (1983) provides as follows:

> (1) in the 1980 and 1982 general elections, broadcasters made projections of election results in many States while polls were still open;
>
> (2) those projections may have decreased voter participation and affected close elections;
>
> (3) early projections of election results undermine the belief of individuals in the importance of their votes—a belief that is essential in a democratic society;
>
> (4) rapidly developing technology makes it possible that projections of election results will be made earlier and in more elections;
>
> (5) a uniform poll closing time will not solve this problem if projections of election results are based on exit interviews; and
>
> (6) with the approach of the 1984 election, there is continued concern about the impact of early projections of election results on the electoral process. SEC. 2. In light of the findings set forth in the first section of this resolution, it is the sense of the Congress that, to maintain the appropriate balance between freedom of the press and the integrity of the electoral process, in future elections —
>
> (1) broadcasters and other members of the news media should voluntarily refrain from projecting election results before the polls close; and
>
> (2) the news media, including industry, trade, and professional organizations, should adopt guidelines to assure that data from exit interviews are not used to project election results before the polls close.

Resolution 227 has since been amended to read identically to the language contained in resolution 321. *See infra* note 21.

20. H.R. CON. RES. 98th Cong., 2d Sess. (1984) provides as follows:

> Calling upon the television and radio industry and other members of the news media voluntarily to refrain from projecting Presidential election results or making predictions in Presidential elections on election day until all the polls throughout the United States have closed.
>
> Whereas in 1980, on the west coast, electronic media made Presidential election

More recently, the entire House adopted Resolution 321 which calls for networks to refrain from characterizing or predicting any election results until the race in question has ended.[21] Subsequently, the

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projects at 3:30 postmeridian;

Whereas the voter turnout in 1980 was the lowest since 1948;

Whereas in 1980, 3 per centum of registered voters in the Western United States reported that they did not go to the polls because of early election projections by television and radio;

Whereas in 1980, countless eyewitnesses reported individuals leaving polling places following announcements by broadcasters of a projected Presidential winner;

Whereas rapidly developing technology and techniques make it probable that projections will be made earlier in future elections;

Whereas a decline in voter participation is an unacceptable trend for a healthy, vibrant political environment;

Whereas early election projections do not serve any significant societal purpose and are unnecessary and potentially damaging to the political process and voter participation;

Whereas the right of American to cast informed and educated votes is the cornerstone of our democracy and freedom of the press is intended to further that basic right; and

Whereas Congress has a compelling interest and inherent duty to protect the voting rights of all Americans and to seek an increase in participation in the electoral process: Now, therefore, be it

Resolved, That the House of Representatives calls upon the television and radio industry and other members of the news media voluntarily to refrain from projecting Presidential election results or making predictions in Presidential elections on election day until all the polls throughout the United States have closed.

21. H.R. CON. RES. 321, 98th Cong., 2d Sess. (1984) provides:

Resolved by the House of Representatives (the Senate concurring), That the Congress finds that —

(1) in the 1980 and 1982 general elections, broadcasters made projections of election results in many States while polls were still open;

(2) those projections may have decreased voter participation and affected close elections;

(3) early projections of election results undermine the belief of individuals in the importance of their votes — a belief that is essential in a democratic society;

(4) rapidly developing technology makes it possible that projections of election results will be made earlier and in more elections, especially in States with more than one poll closing time (which States might consider adopting a single closing time);

(5) if projections of election results are based on exit interviews and the news media do not voluntarily refrain from making those projections before the polls close, then a uniform closing time will not solve this problem; and

(6) with the approach of the 1984 election, there is continued concern about the impact of early projections of election results on the electoral process.

SEC. 2. In light of the findings set forth in the first section of this resolution, it is the sense of the Congress that, to maintain the appropriate balance between freedom of the press and the integrity of the electoral process, in future elections

(1) broadcasters and other members of the news media should voluntarily refrain from characterizing or projecting results of an election before all polls for the office have closed; and

(2) the news media, including industry, trade, and professional organizations, should adopt guidelines to assure that data from exit interviews are not used to char-

United States Senate joined the House in adopting the resolution.[22]

A congressional resolution is merely the adoption of a motion concerning subject matter which would not typically constitute a statute.[23] As a result, a congressional resolution does not carry the force of law and no penalties exist for noncompliance.[24] Thus, networks face no legal liability for continuing to predict election results. A resolution may, however, have the effect of law if both houses of Congress and the President approve it.[25] House Resolution 321 may well become law through this procedure.[26] Therefore although networks have no present legal duty to comply with the mandate of House Resolution 321, their noncompliance may encourage future statutory regulation.

The absence of election prediction regulations evinces congressional awareness of the delicate balance between free speech and the interests of government in preserving the integrity of the electoral process. If Congress acts on its threats to statutorily restrict exit polling, this legislation is certain to encounter constitutional challenges. American courts must, therefore, stand ready to determine whether curtailing exit polling and early election predictions is permissible under the Constitution.

IV. Traditional Judicial Responses to First Amendment Regulatory Schemes

Historically, the judiciary has paid great deference to the press.[27] A robust press promotes free and open discussion. Free speech is, therefore, considered a preeminent right under democratic theory.[28]

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acterize or project results of an election before all polls for the office have closed.

22. Reaves, *Stifle Exit Polls?*, 70 A.B.A. J. 33 (Nov. 1984).

23. Black's Law Dictionary 1178 (5th ed. 1979).

24. *Id.* The distinction between a joint resolution and a concurrent resolution of Congress is that the former requires the approval of the President while the latter does not. *Id.*

25. *Id.* A resolution passed in both houses of the legislature, signed by the presiding officers of both houses and approved by the President has the effect of a law as that term is used in the Constitution. A joint resolution signed by the President may alter, modify, or create law. *See* 6 Op. Att'y Gen. 680, 692 (1854). *See also* Oklahoma News Co. v. Ryan, 101 Okla. 151, 153, 224 P. 969, 972 (1924) (extending this principle to the states).

26. *See supra* notes 24-25.

27. J. Nowak, R. Rotunda & J. Young, Constitutional Law 859-60 (1983) [hereinafter cited as J. Nowak]. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) ("without some protection for seeking out the news, freedom of the press would be eviscerated"); Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (news gathering qualifies for first amendment protection). *See generally* Note, *The Right of the Press to Gather Information*, 71 Colum. L. Rev. 838 (1972) (suggesting the news media's most important function is to serve as a conduit of information).

28. Historically, the first amendment has enjoyed a preferred position among other constitutional rights. The concept of a preferred position for the amendment arose in dicta in

Accordingly, courts have rarely allowed the first amendment to be abridged in furtherance of governmental interests.[29]

To withstand constitutional attack, a statute regulating free speech must survive close judicial scrutiny. Where laws threaten to restrict speech, courts typically balance the various conflicting interests involved.[30] In balancing these interests, courts focus on the governmental regulation's purpose, the first amendment rights abridged, and the severity of the abridgement.[31] A court will vary its level of scrutiny depending on the degree of first amendment infringement.[32]

United States v. Carolene Prod. Co., 304 U.S. 144 (1938). In *Carolene*, Chief Justice Stone suggested in a footnote that congressional limitations on the first amendment should be narrowly construed. Five years later, the Court explicitly held that freedom of speech has a preferred position. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See generally* J. NOWAK, *supra* note 27, at 864-67.

Nowak explores the first amendment in terms of both the preferred position of free speech and the absolutist view. Under the absolutist view the first amendment would not be subject to balancing by definition. Rather, the judiciary would have to invalidate every law no matter how incidentally it burdened free speech. Recognizing the impracticality of this view, Nowak suggests that if in fact speech is not an absolute right, it is certainly in a preferred position to other rights in the Constitution. *Id. See also* Cox, *Freedom of the Press*, 1983 U. ILL. L. REV. 3. The theory that first amendment protection of free speech is essential to an intelligent self-government in a democratic society was strongly advocated by Alexander Meiklejohn. Meiklejohn asserted that the objective of the framers was to help American citizens understand their own political institutions. Under Meikeljohn's analysis, therefore, citizens should have access to all available information in the political spectrum. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576 (1978) (discussion of Milton's "market place of ideas" theory); Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 6-8 (collective interest in free speech provides mechanism for citizens to exercise self-government).

29. *See infra* note 34.

30. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (state's interest in preserving the integrity of the pharmaceutical profession held incidental to the first amendment right of citizens to receive information on prescription drug prices); Young v. American Mini Theaters, 427 U.S. 50 (1976) (state interest in avoiding concentration of "adult movie theaters" was weighed against zoning restrictions prohibiting the location of the theaters within 1000 feet of each other; slight burden on speech held to be justified by that interest); Largent v. Texas, 318 U.S. 418 (1943) (state interest in regulating dissemination of religious views weighed against discretionary sales licensing system; burden on free speech was too great to uphold the state's interest).

31. *See* Konigsberg v. State Bar of California, 366 U.S. 36 (1961). In *Konigsberg*, Justice Harlan, writing for the majority, presented his theory of judicial balancing. Harlan suggested an approach for examining legislative regulations which appear to encroach on the guarantees of the first amendment. When a valid governmental interest exists, the Court must weigh that interest against the traditional guarantees of free speech. The first amendment may not be suppressed unless the government can justify the need for suppression. *Id.* at 49-51. *See also* L. TRIBE, *supra* note 28, at 580-84; Frantz, *The First Amendment in Balance*, 71 YALE L.J. 1424 (1962).

32. *Compare* Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (a government regulation which restricts speech based on its content will be invalidated unless the government can demonstrate the regulation is necessary to serve a compelling state interest and narrowly drawn to meet that purpose) *with* Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 648 (1981) (a content-neutral government regulation will be upheld as long as the regula-

Courts generally employ a pure balancing of interests when the governmental regulation involved is not intended to control speech.[33] The courts weigh the regulations' effect on expression against the governmental interest served by its enforcement.[34] A content-neutral regulation is permissible if it is the least restrictive means of accomplishing a valid governmental interest,[35] and if it merely restricts the time, place, or manner of the speech.[36] Additionally, reasonable alternative methods of communication must be available to both speakers and listeners.[37]

In contrast to content-neutral regulations, content-based regulations favor certain modes of communication over others.[38] These regulations are presumptively unconstitutional under the first amendment.[39] The Supreme Court has allowed content based restrictions only when the governmental interest involved is compelling, substan-

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tion merely rejects the time, place, or manner of speech). *See also* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978).

33. The Court's balancing analysis under which it weighs competing interests arose from dicta in Schneider v. State, 308 U.S. 147, 161 (1939). *See* Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387, 387 (1979).

34. City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2128 (1984). *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (city's interest in avoiding visual clutter was sufficient to justify a prohibition of billboards); Young v. American Mini Theaters, 427 U.S. 50 (1976) (city regulation requiring "adult movie theaters" to be 1000 feet apart upheld against first amendment challenge); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (Court upheld city's prohibition of political advertising on its buses stating that the city was entitled to protect the aesthetic and efficiency aspects of of its mass transit system); Adderly v. Florida, 385 U.S. 39 (1966) (right of individuals to publicly protest was subordinate to city ordinance prohibiting demonstrations on jailhouse property).

35. Schneider v. State, 308 U.S. 147, 162 (1939). *See* Stone, *supra* note 32, at 86.

36. City of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2130. *See* L. TRIBE, *supra* note 28, at 682-83.

37. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542-43 (1980) (statute prohibiting utility companies from using bill inserts to discuss political matters left no alternative mode of communication).

38. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (regulations restricting speech based on its content will be invalidated unless the government demonstrates a compelling interest in upholding the regulation and the restriction is narrowly tailored to meet the government's needs); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (content restriction on expressive activity undercuts the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open").

39. The Court has defined three exceptions to the general principle that content-based restrictions are unconstitutional. A content-based regulation will be held unconstitutional unless a compelling governmental interest justifies the regulation, the speech itself is unprotected by the first amendment, or the speech poses a clear and present danger. L. TRIBE, *supra* note 28, at 670. *See, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) (obscene language not protected by the first amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words not protected by the first amendment); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech may be regulated if it is designed to incite or produce imminent unlawful action). *See* J. NOWAK, *supra* note 27, at 873-82, 954-57, 1008-027; Bogen, *supra* note 33, at 441.

tial or cogent.[40]

The court applied a content-neutral analysis in *Young v. American Mini Theatres.*[41] In *Young,* a Detroit "anti skid-row" ordinance prohibited locating adult movie theaters within 1,000 feet of any two other "regulated uses"[42] or within 500 feet of residential areas.[43] An adult theater operator brought suit alleging the statute[44] was an impermissible content based restriction.[45] The Court began its analysis by considering the content which was to be statutorily controlled. The Court found that the city's general zoning law required all motion picture theaters to satisfy certain locational requirements.[46] Therefore, the statute merely regulated the place where adult films could be shown.[47] Because these restrictions constituted merely a permissible time, place, or manner regulation, the Court's content-neutral analysis considered only whether the city's community interest in avoiding the concentration of adult movie theaters outweighed the public's first amendment right to receive information.[48] It concluded the city's interest in the present and future character of its neighborhoods justified upholding the statute.[49]

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40. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). *See, e.g.,* Carey v. Brown, 447 U.S. 455, 461 (1980) (for a government regulation to be sustained, the government must demonstrate the legislation serves a "substantial" state interest); Regents of University of California v. Bakke, 438 U.S. 265, 299 (1978) (a state must demonstrate a "compelling" governmental interest when burdening a class of persons); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (the state must demonstrate a "cogent" interest to justify abridgement of the first amendment).

41. 427 U.S. 50 (1976). *See generally* Comment, *Young v. American Mini Theaters, Inc.: A Limit on First Amendment Protection,* 12 NEW ENG. L. REV. 391 (1976); Brest, *The Supreme Court 1975 Term,* 90 HARV. L. REV. 1 (1976).

42. 427 U.S. at 54. The zoning ordinance defined regulated uses as theaters, bookstores, liquor stores, pool halls, pawnshops and other similar activities. *Id.* at 52 n.3.

43. *Id.* at 52.

44. The Detroit Michigan ordinance defined "Adult Motion Picture Theater" as: "an enclosed building . . . for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas'." *Id.* at 53 n.5.

45. *Id.* at 55. The controversy centered on the distinction between types of adult theaters. The Detroit zoning ordinance differentiated between theaters featuring sexually explicit movies and those which do not. *Id.* at 56.

46. *Id.* at 62.

47. *Id.*

48. *Id.* at 62-63. Detroit argued its ordinance was necessary to the community under the theory of inverse zoning. Inverse zoning suggests cities forbid certain businesses from locating in particular areas under the theory that concentration of these businesses are injurious to a neighborhood. *See id.* at 54 & n.6. A neighborhood can prevent deterioration by forbidding the formation of such concentrations. *See id.* Detroit's first inverse zoning ordinance was passed in 1962. The city added "adult bookstores" to the list of regulated uses in 1972. Brest, *supra* note 41, at 196-97 n.5.

49. 427 U.S. at 72. The Court concluded the city's interest in "the present and future character of its neighborhoods" justified an incidental restriction on the first amendment. *Id.*

In contrast to the *Young* case, the Supreme Court decision of *Police Department v. Mosely*[50] illustrates the approach taken by courts in analyzing content-based regulations. *Mosely* addressed a Chicago city ordinance which prohibited all picketing within 150 feet of a school unless the picketing involved a peaceful labor dispute.[51] The Court determined that, in order to withstand constitutional scrutiny, any government restriction selectively excluding a particular type of speech must serve a substantial governmental interest[52] and be narrowly tailored to meet a specific goal.[53] Although Justice Marshall, writing for a unanimous court, noted that the government could justify the selective exclusion of persons from a public forum in a few rare instances, such as where necessary to prevent public disorder, such justifications would be carefully scrutinized.[54] The Court con-

50. 408 U.S. 92 (1972).

51. *Id.* at 92-93. The Supreme Court considered *Mosely* along with Grayned v. City of Rockford, 408 U.S. 104 (1972). *Grayned* invalidated an almost identical ordinance which the Illinois Supreme Court had upheld. 408 U.S. at 94.

The *Mosely* Court characterized picketing as a method of expressing an idea which is subject to broad state regulation. 408 U.S. at 97. The *Mosely* Court recognized, however, that state regulation must give way to free speech principles when these regulations threaten to suppress certain ideas. *Mosely* agreed with Justice Black's opinion in Cox v. Louisiana, 379 U.S. 536 (1965) which stated:

> [B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.

408 U.S. at 97-98.

52. 408 U.S. at 99.

53. 408 U.S. at 101 & n.8. The city argued the restriction is merely a device for preventing disruption of the school. In contrast, the Court held the city ordinance described picketing in terms of the content it wished to control. The essence of content-control is censorship, a concept impermissible under the first amendment. *Id.* at 99.

See also Carey v. Brown, 447 U.S. 455 (1980). In *Carey*, the Court invalidated an Illinois statute which prohibited all picketing of residences or dwellings except for peaceful picketing of employment places involved in labor disputes. Relying on *Mosely*, the Court concluded the state's goal of protecting privacy could not be advanced in a way which allowed picketing only in certain areas of the city. The restriction permitted the expression of views on one particular subject and thus was repugnant to the first amendment. The majority explicitly stated, however, that an anti-residential statute would be upheld if it was uniform and non-discriminatory. *Id.* at 470.

54. 408 U.S. at 98-99. The city argued it had a substantial interest in preventing school disruption. While recognizing the need for order in the city school system, the Court concluded that Chicago had failed to meet its burden. The Court noted that the city itself had previously determined that peaceful labor picketing during school hours was not an undue interference with school. *Id.* at 100. *Cf.* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (school prohibition against wearing arm bands invalidated absent proof that the rule was necessary to avoid substantial interference with school discipline).

cluded that peaceful labor picketing during school hours did not unduly interfere with school activities. Thus, the city was unable to sustain its heavy burden and the Court invalidated the content-based law.[55]

V. State Regulatory Responses to Exit Polling

Two recent federal district court decisions exemplify the contrasting levels of scrutiny which the Supreme Court might apply to the exit poll bans proposed by states.[56] Dissatisfied with the unenforceability of the congressional resolutions, the Florida[57] and Washington[58] state legislatures have imposed regulations prohibiting exit polling.[59] Predictably, these regulatory schemes have been challenged as unconstitutional infringements on first amendment rights. Viewing the regulation as a content-based restriction of speech, the Federal Middle District Court of Florida found the statute unconstitutional.[60] The Washington court, however, in a cursory declaratory judgment and order, apparently viewed a nearly identical statute as content-neutral and upheld it as a permissible time, place, manner restriction.[61]

A. Washington State: The Content-Neutral Approach

Daily Herald v. Munro[62] was the first case to directly address a state exit poll law. *Munro* dealt with a Washington state statute which made conducting an exit poll within 300 feet of a polling place a misdemeanor.[63] Newscasters[64] challenged the statute as an uncon-

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55. 408 U.S. at 102.

56. *See* Clean-Up '84 v. Heinrich, 590 F. Supp. 928 (M.D. Fla. 1984); Daily Herald Co. v. Munro, No. C83-840T (W.D. Wash. July 11, 1984).

57. *See* Fla. Stat. § 104.36 (1983) (prohibits solicitation within 100 yards of any polling place).

58. *See* Wash. Rev. Code Ann. § 29.51.020 (1983) (prohibits solicitation within 300 feet of polling place).

59. *See also supra* note 5.

60. 590 F. Supp. at 928.

61. No. C83-840T at 1-2.

62. *Id.*

63. *See* Wash. Rev. Code Ann. § 29.51.020 (1983). The Washington statute provides as follows:

> (1) On the day of any primary, general or special election, no person may, within a polling place, or in any public area within three hundred feet of any entrance to such polling place:
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> (a) Do any electioneering; (b) Circulate cards or handbills of any kind; (c) Solicit signatures to any kind of petition; (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place; or (e) Conduct any exit poll or public opinion poll with voters.

stitutional restriction of speech and commentary.[65] The information gathered from polling data enabled the newscasters to report voting trends as well as electoral outcomes.[66] Requiring newsmen to stand at least 300 feet from the election area allegedly prevented them from gathering information and disseminating it to the public. The challengers argued that this hindrance violated the public's constitutional right to receive information and prevented the press from fulfilling its obligation of disseminating it.[67]

Viewing the statute as content-neutral, the *Munro* court seemed to apply an analysis largely identical to that used in *Young*.[68] The court viewed the Washington statute as a restriction on the place where exit polling could occur, thereby rejecting the plaintiff's argument that the legislation restricted a certain area of protected speech.[69] The court did not explicitly state the regulation was a valid time, place, or manner restriction. Rather, the brief opinion merely listed each requirement necessary to uphold a valid time, place, or manner restriction and stated that the Washington statute satisfied those requirements.[70] Under the court's superfluous analysis, exit pol-

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(2) No person may obstruct the doors or entries to a building in which a polling place is located or prevent free access to and from any polling place. Any sheriff, deputy sheriff, or municipal law enforcement officer shall prevent such obstruction, and may arrest any person creating such obstruction. (3) No person may:

(a) Except as provided in RCW 29.34.157, remove any ballot from the polling place before the closing of the polls; or (b) Solicit any voter to show his or her ballot.

(4) No person other than an inspector or judge of election may receive from any voter a voted ballot or deliver a blank ballot to such elector. (5) Any violation of this section is a misdemeanor under RCW 9A.20.010, and shall be punished under RCW 9A.20.020(3), and the person convicted may be ordered to pay the costs of prosecution.

64. American Broadcasting Co. (ABC), Columbia Broadcast System, Inc. (CBS), National Broadcasting Co. (NBC), The New York Times Co. and The Daily Herald Co. were co-plaintiffs in this action. Plaintiffs' complaint at 1, Daily Herald Co. v. Munro, No. C83-840T (W.D. Wash. filed Apr. 20, 1984). The Daily Herald Company is a subsidiary of the Washington Post. Wash. Post, Dec. 18, 1983, at 4, col. 4.

65. Plaintiffs' complaint at 9, Daily Herald Co. v. Munro, No. C83-840T (W.D. Wash. filed Apr. 20, 1984).

66. *See id.* at 6-8.

67. *See generally id.* at 10.

68. *See* No. C83-840T at 2. In viewing the statute as "content-neutral" the *Munro* order conformed to reasoning typically employed by the Supreme Court in cases when the regulation is not intended to control speech. *See id. See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Talley v. California, 362 U.S. 60 (1960); Schneider v. State, 308 U.S. 147 (1939). *See also* J. NOWAK, *supra* note 27, at 864-78; Brest, *supra* note 41, at 196-205; Stone, *supra* note 32, at 81.

69. *See* No. C83-840T at 1-2. *See also supra* notes 64-65 and accompanying text.

70. *See* No. C83-840T at 1-2 (the state of Washington has a legitimate and compelling interest in regulating orderly elections, the statute is the least restrictive means of accomplishing that interest, and it is neither vague nor overbroad). *Cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968) (a government regulation is justified if it furthers a substantial governmental

ling was not unconstitutional. Rather, the regulation merely sought to govern the permissible area in which exit polling could be conducted. Thus, the statute constituted a valid time, place, manner restriction.[71] Accordingly, the court employed a balancing test to determine whether the government interest involved outweighed the public's first amendment right to receive information.[72] In upholding the statute, the court noted that both the state's interest in maintaining orderly polls and the government's interest in preserving west coast votes justified the restraint on exit polls.[73]

B. Florida: The Content-Based Approach

In contrast, a Florida federal district court employed a content-based approach and invalidated a statute strikingly similar to the one in *Munro*. In *Clean-up '84 v. Heinrich*,[74] a Florida statute which imposed criminal sanctions on individuals soliciting signatures within 300 feet of a polling site[75] was challenged by a political action committee.[76] Based on the committee's arguments, the court held the statute violated the first amendment guarantees of freedom of speech and association.[77]

In reaching the decision, the *Heinrich* court weighed the state's interests in preserving the integrity of the electoral process against citizens' first amendment rights.[78] Unlike *Munro*, however, the court

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interest, the governmental interest is directed at the conduct of the speaker rather than the speech, and the regulation is the least restrictive means of accomplishing the government's goal).

71. *See* No. C83-840T at 1-2. The Court did not explicitly state the restriction was a valid time, place, and manner regulation. The court's brief order merely listed each requirement necessary to uphold a valid time, place, and manner restriction and stated that the Washington statute satisfied these restrictions. *Id.*

72. *See* No. C83-840T at 2 (W.D. Wash. July 11, 1984).

73. *See id.* The court's order was very brief. It explicitly stated that no genuine issue existed as to any material fact in controversy. The Washington restriction only incidentally restricted plaintiffs' ability to gather news. The state, however, was found to have shown a compelling governmental interest which justified upholding the state law. The opinion did not cite any evidence or reasoning to support its holding. *Id.* at 1.

74. 590 F. Supp. 928 (M.D. Fla. 1984).

75. FLA. STAT. § 104.36 (1983) provides as follows:

> Solicitation near polling places. — Any person who, within 100 yards of any polling place on the day of any election, distributes or attempts to distribute any political or campaign material; solicits or attempts to solicit any vote, opinion, or contribution for any purpose; solicits or attempts to solicit a signature on any petition; or, except in an established place of business, sells or attempts to sell any item is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

76. 590 F. Supp. at 929.

77. *Id.* at 930.

78. *Id.* at 930-31.

viewed the statute as a content-based regulation.[79] Thus, under the *Mosley* test, the state had to prove both that a substantial governmental interest was involved and that the interest was narrowly tailored to meet a specific goal.[80]

In invalidating the statute, the *Heinrich* court rejected the state's argument that exit polling restrictions were necessary to maintain order at the polls.[81] The court refused to uphold a law which, based on some vague specter of future disorder, substantially infringed on first amendment rights.[82] Furthermore, the court chastised the state for not adopting a less restrictive means of insuring orderly voting procedures.[83] The state argued that because poll workers themselves could not maintain orderly elections, there was a need for legislation. The court held, however, that these problems would have to be remedied in some way other than a "blanket prohibition" of signature solicitations at the polls on election day.[84]

VI. A Proposal for an Appropriate Constitutional Analysis

The Supreme Court will almost certainly consider the constitutionality of state exit poll laws and the curtailing of early election predictions in the near future.[85] Alternatively, if federal legislation aimed at newscasts is passed, the Court is likely to encounter a constitutional challenge to the law.[86] In either instance, critics will level a number of charges at exit poll laws. Critics would argue that exit poll laws constitute an unreasonable time, place, and manner regulation which leaves no alternative method of communication. They may also argue the classification of information solicitation based on question content violates the first amendment. Finally, they may assert that laws regulating newscasters are unconstitutional prior restraints on protected communication. The Supreme Court will have

79. *Id.* The court stated the right to free debate on political issues is one of the highest values safeguarded by our Constitution, a right that cannot be infringed without a showing of compelling justification. Although the State can enact reasonable regulations to ensure orderly elections, those regulations may not place "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 59 (1976)).

80. 408 U.S. at 101-02.

81. 590 F. Supp. at 930.

82. *Id.*

83. *Id.* at 930-31. Testimony indicated at least two centers for political discussion were within 300 feet of polling places. Under the statute, a person soliciting signatures for a petition on election day at one of these sites could be charged with a misdemeanor. *Id.* at 930.

84. *Id.* at 931.

85. *See supra* notes 5 & 59 and accompanying text.

86. *See supra* notes 15-24 and accompanying text; *infra* notes 133-37 and accompanying text.

to develop an appropriate constitutional analysis to resolve these issues.

A. Levels of Scrutiny

In considering constitutional questions, courts assess the specific classification of the speech, the nature of the forum, and the conflicting interests involved. Liberty of speech and press is not an absolute right.[87] The limits of these rights must always be determined in light of the particular subject matter involved.

The first amendment affords protection in varying degrees to different categories of speech. Traditionally, full protection extends to pure speech, such as the right to criticize the government.[88] Commercial speech which advertises a product or service for business purposes has historically been subject to substantial governmental regulation.[89] Presently, however, commercial speech appears to receive full first amendment protection.[90] Conversely, obscenity, libelous

87. Near v. Minnesota, 283 U.S. 697, 708 (1930).

88. Tinker v. Des Moines School Dist., 393 U.S. 503, 505-06 (1969).

The free speech clause of the Constitution was a natural response to the authoritarian government of the middle ages. Political authority was considered to have derived from God. Thus, criticizing secular authority would result in damnation. Political censorship continued for the three centuries prior to the Declaration of Independence. In an effort to appear superior to the Roman Catholic Church, English royalty required the suppression of ideas antagonistic to the government. The publication of statements criticizing the King was considered seditious libel which was equivalent to criminal assault. Further, all writing had to be licensed prior to its publication. Although the practice of censorship declined in colonial America, the doctrine of seditious libel continued. While promoting free speech which was in accordance with its political views, the pre-revolutionary legislature severely punished its critics. At the time the Constitution was drafted, the idea that liberty of the individual was essential to a free state finally prevailed. Thus, the framers adopted the first amendment, which was intended to eliminate censorship and destroy the doctrine of seditious libel in America. J. NOWAK, *supra* note 27, at 858-61. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) ("offensive" criticism of the draft must be permitted under the first amendment). *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 1-35 (1946) (discussion of the history of free speech); Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

89. *Compare* Valentine v. Chrestensen, 316 U.S. 52 (1942) (the Constitution does not protect speech for profit) *and* Breard v. City of Alexandria, 341 U.S. 622 (1951) (state interest in protecting citizens privacy may prevail against rights of door to door salesmen) *with* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (state may not prevent door to door solicitation when the motive is religiously oriented). *See also* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972) (because the Consitution protects advertising less rigorously than other communication, the Court permitted the federal government to ban cigarette advertising on television); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. FORUM 1080; Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720 (1982).

90. In Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748 (1976), the Court held that free speech extended to any exchange of ideas or information that might enable individuals to make better informed choices. *Id.* Thus, under *Virginia State Bd. of Pharmacy*, states can only regulate misleading advertising. *See, e.g.*, Bates v. State Bar,

speech and "fighting words" are not within the scope of first amendment protection.[91]

The Constitution treats the right of free and open political debate as a value of paramount importance. Accordingly, political speech, which also includes electoral speech,[92] receives the fullest protection under the first amendment.[93] The first amendment prohibits restrictions on candidates, citizens, and associations engaged in political activity. If a government regulation restricts the offering of ideas in the electoral arena, the law will be invalidated unless demonstrable evidence of a compelling governmental interest exists.[94]

Applying this standard, the Supreme Court in *Brown v. Hartlage*[95] found the government's interest in guaranteeing fair elections subordinate to first amendment rights.[96] In *Brown*, the Court explicitly recognized Kentucky's legitimate interest in preserving the integrity of its elections.[97] Nevertheless, a unanimous Court found that, on balance, a candidates' right of free speech outweighed the state's interest in either prohibiting the buying of votes or controlling factual misstatements.[98] The Court did distinguish certain areas which the

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433 U.S. 350 (1977) (state may not regulate attorney advertising); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (invalidated a prohibition of any advertisement of display of contraceptives); Bigelow v. Virginia, 421 U.S. 809 (1975) (Virginia could not regulate advertisements for New York abortions even though abortions were illegal in Virginia).

91. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libelous utterances); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). The theory that certain forms of speech do not deserve first amendment protection has been labeled the two-level theory of free speech. The two-level doctrine arose from dictum in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The *Chaplinsky* Court held that speech which is utterly without redeeming social worth should not receive constitutional protection. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 26. *But see* L. TRIBE, *supra* note 28, at 670 (suggesting the two-level theory of free speech has lost much of its vitality).

92. *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 53 (1982); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); Polsby, *supra*, at 19-20. Polsby perceives a candidate's free speech interests as political speech. This theory suggests that all speech concerning elections is encompassed within the full first amendment protection guaranteed to political speech. *Id.*

93. *See* Regan v. Taxation with Representation of Washington, 103 S. Ct. 1997, 2002 (1983). *See* Brown v. Hartlage, 456 U.S. 45 (1982) (first amendment has its fullest and most urgent application in the case of regulation of the content of political speech); United States v. United Auto Workers, 352 U.S. 567, 594 (1957) (Douglas, J., dissenting) ("The making of a political speech . . . has always been one of the preferred rights protected by the Constitition."). *See also* Polsby, *supra* note 92, at 1.

94. Brown v. Hartlage, 456 U.S. at 53-54.

95. *Id.* at 45.

96. *Id.* at 62.

97. *Id.* at 52.

98. *Id.* at 52-53. Petitioner Brown was a candidate for election against incumbent Hartlage. In a campaign speech attacking Hartlage, Brown promised to substantially lower his salary if elected, thereby saving each taxpayer money. Shortly after the speech, Brown learned that he had violated the Kentucky Corrupt Practices Act which prohibited candidates from

state could justifiably regulate, such as prohibiting candidates from offering monetary incentives in return for votes.[99] *Brown* demonstrated, however, the heavy burden of proof the government must meet to justify infringing on first amendment electoral speech.

B. Balancing of Competing Interests

Early election predictions fall within the broad scope of political speech. A constitutional analysis of any legislation curtailing such predictions must, therefore, weigh the intensity of each competing interest. Such an analysis should precisely define the purpose and importance of both the government's interests in preserving the integrity of the electoral process and the public's interests in protecting free speech.

1. The Government's Interest in the Electoral Process

Both the state and federal governments have legitimate interests in preserving the integrity of the electoral process. Insuring an alert, responsible electorate and preserving the individual's belief in government is paramount to a democratic system.[100] The Supreme Court has, therefore, consistently recognized the state and federal government's significant interest in sustaining the individual's active role in the electoral process.[101] Although the right to vote is not constitutionally protected per se,[102] the Court has referred to voting as a fundamental right preservative of all basic political and civil rights.[103] This right has been extended to include the government's fundamental interest in preserving each citizen's vote.[104] Opponents of early election predictions argue that early publication of election returns breeds apathy among voters and interferes with the government's constitu-

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making monetary promises in consideration for a vote. Brown thereafter retracted his statement. Subsequently Brown won the election and Hartlage filed suit. *Id.* at 47-49.

99. *Id.* at 55. The Court specifically recognized personal solicitation in exchange for a specific agreement. *Id.*

100. First Nat'l Bank of Boston v. Belliotti, 435 U.S. 765, 788-89 (1978). *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976); American Party of Texas v. White, 415 U.S. 767, 782 n.14 (1974). *But see* Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124-26 (1981) (state's compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation, and preventing harassment did not justify intrusion into first amendment protections).

101. *See, e.g., Bellotti*, 435 U.S. at 787; United States v. United Auto Workers, 352 U.S. 567, 575 (1957).

102. San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 35 n.78 (1973).

103. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

104. *Cf.* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (" 'equal right to vote,' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways").

tional right to preserve voter confidence.[105]

In *Reynolds v. Sims*,[106] the Supreme Court acknowledged the "undeniable" constitutional right of citizens to vote in state and federal elections.[107] *Reynolds* struck down an Alabama reapportionment plan which ostensibly gave voters living in certain parts of the state a weighted vote.[108] The majority believed the legislature's scheme contradicted its role as protector of the electorate.[109]

The Equal Protection clause requires that all citizens have an equal vote, no matter where their homes may be located.[110] Therefore, the *Reynolds* Court held that an individual's right to vote is unconstitutionally impaired when its weight is diluted in proportion to votes cast in other districts.[111] Like the reapportionment plan in *Reynolds*, an early prediction of an election's outcome based on returns from the east may give voters on the east coast a more significant role in deciding a presidential winner. Conceivably, this may constitute an unconstitutional dilution of west coast votes.

Any early election prediction which could serve to reduce voter incentive to go to the polls seems repugnant to the principles espoused in *Reynolds*.[112] As distinguished from the *Reynolds* case, however, the government's primary interest in regulating exit polling is to safeguard a small fraction of the population from a premature newscast. Citizens are not physically denied access to the ballot.

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105. The 1980 election day "incident" has caused widespread cynicism among reporters. This loss of confidence has likely extended to the general public. One journalist commented that on election day in 1980 over 83 million Americans voted in the presidential election. About 36,000 responded to exit polls. Levy, *supra* note 7, at 54. Mike Royko, a syndicated columnist, called for Chicagoans to lie to exit pollsters during the 1984 presidential primary. Washington Post, Mar. 16, 1984, § B, at 1, col. 1. Further, Art Buchwald argued network polling methods have become so sophisticated that no one west of the Mississippi need vote in order to decide a presidential election. Los Angeles Times, Nov. 6, 1980, § V, at 2, col. 1.

106. 377 U.S. 533 (1964).

107. *Id.* at 554.

108. *Id.* at 568.

109. *See id.* at 565.

110. *Id.* at 565-66. *See also* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). The *Reynolds* Court analogized dilution of a citizen's vote to invidious discrimination. An unequal vote due to your residence impairs basic constitutional rights under the fourteenth amendment as much as a bar from the polls based on race. 377 U.S. at 566.

111. 377 U.S. at 566. *See also* Evans v. Cornman, 398 U.S. 419, 421-22 (1970) (residents of a mental health institute have the right to vote equal to all other citizens of the state); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626-28 (1969) (invalidating a state statute granting the right to vote in a school election to some citizens of requisite age and citizenship but denying that right to other citizens with the same qualifications); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (Louisiana law providing that only "property taxpayers" have the right to vote in municipal utility bond elections is violative of the equal protection clause of the Constitution).

112. *See supra* note 111 and accompanying text.

Rather, only their incentive to vote is diminished once a winner is predicted. Therefore, while the government's interest in insulating the election process from exit poll results may be significant, it is probably not substantial enough to override first amendment protections.

2. Constitutional Guarantees of Free Speech

The Constitution's framers presupposed that free expression without government intervention was essential to an informed electorate. At the time the first amendment was conceived, the government seemed to pose the only potential threat to a free flow of information.[113] This danger necessitated a constitutional provision which would keep public information purveyors free from potential government control. Consequently, the framers enacted the free press clause of the first amendment which leaves the press free to stimulate public discussion. Thus, the media enjoys constitutional protection predicated on the public's right to receive information.

The press is widely considered the most practical vehicle for quickly disseminating information to the public as it becomes available.[114] The broadcasting media argues that delaying available presidential election information would be inconsistent with traditional journalistic standards.[115] The media contends the function of a journalist is to report information in a timely and honest manner.[116] Therefore, most networks have chosen to disregard Congress' resolution advocating restraint in reporting exit poll results.[117] They contend that if the need to limit journalistic freedom is truly urgent,

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113. J. NOWAK, *supra* note 27, at 860-61.

114. The media is the only system which can successfully spread information quickly and accurately to a country of 215 million. Thus, without the large organization of editors and reporters, self government would not work. *Cf.* Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("The electorate's increasing dependence on television, radio, and other mass media for news and information has made these . . . modes of communication indispensable instruments of effective political speech.").

The organized print and electronic media have the enormous resources required to seek out, assimilate, and interpret information of governing importance. "[T]elevision has replaced newspapers as the primary source of news for most Americans." Albert, *The Federal Regulation of Radio and Television Newscasts*, 34 U. FLA. L. REV. 309, 310 (1982). Over 56 million Americans watch the early evening news broadcast by the three major networks. *Id.*

115. *See generally Hearings*, *supra* note 2; *Election Hearings*, *supra* note 4; *Broadcast Media Hearings*, *supra* note 10; *Broadcast Early Elections Hearings*, *supra* note 10.

116. *Hearings*, *supra* note 2, at 54. Veteran journalists have strongly asserted that, with the exception of the very rare instances when bodily harm might result, any attempt to delay reporting is a mistake. Many individuals agree. For example, President Kennedy suggested that had he not restrained the New York Times from reporting the "Bay of Pigs" landing, a great disaster might have been averted. *Id.*

117. *See supra* note 6.

Congress should pass binding corrective legislation.[118]

The Supreme Court has vigorously protected the press' role in disseminating electoral information. Both *Brown* and *Reynolds* explicitly recognized the paramount value of each individual's voice in the electoral process.[119] In *Mills v. Alabama*,[120] the seminal case on the interrelationship between first amendment rights and legislative efforts to ensure "purer" elections, the Court unanimously invalidated a broadly based corrupt practices law.[121] The Alabama statute imposed criminal penalties on newspapers publishing editorials on election day which concerned election issues.[122] The *Mills* Court acknowledged that the first amendment's major purpose was to protect the free discussion of all matters pertaining to the political process.[123] Overturning the lower court, the Supreme Court held that a state's interest in limiting media influence in a public election was not compelling enough to suppress free speech.[124]

Under *Mills*, the government cannot silence the news media merely because its news stories or editorial commentaries affect voting decisions. *Mills* might be distinguished from early election predictions, however, because the latter do not merely influence the voters' choice of candidates, but instead affect the voters' decision of whether to vote at all. Notwithstanding this argument, *Mills* undoubtedly established that courts will strictly scrutinize government actions barring the press from influencing voter opinions on election day. Under this analysis, exit polling would be presumptively protected speech.

The Supreme Court has specifically recognized the public's right to receive information from the broadcasting media. In *Red Lion Broadcasting Co. v. Federal Communications Commission*,[125] the

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118. Broder, *supra* note 4.

119. *See supra* notes 95-99 & 106-11 and accompanying text.

120. 384 U.S. 214 (1966).

121. *Id.* at 220.

122. *Id.* at 215-16. On election day, an Alabama newspaper carried an editorial strongly urging citizens to adopt a mayor-council form of government. *Id.* at 215.

123. *Id.* at 218. The Court discussed at length the major role the press plays in a democratic society. A vital function of the press is to discuss those matters relating to the political process. This includes discussion of all elected officials. The press was designated to serve as a "powerful antidote" to any abuses of government. Essentially, disseminating information about candidates and elected officials is an integral factor in a democratic society. *Id.* at 219.

124. *Id.* at 220.

125. 395 U.S. 367 (1969). The *Red Lion* decision consolidated two conflicting cases from the federal courts of appeals. In Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), the Seventh Circuit held the FCC's "political editorial" and "personal attack" rules violated broadcasters' first amendment rights of free speech and commentary. *Id.* at 1020. In contrast, the District of Columbia Court of Appeals in *Red Lion*, 381 F.2d 908 (D.C. Cir. 1967), upheld the order requiring licensees to offer airtime to individuals person-

Court upheld the Federal Communication Commission's right to impose the fairness doctrine on the broadcasting media.[126] Under the fairness doctrine, broadcast stations must give equal time to editorial replies.[127] Recognizing television as the most optimum method for disseminating information to the greatest number of people, the Court mandated adoption of the doctrine under first amendment principles.[128] In effect, the Court found the public's right to receive information outweighed the broadcasters right to stress selective viewpoints.[129]

The *Red Lion* decision permitted government infringement upon free speech. This particular infringement, however, enhanced the public's ability to receive full and accurate information. *Red Lion* viewed television as a limited resource.[130] The government imposed

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ally attacked on their television stations under the public's constitutional right to receive all information. *See id.* at 930. The Court affirmed *Red Lion* and reversed *RTNDA*. 395 U.S. at 401. For a further discussion of *Red Lion* see generally Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974 (1970); *The Supreme Court 1968 Term*, 83 HARV. L. REV. 7, 133-47 (1969) [hereinafter cited as *1968 Term*]; Comment, *Red Lion and the Fairness Doctrine: Regulation of Broadcasting "In The Public Interest"*, 11 ARIZ. L. REV. 807 (1969).

126. 395 U.S. at 400-01. In writing the Constitution, the framers could not have anticipated the advent of the electronic broadcast media. Unlike the traditional written press, access to the broadcasting media is very limited. Thus, when some individuals gain access to this resource, others must be denied. In response to this problem, Congress has created a regulatory agency, the Federal Communications Commission, aimed at upholding constitutional principles in a limited media. The FCC requires each station to have a license prior to broadcasting. The award of the license may be subject to reasonable regulations with goals other than the suppression of ideas. *Red Lion* held this regulation is permissible because the right of listeners and viewers is paramount to the rights of broadcasters. *Id.* at 390. *See generally* J. NOWAK, *supra* note 27, at 894-902; Geller & Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U.L. REV. 603 (1983); Goldberg, Ross & Spector, *Cable Television, Government Regulation, and the First Amendment*, 3 COMM/ENT L.J. 577 (1981); Lively & Leahy, *Government and the Media: Regulating a First Amendment Value System*, 31 U. FLA. L. REV. 913 (1979).

127. 395 U.S. at 369-70. *See* Pub. L. No. 86-274, § 1, 73 Stat. 557 (1959), *amending* 47 U.S.C. § 315(a) (1958) (codified at 47 U.S.C. § 315(a) (1982)) (If a licensee permits a candidate for public office to use a broadcasting station, he must afford equal opportunity to all other candidates for that office.). The fairness doctrine requires all licensed broadcasters to provide equal opportunities to individuals who have been personally attacked and to legally qualified candidates for office if any one candidate in the race is permitted air time to present views on an issue of current importance. *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. REV. 1222, 1225 (1970); Zack, *FCC and the Fairness Doctrine*, 19 CLEV. ST. L. REV. 579 (1970). *Cf. generally* Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT L.J. 1 (1981) (the fairness doctrine does not extend to cable television).

128. *See* 395 U.S. at 400-01.

129. *See id.* at 390.

130. *Id.* at 376. The Court espoused the views of Congressman White, sponsor of the Radio Act of 1927. The Radio Act was the first piece of legislation regulating broadcast frequency. Congressman White asserted that "'[i]f enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.'" *Id.* at 376 n.5.

fairness doctrine was apparently considered the only way to guarantee equal and open access to this resource for the greatest number of people.[131]

C. Constitutionality of Federal Legislation

Any curtailment of early election predictions would contravene the *Red Lion* Court's mandate of equal access to the media.[132] As distinguished from the fairness doctrine, a government abolition of election predictions would stifle rather than promote discussion. Under the guise of protecting citizens' rights to a fair and honest election, government would be limiting what citizens could see and hear.

Congress has arguably acknowledged the possibility that a federal exit poll restriction would unconstitutionally abridge the first amendment by its reluctance to pass a binding law for bidding exit polling.[133] The first amendment cannot be suppressed unless the government can prove a compelling state interest justifies the suppression.[134] While the government has a fundamental interest in preserving each citizen's vote,[135] this interest is probably not compelling enough to deny the press the constitutional freedom they are entitled to enjoy.

The Supreme Court recently held a state's interest in preserving the overall integrity of the electoral process did not justify interference in the protected realm of first amendment rights.[136] Under such a rule, any federal exit poll legislation would seem to be clearly un-

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131. *See id.* at 377. "[T]he 'public interest requires ample play for the free and fair competition of opposing views,. . . .' " *Id. See also 1968 Term, supra* note 125, at 141 (broadcasters should not systematically exclude ideas); Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647-50 (1967) (discussion of marketplace of ideas theory).

132. *See supra* notes 125-31 and accompanying text. *See generally 1968 Term, supra* note 125, at 138-46; Comment, *supra* note 125, at 807-21.

133. *See supra* notes 16-25 and accompanying text.

134. *E.g.*, Widmar v. Vincent, 454 U.S. 263, 270 (1981).

135. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("By denying some citizens the right to vote, such laws deprive them of a 'fundamental political right, . . . preservative of all rights.' ") (quoting Reynolds v. Sims, 37 U.S. 533, 562 (1964)).

136. Democratic Party of the United States v. Wisconsin *ex rel* La Follette, 450 U.S. 107, 125-26 (1981). In *La Follette*, the Democratic Party challenged the constitutionality of Wisconsin's open primary election, which entitled citizens to choose their preferred candidate without regard to party preference. The law further required that Democratic delegates to the National Convention be bound to cast votes in the same allocations as the statewide primary. Consequently, the National Democratic Party refused to seat the Wisconsin delegates, arguing that such a primary did not truly represent those who had openly stated affiliation with the party. *Id.* at 110-13. The party charged the state regulation impermissibly impaired the Democratic Party's freedom of political association protected by the first amendment. *Id.* at 113. The state argued it had a compelling interest in preserving the integrity of the electoral process, increasing voter participation in primaries, and preventing the harassment of voters. *Id.* at 124-25.

constitutional. Proponents of federal exit poll restrictions argue such legislation is necessary for the fair administration of elections. Advocates further assert that such a statute is important to the democratic process by preserving the incentive to vote for a portion of the electorate.[137] Under recent case law, however, these arguments would not pass judicial muster. The court will probably choose to favor the needs of the electorate at large over those of the small fraction of the populous affected in order to preserve the level of speech the Constitution safeguards.

D. Constitutional Analysis of State Exit Poll Laws

Determining the constitutionality of exit poll legislation presents a clash of fundamental rights. Each right is essential to a democratic system and each is constitutionally based. Inherent in our democratic system, however, is a judicially mandated hierarchy that elevates some first amendment interests over others. The varying levels of constitutional scrutiny illustrate this hierarchy.[138]

Recent Supreme Court decisions have adopted a policy of favoring the federal government's interests where the government seeks to preserve the integrity of the electoral process.[139] For example, in *Buckley v. Valeo*,[140] the Court found the federal government's interest in administering fair elections sufficiently compelling to incidentally burden the first amendment.[141] The *Buckley* Court considered the constitutionality of limitations on campaign expenditures and contributions.[142] In sustaining the disclosure and reporting provisions of the Federal Election and Campaign Act,[143] the *Buckley* Court held

137. *See supra* note 11.

138. *See supra* notes 36-40 and accompanying text.

139. *See, e.g.*, Federal Election Comm'n v. National Right to Work Comm., 103 S. Ct. 552, 559 (1982) (first amendment associational rights superceded by congressional interest in enacting a statute limiting certain corporate funding); Buckley v. Valeo, 424 U.S. 1, 29 (1976) (government's interest in preventing corrupt campaign contributions in federal elections is paramount to first amendment free speech).

140. 424 U.S. 1 (1976).

141. *Id.* at 29.

142. *Id.* at 6-7. The Court upheld the individual contribution limits, the disclosure and reporting provisions, and the public financing schemes included in the 1974 amendments to the Election Campaign Act of 1974. The Court, however, found limitations on campaign expenditures by independent individuals, groups or a candidate repugnant to the Constitution. *Id.* at 143.

143. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18 and 47 U.S.C. (Supp. II 1972)), *amended by* Pub. L. No. 96-187, 93 Stat. 1339 (1979) (current version at 2 U.S.C. §§ 431-455 (1982)). For an in-depth analysis of the constitutional impacts of the Federal Election Campaign Act see Note, *The Unconstitutionality of Limits on Contributions to Independent Expenditure Committees*, 35 U. FLA. L. REV. 316 (1983).

the government's duty to prevent corrupt campaign practices justified a slight impediment of first amendment rights.[144]

In contrast to its support of laws upholding the integrity of the electoral process, the Court has invalidated regulations which suppress campaign information. The *Brown* decision reaffirmed the Court's position that voters need to hear all electoral information even if such information is slightly tainted.[145] Even prior to *Brown*, the *Mills* Court had refused to silence information essential to the voters election choice.[146] *Mills* stated that the government's interest in providing sterile conditions on voting day was an inadequate justification for the suppression of speech.[147] Under this rationale, newspapers have published public opinion polls through the day of an election. Arguably, exit polls are merely public opinion polls.[148] Thus, the policy of prohibiting government regulations which silence information pertinent to voter choice should apply.

E. Proposed Resolution of the Munro-Heinrich *Disparity*

Conceivably, a court may consider both the *Heinrich* and *Munro* decisions in determining the constitutionality of exit poll legislation. The approaches taken in the two decisions pose alternative methods for deciding the exit poll dispute. An analysis of both *Heinrich* and *Munro* in the context of past Supreme Court decisions, however, reveals the appropriate constitutional resolution for exit poll regulation.

1. Analysis of the *Munro* Approach

Since its earliest decisions concerning the first amendment, the Supreme Court has occasionally permitted the state to curtail speech when necessary to advance a significant government interest.[149] A government regulation aimed at accomplishing a compelling purpose is constitutionally permissible if it is a reasonable regulation affecting

144. 424 U.S. at 27-29.

145. 456 U.S. at 61. *See supra* notes 92-99 and accompanying text.

146. 384 U.S. at 219. *See supra* notes 120-24 and accompanying text.

147. 384 U.S. at 219-20.

148. Citizens arguably have a constitutional right to predicate their votes on electoral returns if that information is ascertainable. Thus, just as many citizens consider public opinion polls in their electoral decisions, individuals should be allowed to consider exit poll results.

149. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (state's interest in maintaining order at a fairground justified a place restriction on speech); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (states may forbid solicitation by attorneys for pecuniary gain to protect its citizens from adverse consequences); Friedman v. Rogers, 440 U.S. 1 (1979) (state's interest in protecting citizens from potentially misleading advertising justified a ban on the use of trade names by optometrists).

only the time, place, or manner of speech.[150] Under the content-neutral analysis of a time, place and manner restriction, the court focuses on the conduct of the speaker rather than the speech itself. Taking this approach, the *Munro* court held that prohibiting pollsters from approaching within 300 feet of a polling site was a reasonable restriction on the place of the pollster.[151]

In contrast to the *Munro* judgment, the *Heinrich* court, in a brief discussion of the time, place, and manner restrictions created by the exit poll law, criticized the use of a content-neutral analysis.[152] Testimony at the *Heinrich* trial indicated that at least two centers for political discussion were within 300 feet of polling places. Under the exit poll statute, a person soliciting signatures on election day at one of these sites could be charged with a misdemeanor.[153] The *Heinrich* court found the state could not produce evidence to justify this restriction.[154] In comparison, *Munro* cited no evidence in support of its holding validating a similar statute.[155]

Interestingly, *Munro* was decided in Washington, one of three states most effected by the polling technique.[156] The exit poll controversy arose out of concern for west coast voters. Conceivably, the

150. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2130 (1984). In *Vincent*, a recent decision concerning electoral speech, the Court upheld a city ordinance restricting the posting of signs on public property. *Id.* at 2135-36. A local candidate who campaigned chiefly by posting signs around town challenged the statute as an unconstitutional abridgement of free speech. *Id.* at 2122. The *Vincent* Court rejected the petitioners' argument. The Court recognized the ordinance did place a slight burden on free speech. *Id.* at 2128. The candidate's right to post signs, however, was considered subordinate to the City's esthetic and economic interests. *Id.* at 2130, 2135-36. The Los Angeles ordinance merely restricted the manner by which the candidate could campaign and, therefore, was valid as a reasonable time, place, or manner restriction on speech. *See id.* at 2134.

151. *See Munro,* No. C83-840T at 2.

152. *Cf.* 590 F. Supp. at 930.

153. *Id.* The Jewish Towers and the Sheet Metal Workers Union hall were within 300 feet of a Tampa polling site. Both buildings were centers for political discussion where the solicitation of signatures was likely to occur. Under the statute, an individual solicitating signatures in one of these buildings on election day could be charged with a misdemeanor. *Id.*

154. *Id.* The only evidence the state presented to demonstrate its compelling need to preserve the statute was one witness who testified that an "otherwise inoffensive young man" made a coy comment following the witness' refusal to sign the petition and that two out of the 124 precinct captains claimed some dissatisfaction with the order of the elections. The state further argued that the statute was needed because the deputies charged with maintaining order at the elections received only twenty minutes of instruction and thus might be unprepared to handle possible disruption. *Id.*

155. *See* No. C83-840T at 2.

156. Early election predictions most effect Washington, Oregon, and California because their polls close three hours later than those in east coast states. The government officials championing this legislative reform are primarily from the western states. These individuals are protecting both their constituents and perhaps themselves because decreased voter turnouts may negatively affect their own elections. *See supra* note 3. *See generally Hearings, supra* note 2; *Election Hearings, supra* note 4.

judge took a paternalistic attitude in deciding this issue. The declaratory judgment and order was a brief synopsis citing no legal precedent. The court recognized, however, the possibility that first amendment infringements could result from its order upholding a 300 foot ban on exit polling as a reasonable "place" restriction.[157]

Courts often promote government interests through the guise of time, place or manner restrictions.[158] For example, in *International Society for Krishna Consciousness v. Eaves*,[159] the Fifth Circuit upheld as a valid place restriction a state statute prohibiting religious speech in an airport except at designated places. The designated places, however, were small booths located in isolated areas of the airport.[160] This effectively prohibited the speakers from having any type of effective voice. Nevertheless, the court held that the government had a compelling interest in regulating activities at the airport and that the statute only incidentally burdened free speech.[161]

As in the *Eaves* case, requiring pollsters to stand 300 feet from an election booth undercuts the effectiveness of their speech. From a distance of 300 feet, pollsters can only obtain a sparse sampling of the voting public, thereby rendering accurate exit poll predictions impossible. Consequently, newscasters would be unable to broadcast accurate results even though the Court has recognized the right to broadcast news as constitutionally protected. Upholding the validity of a polling restriction would terminate the first amendment protection of exit polling and would effectively achieve the purpose of a unilateral exit poll ban.[162]

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157. No. C83-840T at 1.

158. *See, e.g.*, Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984). In *Vincent*, the Court held an ordinance prohibiting a candidate from posting campaign signs still left ample alternatives for communications with the electorate. *Id.* at 2133. The *Vincent* Court specifically suggested the use of alternate means of communication. *Id.* The "reasonable alternatives" left by the statute, however, are rather irrational. "The average cost of communicating by handbill is . . . likely to be far higher than the average cost of communicating by poster." *Id.* at 2137 (Brennan, J., dissenting).

Under *Vincent*, candidates may turn to the media to communicate their messages. The media, however, is a much more costly alternative than posting signs around town. An individual with sparse resources may be unable to run a successful campaign. The statute's seemingly "reasonable alternatives" are essentially violative of an open candidacy system.

159. 601 F.2d 809 (5th Cir. 1979). *See also* Heffron v. International Soc'y of Krishna Consciousness, Inc., 452 U.S. 640 (1981). A state regulation restricting religious solicitation by Hari Krishna followers relegated the group to a small booth on a Minnesota fairground. *Id.* at 644. The statute effectively silenced the religious group's voice because in order for an individual to hear what the followers had to say, the individual had to choose to approach the religious group. This effectively mooted the Krishna's speech, because most individuals were hesitant to approach the group.

160. 601 F.2d at 826-30.

161. *Id.* at 830.

162. *See supra* text accompanying notes 5 & 10.

Time, place, or manner restrictions are constitutionally permissible because they are less likely to distort public debate.[163] Theoretically, under a time, place, or manner restriction, the information the restriction affects is ultimately disseminated. In practice, however, content-neutral restrictions may impair the communication of some messages more than others.[164] For example, the Florida anti-solicitation statute may have a greater impact on the news media than on a group seeking signatures to get a referendum on the ballot because the latter could use other means to accomplish their goals.[165] Regardless of its label as content-neutral, the ultimate result of any exit poll regulation would necessarily be a silencing of newscasters on election night.

2. Analysis of the *Heinrich* Approach

Entrusting government with the power to control the media creates the danger of potential content manipulation by regulatory authorities. The Supreme Court has, therefore, consistently prohibited government restrictions which are solely based on fears of how people may react to specific communication.[166] The first amendment presupposes people will act in their own best interest if information is readily available.[167] For this reason, regulations directed at specific types of speech are placed under a more exacting scrutiny than a mere balancing test.

Legislation limiting certain types of communications distorts public debate. These regulations are the antithesis of a citizen's right to

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163. *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 199-200 (1983) (discussion of the rationale behind the content-based/content-neutral distinction).

164. *Id. See generally* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-07 (1978) (discussion of the societal effects of content regulation).

165. For example, individuals interested in obtaining signatures for a referendum would probably encounter a substantial part of the community at local supermarkets, churches, or shopping malls.

166. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); Cohen v. California, 403 U.S. 15, 24 (1971) ("[g]overnmental bodies may not prescribe the form or content of individual expression"); New York Times v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open."); NAACP v. Button, 371 U.S. 415, 444-45 (1963) ("[T]he Constitution protects expression . . . without regard to . . . the truth, popularity, or social utility of the ideas."); Wood v. Georgia, 370 U.S. 375, 389 (1962) ("Men are entitled to speak as they please on matters vital to them . . . [they may not be subject to] punishment for contempt for the expression."). *See generally* Stone, *supra* note 163, at 212-13 (discussion of content-control and the Supreme Court).

167. *Cf.* Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

receive information free from government censorship. The Supreme Court has, therefore, consistently invalidated statutes targeting a certain area of speech.[168] For example, a city ordinance which was specifically targeted at real estate companies and prohibited the posting of "for sale" or "sold" signs was held unconstitutional.[169] Similarly, a city ordinance prohibiting all picketing except peaceful labor picketing was also invalidated.[170] State exit polling laws selectively prohibit a specific form of solicitation.[171] The *Heinrich* court correctly identified this infirmity and invalidated the law as an unconstitutional burden on a targeted area of speech.[172]

In its well reasoned opinion, the *Heinrich* court identified orderly elections as the goal of Florida's exit poll legislation. Rejecting the statute's infringement on first amendment rights, the court gave examples of alternative methods of obtaining this goal which would not infringe on protected speech.[173] Under the *Heinrich* analysis, government cannot infringe upon the first amendment rights of the general public in order to preserve the voting incentive of a few.[174]

An appropriate constitutional analysis of exit poll legislation should rest upon the principals espoused in *Heinrich.* State attempts to limit election predictions curtail a specific speech interest. For the Court to uphold this legislation, the government's interest in administering elections free of exit polls must be substantial enough to pass a strict scrutiny test. In the case of exit poll restrictions, however, the government's interest in protecting a small pool of votes does not justify the suppression of first amendment rights. Any state legislation aimed at curtailing exit polling or early election returns should be declared unconstitutional.

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168. J. NOWAK, *supra* note 27, at 977-88. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (zoning ordinance distinguishing commercial and noncommercial advertising was invalidated as an unconstitutional content regulation); Carey v. Brown, 447 U.S. 455 (1980) (state statute prohibiting all picketing of residences except for peaceful labor picketing of an employer involved in a labor dispute invalidated); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (city ordinance which prohibited all picketing in front of schools except peaceful labor picketing held invalid as a content-based regulation).

169. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977). *See generally* Comment, *The Constitutionality of a Municipal Ordinance Prohibiting "For Sale," "Sold," or "Open" Signs to Prevent Blockbusting*, 14 ST. LOUIS U.L.J. 686 (1970).

170. Carey v. Brown, 447 U.S. 455 (1980).

171. FLA. STAT. § 104.36 (1983) prohibits the distribution of political and election material, but not any other types of information.

172. *See* 590 F. Supp. at 930.

173. *Id.* at 930-31.

174. *See id.* The court demonstrated its unwillingness to compromise first amendment rights of an entire jurisdiction because a few citizens were inconvenienced. On a national level, this theory suggests that United States citizens' first amendment rights of free speech and right to receive information should not be sacrificed at the expense of a small fraction of the population.

F. Congressional Legislation as a Prior Restraint of Speech

In addition to viewing a restraint on early elections as an unconstitutional content-based regulation, the Court may also perceive it as a prior restraint.[175] Under the doctrine of prior restraint, the government cannot restrict speech prior to an adequate judicial determination that the first amendment does not protect the expression.[176] Although the first amendment is not an absolute bar to prior restraints, any system of prior restraints is presumptively unconstitutional.[177] Moreover, even in cases where the presumption is rebutted, the Court has insisted upon procedural safeguards designed to insure as full a presentation of the matter as the circumstances permit.[178] In short, the Court allows prior restraints only in exceptional cases.[179] The Court has invoked the prior restraint doctrine to invalidate most regulatory schemes of government censorship.[180] The Supreme Court, however, has been reluctant to rule on cases where its decision ultimately effects electoral outcomes.[181] Conceivably, the Court could choose to abstain from deciding the question at all. This, however, is highly unlikely.

A primary concern in prior restraint cases has been that any restraint, however temporary, allows the government to destroy the immediacy of the intended speech.[182] This often deprives the speech of

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175. *See generally* Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982) (prior restraint doctrines are a necessary mandate under a democratic system); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955) (thorough analysis of the prior restraint doctrine).

176. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931). In *Near*, the Court firmly adopted the doctrine of prior restraint. The Court presumed the chief purpose of freedom of the press was to prevent all prior restraints of speech. Thus, the *Near* Court held that many schemes constituting a prior restraint of speech are invalid under the first and fourteenth amendments. *Id.* at 716. *See* Emerson, *supra* note 175, at 648; J. NOWAK, *supra* note 27, at 890-92.

177. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Freedman v. Maryland, 380 U.S. 51, 57 (1965); Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

178. J. NOWAK, *supra* note 27, at 890-92.

179. 283 U.S. at 716. The Court listed three exceptions to the general rule that prior restraints are forbidden: (1) publications obstructing the government's recruiting services, or publications concerning sailing dates or the number and location of troops, (2) publications containing obscenity, (3) publications inciting "acts of violence and the overthrow . . . of orderly government." *Id.*

180. L. TRIBE, *supra* note 28, at 724. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (plays); New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon papers); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (parade permit); Freedman v. Maryland, 380 U.S. 51 (1965) (films); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) (books).

181. *See, e.g.*, O'Brien v. Brown, 409 U.S. 1 (1972) (Court unwilling to decide whether California delegates were unconstitutionally denied a seat at the convention because such a decision would ultimately effect the outcome of the presidential election).

182. *See* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 182 (1968).

its persuasiveness and, in some cases, is tantamount to permanently preventing its dissemination. In *Carroll v. President & Commissioners of Princess Anne*,[183] the Court recognized that the element of timeliness can be essential in the speech process. Even a fractional delay in transmitting information to the public may be of critical importance.[184] In *Carroll*, the respondents held a racist rally, and planned to continue the rally on the following day. Local officials, however, intervened with a temporary injunction.[185] Rejecting the petitioner's argument that the injunction was merely an intervention in events which had already commenced, the Court held that the injunction was an unconstitutional prior restraint. *Carroll* held that the immediate dissemination of the facts on important issues was crucial to the operation of a democracy.[186]

The injunction in *Carroll* is strikingly similar to governmental attempts to eliminate exit polling and early election predictions. Arguably, however, any present government intervention in the media's election broadcasts would not constitute a prior restraint. The judiciary might analyze legislation in the context of the 1980 election experience. This is a tenuous approach, however, because candidates and voter behavior differ substantially from year to year. Following the principals espoused in *Carroll*, any present congressional intervention in election night broadcasts would be an interference prior to an adequate judicial determination of the legislation's constitutional impact.

Of the various types of prior restraints, a system making speech or publication dependent on the prior permission of government officials is the most objectionable. Under such a system, the suppression of speech is accomplished by a "single stroke of the pen."[187] Congressional action at this time would, ostensibly, create this forbidden system. Not only would an enactment of federal legislation be a prior restraint of speech, it would also undermine traditional constitutional principles in a most violative way.

VII. CONCLUSION

The Constitution's framers took steps to insure each individual an equal access to all available information. While the government's pa-

183. 393 U.S. 175 (1968).

184. *Id.* at 182 (quoting A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964)).

185. *Id.* at 177.

186. *Id.* at 182 (quoting A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964)).

187. Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 425 (1983).

ternalistic restrictions are laudable for attempting to ensure all votes receive equal weight, they are contrary to the democratic idea of freedom of information. Absent a threat to national security, allowing the government to regulate speech is a frightening proposition. If the Congress passes legislation regulating early election predictions, the danger exists of this restriction escalating into a much more dubious exercise of government control. Restrictions of east coast presidential electoral returns might ultimately result in a ban on the broadcast of primary results until the last primaries have been held. Conceivably, this limited regulatory scheme could approach total electoral censorship.

Concededly, the broadcast of early election returns is not desirable. It hampers the voice of at least a small group of voters. Allowing restrictions of election returns, however, whatever their form, would give Congress leverage to eventually enact even more stringent election speech regulations. Because of this threat, the only realistic solution to the exit polling conflict is for the small fraction of voters affected to defer to the good of the electorate at large. The Court in deciding this issue must recognize that upholding any such legislation may have the effect of encouraging future government censorship. Congressional attempts to enact election broadcast legislation create an unacceptable risk of suppression of information.

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