

REGULATING ELECTION PROJECTIONS: A CONFLICT OF GUARANTEES

On January 17, 1985, the three major television networks¹ voluntarily agreed not to announce projected election results in any state until that state's polls closed.² The networks' agreement responded to congressional findings that early projections discouraged voting³ and influenced election outcomes.⁴ The agreement does not address problems concerning voting pattern distortions in national elections created by time zone differences⁵ and by the networks' reporting of state-by-state election projections.⁶ The shortcomings of the agreement underscore the need for a complete ban on election projections. A direct restraint on election-day

1. The three major networks are: American Broadcasting Company ("ABC"), Columbia Broadcasting System ("CBS") and National Broadcasting Company ("NBC").

2. *Networks Won't Air Certain Election Data Until Polls Close*, Wall St. J., Jan. 18, 1985, at 36, col. 2. Congress suggested voluntary restraint to avoid federal regulation of the networks' election day practices. H.R. CON. RES. 227, 98th Cong., 2d Sess. (1984).

3. See *infra* notes 20-25 and accompanying text. Not only voters in early time zones—for example, California, Oregon, Washington, Hawaii and Alaska—are affected by the election projections. *How the West Was Made to Feel Its Vote Would Not Count*, N.Y. Times, Nov. 6, 1980, at A32, col. 1. Election projections also affect voters in the Eastern, Central and Mountain time zones. Jackson, *Election Night Reporting and Voter Turnout*, 27 AM. J. POL. SCI. 615, 616 (1983). Broadcasts of election projections usually begin early in the day, before polls close on the East Coast. "Thus, potential voters throughout the country [are] possibly deterred by the election night reporting." *Id.*

4. Wall St. J., *supra* note 2, at 36, col. 2. For a discussion of the impact of election projections on election outcomes, see *infra* notes 38-41 and accompanying text. See also 3 *Networks to Delay Vote Projections*, St. Louis Post-Dispatch, Jan. 18, 1985, at 10A, col. 2; Barron, *Are Restraints Needed on Election Day Polls?*, N.Y. Times, Sept. 13, 1984, at 15, col. 5-6.

5. Under the networks' agreement, as polls close in eastern states, election projections for those states are reported. The time zone differential creates problems because polls in the Midwest remain open at least one hour after poll closings on the East Coast; the West Coast polls remain open at least two hours after the East Coast's poll closings. See generally *Election Day Practices and Election Projections: Hearings Before the Task Force on Elections of the Committee on House Administration and the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce*, 97th Cong., 1st & 2d Sess. 29-30 (1981 & 1982) (listing poll opening and closing times for each state) [hereinafter cited as *Hearings on Election Day Practices and Election Projections*]. The problem is compounded because an average of 25% of persons who vote do so after 6:00 p.m.. Light, *Effect of Media Projections on Pacific Coast Voting under Congressional Study*, 39 CONG. Q. WEEK REP. 1437 (1981). For a general discussion of the effect of broadcasts of election projections on voter behavior, see *infra* notes 34-41 and accompanying text.

6. Wall St. J., *supra* note 2, at 36, col. 2. Because the agreement allows state-by-state reporting of exit poll results, the final projections of the nationwide vote would be evident as soon as the polls closed in a significant number of states. *Id.*

projections until polls close everywhere in the country is necessary to preserve the integrity of an individual's right to vote.

This Note responds to the networks' claim that early election projections are protected by the first amendment guarantee of freedom of speech. Part I examines the election projection problem, its impact on voting behavior and congressional measures adopted to resolve the problem.⁷ Part II discusses the Supreme Court's treatment of practices that threaten the integrity of the election process,⁸ and the first amendment principles that have guided the Court in sustaining regulations of such practices.⁹ Part III addresses the conflict between freedom of speech and the need to protect the election process.¹⁰ This Note concludes that preservation of the right to vote outweighs a slight infringement on free speech, and that Congress should enact legislation to postpone the announcement of projected election winners until all polls have closed.

I. A VIEW OF ELECTION PROJECTIONS

A. *The History of the Election Projection Issue*

Complaints about early election projections are not new.¹¹ In both the 1964 and 1972 presidential elections, NBC and CBS announced the projected winner shortly after polls closed in the eastern United States.¹² Fear that the early election projections influenced voting in earlier time zones prompted the introduction of several bills in Congress.¹³ Early

7. See *infra* notes 11-40 and accompanying text.

8. See *infra* notes 43-51 and accompanying text.

9. See *infra* notes 52-75 and accompanying text.

10. See *infra* notes 76-104 and accompanying text.

11. A "projection" is an election forecast based on a sample of actual votes cast. A "prediction" is a forecast based on a sample of polls or surveys. Fischer, *Network "Early Calls" of Elections: An Analysis of the Legality of Proposals to Keep the Voting Process from Becoming an Academic Exercise*, 14 Sw. U.L. REV. 428, 429 n.6 (1984).

12. Fischer, *supra* note 11, at 433. In the 1964 election, NBC predicted at 3:48 p.m. EST that presidential candidate Lyndon Johnson would receive between 60 and 70% of the popular vote. Mendelsohn, *Western Voting and Broadcasts of Results on Presidential Election Day*, 30 PUB. OPINION Q. 212, 217 n.5 (1966). At 6:04 p.m. EST, CBS proclaimed Johnson as the victor. *Id.* at 217. In the 1972 election, CBS and NBC again declared the victor before election polls closed nationwide. *Id.*

13. *Projections—Predictions of Election Results and Political Broadcasting: Hearings on S.1548, S.1859, S.1926, S.2090 and S.2128 Before the Subcommittee on Communications of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as *1967 Hearings*]. The Eighty-eighth Congress introduced four bills and the Ninetieth Congress introduced two bills: S. CON. RES. 94 (88th Cong.) (expressing belief that news media should not, during the 1964 election, announce computer-generated election projection results until all the polls closed), S.3115 (88th

studies concluded that election projections had little effect on voter turnout,¹⁴ voters' candidate preference,¹⁵ or the outcome of secondary races.¹⁶

The 1980 presidential election epitomizes the problem with early election projections. On election day, November 4, 1980, at 5:00 p.m. EST, the three major networks announced that Ronald Reagan was the probable winner of the presidential election.¹⁷ At 6:30 p.m. EST, NBC an-

Cong.) (proposing federal regulation of polling hours and prohibition on announcing election results until all polls close), S.3118 (88th Cong.) (prescribing uniform poll closing), S.2927 (88th Cong.) (supplementing the Communications Act to preclude the broadcast of actual or projected results, or any opinion thereon, in any national election), S.36 (90th Cong.) (proposing uniform poll closing), and H.R. 1423 (90th Cong.) (proscribing broadcast of certain election returns until all polls close).

14. Wolfinger & Linquiti, *Tuning In and Turning Out*, 45 PUB. OPINION Q. 56, 57 (1981), in a comparison of the 1972 and 1974 elections, showed election projections caused 2.7% decline in voter turnout. Epstein & Strom, *Election Night Projections and West Coast Turnout*, 9 AM. POL. Q. 479, 479 (1979), reported that voter turnout was a function of a complicated combination of factors unrelated to election day projections, including age, place of residence (urban or suburban), income, education, occupation, decline of political parties, the mode in which voters receive political information (for example, neutral television news replaces partisan political message), and changes in the electoral calendar (state and local elections are isolated from presidential race). *Id.* at 486-87. Laurily Epstein was a polling consultant for NBC News at the time that she co-authored this study.

Fuchs found early election projections had a negligible effect on voter behavior. Fuchs, *Election-Day Radio, Television and Western Voting*, 30 PUB. OPINION Q. 226, 231 (1966). Fuchs claimed, however, that the 1964 election was unique. He stated that under normal circumstances, the effect of election projections on voter turnout may be greater. *Id.* at 236. Mendelsohn also concluded that premature election projections had little effect on voter turnout. Mendelsohn, *supra* note 12, at 212.

15. Wolfinger and Linquiti state that a "bandwagon effect" may occur when voters see that their candidate is projected to win. They claim that while these voters go to the polls, the potential voters backing the losing candidates are likely to head for the nearest bar. Wolfinger & Linquiti, *supra* note 14, at 59.

Fuchs found that in 1964 slightly more than 2.7% of voters switched their presidential candidate preference before voting due to election day projections. Fuchs, *supra* note 14, at 234.

Mendelsohn claimed that political partisanship is the most influential determinate of candidate choice. He found that a majority of voters do not consider election returns to be important to their voting decision. To support these conclusions, Mendelsohn noted that 62% of the voters studied during the 1964 election were not influenced by the election projections because they voted before the early calls went on air. Mendelsohn concluded that election projections do not influence choices. Mendelsohn, *supra* note 12, at 219-25.

16. Only Epstein and Strom addressed this issue. They concluded that the early projections did not effect secondary races. In 1980, two incumbent Democratic Representatives, James Corman (D. Cal.) and Al Ullman (D. Ore.), claimed that the early projection and premature announcement of a Reagan victory caused their defeat because voters stopped going to the polls. Epstein and Strom counter that in Ullman's district, voter participation increased from its 1976 level. They contend that for this reason alone, his defeat could not be blamed on premature calls. Epstein & Strom, *supra* note 14, at 485, 490 n.4.

17. J. GREENFIELD, *THE REAL CAMPAIGN: HOW THE MEDIA MISSED THE STORY OF THE 1980 CAMPAIGN* 298 (1982).

nounced that Reagan would win a "very substantial victory."¹⁸ At 8:15 p.m. EST, two hours and forty-five minutes before the polls closed on the West Coast, NBC declared Reagan the next President of the United States.¹⁹ Finally, at 9:45 p.m. EST, again before West Coast closings, the networks broadcasted President Carter's concession speech.²⁰

Various precincts reported that voters who were standing in lines at the polls left after hearing the networks' predictions.²¹ Voters who were driving to the polls heard the election results on the radio and turned away.²² Local television stations received thousands of phone calls criticizing the projections.²³ Election volunteers in California failed to ap-

18. *Id.* No state had closed all of its polls by 6:30 p.m. EST. HOUSE REPORT OF THE COMMITTEE ON HOUSE ADMINISTRATION EXPRESSING THE SENSE OF THE CONGRESS WITH RESPECT TO THE ADVERSE IMPACT OF EARLY PROJECTIONS OF ELECTION RESULTS BY THE NEWS MEDIA, 98th Cong., 2d Sess. 2 (1984) [hereinafter cited as HOUSE REPORT].

19. HOUSE REPORT, *supra* note 18, at 2. At 8:15 p.m. EST, polls were still open in approximately one-half the states, including: New York and Rhode Island on the East Coast, about one-third of the states in the central time zone, all of the states in the Mountain and Pacific time zones, and Alaska and Hawaii. *Id.* ABC and CBS followed NBC by projecting Reagan's victory at 9:52 p.m. EST and 10:32 p.m. EST. *Id.*

In the 1980 election, NBC was the first network to call an election on the basis of exit poll results. Traditionally, networks project election totals in individual states on the basis of actual votes tabulated in key precincts. By utilizing exit poll data, NBC called many states at the same time or minutes after the polls closed in that state. GREENFIELD, *supra* note 17, at 299.

20. GREENFIELD, *supra* note 17, at 299. A study conducted by John Jackson of the University of Michigan concluded that either Carter's concession or the election projections affected voter turnout. The two factors, however, did not have a cumulative effect on voter behavior. Jackson, *supra* note 3, at 628-29.

21. HOUSE REPORT, *supra* note 18, at 2-6 (testimony by Ray Phelps, Director of Elections in Oregon, stating that he and many others observed people walking away from the polls without voting) (quoting from *Early Election Returns and Projections Affecting the Electoral Process: Hearings Held Jointly Before the Committee on House Administration and the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce*, 97th Cong., 1st Sess. 217 (1981) [hereinafter cited as *Early Election Returns*]); *id.* at 5 (Sacramento area coordinator for former President Carter testified that those who did vote claimed "they 'knew' that their votes didn't count.") (quoting from *Early Election Returns, supra*, at 175).

22. *Id.* at 2 (testimony that people drove by the polling places and shouted to pollgoers, "We heard on the radio it's been decided, why bother—. . .") (quoting from *Early Election Returns, supra* note 21, at 175).

23. *Id.* at 3. A voters' service director of the League of Women Voters reported the following account:

We have 499 registered voters in my precinct. Usually . . . after 6:30 p.m., . . . we have a tremendous [voter turnout]. But this time, not one voter came between 6:50 and 7:20. We didn't have a radio and couldn't imagine what had happened . . . Finally, a man came in at 7:20 and told us, "it was all over." After that, only seven more people came in saying things like, "I know I'm throwing my vote away," and "I'm only here to vote on the propositions."

(quoting from *Early Election Returns, supra* note 21, at 70).

pear, and people stopped calling voter information telephone lines.²⁴ Candidates in close state and local races claimed that the projections discouraged voting and therefore contributed to their defeat.²⁵

Widespread criticism after the 1980 election prompted Congress to hold hearings to determine the effects of election projections on voting behavior.²⁶ The hearings produced three critical findings. First, election projections reduce voter turnout in the western states.²⁷ Second, early projections may alter the outcome of close races.²⁸ Finally, early projections reduce voter confidence in the value of their individual vote, threatening the integrity of democratic government.²⁹

Prior to the 1984 presidential race, Congress adopted a resolution urg-

24. GREEFIELD, *supra* note 17, at 299-300. One witness explained that she scheduled the Democrat's door-to-door canvassing efforts in Sacramento to begin at 3:00 p.m. By that time, television stations had broadcast projections of Carter's defeat. Most voluntary canvassers failed to arrive. Those who did work returned to the campaign headquarters telling stories of voter dismay and apathy because of network projections. *Early Election Returns, supra* note 21, at 175.

25. HOUSE REPORT, *supra* note 18, at 3. The House Report claims that the slightest impact on voter turnout could have affected the outcomes of several state and local elections. For example, 0.28% of the vote decided one California Assembly seat. *Id.* at 7. The report also cites the case of the 21st Congressional District of California seat, "where an additional [two] per cent would have meant 5000 votes in a race that was decided by 864 votes." *Id.* A seven-vote lead decided the winner of a Montana legislature seat. *Id.* Also, out of more than a quarter of a million votes cast in the race for the 17th District seat for the California state senate, a margin of 838 votes determined the winner. *Id.*

Network interference with voter participation occurred in 1984 during the Iowa Democratic presidential caucuses. *Are Restraints Needed on Election Day Polls?, supra* note 4, at 15, col. 5-6. Iowa Democrat Party Rules prohibit caucus participants from expressing their candidate preference until 8:30 p.m. *Early Election Projection: The Iowa Experience, Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2d Sess. 8 (1984)* [hereinafter cited as *The Iowa Experience*] (statement of Representative Timothy E. Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance). At 8:12 p.m., before thousands of Iowans had the opportunity to select their Democratic candidate, CBS announced that Walter F. Mondale would win the Iowa Democratic caucus. *Id.*

26. See generally *Hearings on Election Day Practices and Election Projections, supra* note 5; *Early Election Returns, supra* note 21; *The Iowa Experience, supra* note 25.

27. HOUSE REPORT, *supra* note 18, at 6. Congress relied heavily on individual accounts of the events of the 1980 election to support its conclusion that election projections reduced voter turnout. *Id.* at 3, 5-6. Hesitating to adopt the studies and surveys reported on the record, Congress nevertheless concluded "that [the studies showed] there was a significant decline [in voter turnout] due to the early network projections." *Id.* at 4.

28. *Id.* at 7. Congress emphasized that even a possibility of network influence on election outcomes is a serious problem. *Id.*

29. *Id.* at 7. Congress pointed to testimony by John Behnke, president and general manager of KOMO-TV and KOMO-Radio, to summarize the message conveyed to voters in 1980 by the networks. Behnke, quoting an ABC commentator, stated, "Well, you folks out West might as well not

ing the networks to withhold voluntarily election projections until after all of the polls across the country close.³⁰ Congress also requested that the broadcasting industry restrict the use of exit polls as the basis for election projections.³¹ The networks ignored the resolution during the 1984 election, instead adopting a scheme permitting them to identify probable winners before polls closed and to predict the outcome of the presidential election three hours before the polls closed on the West Coast.³² After the 1984 election, the three major networks acceded to Congress' request for restraint on the condition that Congress investigate a uniform poll closing time for national elections.³³

B. *The Effects of Election Projections on Voter Behavior*

The networks argue that election projections have no meaningful effect on voter behavior.³⁴ Recent investigations reveal, however, that election

go to the polls because it is all decided." *Id.* (quoting from *Early Election Returns*, *supra* note 21, at 280).

Congress pointed to three reasons justifying its fear of improper influence on voters by the media. First, public perception that the vote has no value is as damaging as an impact on voter turnout. A democracy rests on individual citizens' willingness to accept the results of the electoral process. *Id.* at 8. If the integrity of this process is in doubt, so is the democratic state. *Id.*

Second, as one witness testified, the influence of the election projections ". . . causes one to fear that we are creeping rapidly toward the policies and tactics of the Eastern Countries—fool the people into believing they have a choice in helping choose their officials but in fact only a handful of influence-peddling organizations will actually make the decision." *Id.* (quoting from *Early Election Returns*, *supra* note 21, at 215).

Third, the voters' perception that their vote "did not count" in 1980 may lead to cumulative damage as voters might assume the same stance in 1984, 1988 and so on. *Id.* at 8 (citing Representative William M. Thomas, *Early Election Returns*, *supra* note 21, at 294).

30. H.R. CONG. RES. 227, 98th Cong., 2d Sess., 130 CONG. REC. H11722, S11024 (1984). The resolution does not clarify whether the networks are to refrain from reporting the projections before the polls close in each individual state or after all polls close nationwide. One purpose of the resolution was to emphasize to the media the urgency of the election projection issue. HOUSE REPORT, *supra* note 18, at 17. Congress also wanted to defer final resolution of the issue to the networks. *Id.*

31. The resolution specifically stated: ". . . the news media . . . should adopt guidelines to assure that data from exit interviews are not used to project election results before the polls close." H.R. CON. RES. 227, 98th Cong., 2d Sess. 3 (Apr. 10, 1984).

32. See Gans, *TV's Election Damage*, N.Y. Times, Nov. 5, 1984, at 25, col. 1. The plan additionally allowed projections in states straddling two time zones prior to poll closings in the state's western zone.

33. See Wall St. J., Jan. 18, 1985, at 36, col. 2. *But see infra* notes 138-145 and accompanying text (demonstrating the inadequacy of uniform poll closings as a solution). The networks' conditional response to Congress' resolution indicates the power wielded by the major broadcasting companies. See generally BOTEIN & RICE, NETWORK TELEVISION AND THE PUBLIC INTEREST 3-34 (1980).

34. *Early Election Returns*, *supra* note 21, at 14 ("Election-night vote projections have never been demonstrated to have any measurable effect on either voter turnout or voter choice") (state-

projections influence voters' decisions whether to vote and for whom. In a comparative study of the 1972 and 1974 elections, Professors Wolfinger and Linquiti found that early election calls caused a 2.7 percent decline in voting.³⁵ On the West Coast alone, this decline amounted to the loss of almost a half million votes.³⁶ Professor Jackson, confirming Wolfinger's and Linquiti's study, posited a correlation between the voter's perception of the need for his vote and the voter's decision whether or not to vote, and concluded that early projections affect voter turnout when the projections conflict with the voter's prior expectations.³⁷

Election projections also may affect a voter's candidate preference. Election projections may cause voters to jump on the bandwagon of an apparent winner or side with a projected underdog.³⁸ Sociological studies indicate that early election calls produce a "bandwagon effect," encouraging voters to change their vote solely on the basis of the projection.³⁹ More importantly, the bandwagon effect influences secondary races by helping candidates in congressional, local and state elections "ride the coattails" of the projected winner of the presidential race.⁴⁰ One commentator found that at least twenty percent of the population was undecided on election day in 1964.⁴¹ The susceptibility of vot-

ment of William J. Small, President, NBC News); L.A. Times, Feb. 25, 1984, § 2, at 8, col. 1 (Gene Mayer, Senior Vice-President of CBS News, in responding to complaints about election projections, stated: "[W]e're on record as saying that those criticisms are unjustified"); *The Iowa Experience*, *supra* note 25, at 122 (statement by Ralph E. Goldberg, Vice-President and Assistant to the President, CBS News, claiming that network projections do not have a harmful effect on the electoral process).

35. Wolfinger & Linquiti, *supra* note 14, at 56. Wolfinger and Linquiti derived the 2.7% decline figure from a sample of about 90,000 people, or sixty times as many used in a Gallop poll sample.

36. *Id.*

37. Jackson, *supra* note 3, at 616, 633. For example, when election projections of an easy victory reach voters anticipating a close race, the voters stay home. *Id.* at 632. On the other hand, when voters expect a landslide, but projections reveal a close race, voter turnout increases. *Id.* Jackson found that overall voter turnout decreased by 6-11%. *Id.*

38. See Note, *Reporting Election Returns and Computer Predictions: Proposed Regulation*, 50 IOWA L. REV. 1173 (1965). But see *Elections, Computers and the First Amendment*, 2 COLUM. J.L. & SOC. PROBS. 17, 35 (1966).

The "bandwagon" or "underdog" effects defy measurement. Wolfinger & Linquiti, *supra* note 14, at 57. Wolfinger and Linquiti state that evidence on these effects is difficult to derive because sample sizes are usually too small and the temptation to rationalize voting behavior to these effects is too great.

39. See, e.g., Note, *supra* note 38, at 1177 (1964 election projections affected 1% of Oregon voters).

40. *Id.* at 1179.

41. 1967 Hearings, *supra* note 13, at 215 (statement of Prof. Warren E. Miller) (13% of voters

ers to influence from election projections threatens to undermine the integrity and meaning of the right to vote.

II. THE CONFLICTING GUARANTEES

Congress should safeguard the right to vote from the impact of election projections on voting behavior. The television networks claim, however, that the first amendment guarantees the right to broadcast election projections.⁴² A clear conflict exists between the right to vote and freedom of speech. The resolution of this conflict turns largely on the classification of the right to vote as a compelling governmental interest. The following discussion analyzes the Supreme Court's efforts to preserve the right to vote and sets forth certain principles of first amendment analysis that would likely guide the Supreme Court in evaluating the permissibility of a ban on election projections.

A. *The Right to Vote: A Compelling Interest*

The right to vote is integrally related to the first amendment right of free speech.⁴³ As the elemental form of political expression, voting protects against government interference with other basic liberties and guarantees political accountability to the electorate.⁴⁴ Voter confidence in this process is the source of governmental authority.⁴⁵ For these reasons, the Supreme Court characterizes the right to vote as fundamental under the fourteenth amendment.⁴⁶

To maintain voter confidence in the voting process, the Court has sustained statutes that preserve the integrity of the election process, includ-

surveyed changed their candidate preference on election day). Professor Miller, however, found no evidence that election projections influenced voter decisions. *Id.* at 211, 212.

42. Barron, *supra* note 4, at 15, col. 5-6.

43. See, e.g., Anderson v. Celebrezze, 460 U.S. 780 (1983) (restrictions on the eligibility of voters and candidates implicate first amendment rights).

44. In *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), the Supreme Court explained: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

45. *Id.*; see also THE FEDERALIST No. 39, at 302 (1888); HOUSE REPORT, *supra* note 18, at 8 (quoting *Early Election Returns*, *supra* note 21, at 316).

46. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). The right to vote is an implicit right under the fourteenth amendment guarantee of equal access to the electoral process. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 101 (1973) (Marshall, J., dissenting). The Supreme Court applies strict scrutiny to statutes interfering with or impairing the right to vote. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

ing statutes restricting freedom of speech. In *Buckley v. Valeo*,⁴⁷ the Supreme Court examined the constitutionality of the Federal Elections Campaign Act, an election campaign financing regulation. In *Buckley*, the challengers asserted that various restrictions on individual campaign contributions violated the freedoms of speech and association.⁴⁸ The government claimed that the need to protect candidates from the appearance of improper influence justified the provisions.⁴⁹ The Court held that the compelling governmental interest in protecting the integrity of the election process outweighed the incidental restraint on freedom of speech.⁵⁰ The Court reasoned that although contributions serve as “a general expression of support” for a candidate and his views, the regulation entailed only an indirect restriction on the contributor’s ability to engage in that expression.⁵¹

The interests underlying the need to preserve the integrity of the election process are compelling. Even speculative interests, such as protecting against the appearance of impropriety in the election process, have justified the regulation of practices that are arguably within the protection of the first amendment.

B. “Subject-Matter” Restrictions on Speech

The first amendment prohibits Congress from making laws that abridge the freedom of speech.⁵² Freedom of speech promotes intelligent

47. 424 U.S. 1 (1976) (per curiam).

48. *Id.* at 24.

49. *Id.* at 25. The Court stated that even a “significant interference” with protected first amendment rights is constitutional if the interest is sufficiently important and the means are narrowly drawn to avoid “unnecessary abridgment” of first amendment rights. *Id.*

50. *Id.* at 26-27. The Court deferred to Congress’ determination that “the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’” *Id.* (quoting *United States Civil Serv. Comm’n v. National Ass’n. of Letter Carriers*, 413 U.S. 548, 565 (1973)). The Court noted further that the statute was drawn narrowly to serve this interest because it left individuals free to participate in independent political expression. 424 U.S. at 28-29; *see also* *California Medical Ass’n v. Federal Election Comm.*, 453 U.S. 182 (1981) (upholding the Federal Elections Campaign Act against first amendment challenge); *United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548 (1973) (employing “appearance of impropriety” rationale to sustain statute prohibiting federal employees from participating in partisan political activities). In *Brown v. Hartlage*, 456 U.S. 45, 57-59 (1982), the Court interpreted the “appearance of impropriety” rationale of *Buckley* to apply to situations of actual or possible corruption.

51. 424 U.S. at 21. The Court reasoned that it is the contribution itself by which the message of support is symbolized and conveyed and not the amount of the campaign contribution. *Id.*

52. The first amendment provides in part: “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend. I. The Supreme Court has not

self-government,⁵³ and fosters individual self-fulfillment⁵⁴ and the search for truth through the free exchange of ideas.⁵⁵

In evaluating the permissibility of a restraint on the freedom of speech, the Supreme Court often distinguishes between content-neutral and content-based restrictions on speech.⁵⁶ A content-neutral restriction serves an interest unrelated to the message conveyed.⁵⁷ In contrast, a content-based restriction serves an interest directly related to the message conveyed.⁵⁸ The Court is consistently hostile to content-based restrictions.⁵⁹

distinguished between free speech and free press in developing principles governing the first amendment. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

53. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

54. For an elaboration on the self-fulfillment, autonomy values underlying the first amendment, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

55. Justice Holmes explained the concept of the "marketplace of ideas" in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

John Milton wrote:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst in a free and open encounter?

MILTON, *AEROPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND* (1644), reprinted in *AEROPAGITICA AND OTHER PROSE WORKS* 223-28 (1972).

56. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

57. The Supreme Court has validated laws that restrict speech because of the content neutrality of the restriction. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654-56 (1981) (limitation on solicitation on state fairgrounds to designated areas justified by need for crowd control); *Breard v. City of Alexandria*, 341 U.S. 622, 645 (1951) (ordinance prohibiting door-to-door solicitations without homeowners' consent upheld); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (law prohibiting sound trucks that emit "loud and raucous" noise upheld); *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (ordinance requiring permit fee to hold a parade upheld).

58. The most common form of content-based restrictions distinguishes the application and purpose of the statute from the specific information or ideas that it conveys. See, e.g., *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97-98 (1977) (law banning display of "For Sale" signs in residential community); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (zoning ordinance requiring adult movie theatres showing nonobscene, sexually explicit films to be dispersed throughout the city); *Miller v. California*, 413 U.S. 15, 16-18 (1973) (criminal obscenity statute); *Dennis v. United States*, 341 U.S. 494, 495-97 (1951) (law prohibiting advocacy of violent overthrow of government).

59. Professor Stone explains that the Court relies on two reasons for its speech-protective approach to content-based restrictions:

[B]ecause such restrictions accord differential treatment to speech because of its content, they necessarily distort the ordinary workings of the "marketplace of ideas" in a content-differential manner. Such restrictions thus leave the public with only an incomplete — and perhaps inaccurate — perception of their social and political universe. As a consequence,

A restriction of speech directed at an entire subject matter, rather than a particular idea or viewpoint, defies classification as either a content-neutral or content-based restriction. In the past, the Supreme Court has treated such "subject-matter" restrictions both as content-neutral and content-based. In *Police Department v. Mosley*,⁶⁰ for example, the Court invalidated an ordinance prohibiting all picketing, except peaceful labor dispute picketing, within 150 feet of any school. The Court treated this subject-matter restriction as content-based, concluding that the ordinance impermissibly discriminated among types of picketing.⁶¹

On the other hand, the Court has sometimes treated subject-matter restrictions as content-neutral, applying a lesser standard of scrutiny to sustain the challenged restraint. Thus, in *Broadrick v. Oklahoma*,⁶² the Court concluded that federal and state statutes that prohibit public employees from engaging in partisan political activities did not violate the first amendment.⁶³ Noting that the statutes helped to maintain impartiality in the administration of the laws, the Court concluded that the statutes were content-neutral because they operated evenly and did not involve the government in impermissible censorship.⁶⁴ In conclusion, the Court is less hostile toward subject-matter restrictions because they are

they tend seriously to undermine two of the principal purposes of free speech: they distort the search for truth, and they distort the process so essential to the effective operation of a self-governing society by which the citizen makes for himself critical decisions on matters of public policy.

Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 101 (1978).

60. 408 U.S. 92, 94 (1972).

61. *Id.* at 94-96. The Court expressed concern about government censorship, indicating its equation of subject-matter restrictions with content-based restrictions. See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (subject-matter restriction treated as content-based). But see *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (discussed *infra* notes 66-75).

One commentator points out that the *Mosley* Court departed from traditional constitutional analysis of content-based restrictions. Previously, the Court had focused on whether the restricted speech was sufficiently harmful to justify government interference with the speech. In *Mosley*, however, the Court focused on the harm created by the distinction between labor and nonlabor picketing. The *Mosley* Court asked "not whether there is adequate reason to restrict the speech restricted, but whether there is adequate reason to restrict *only* the speech restricted." Stone, *supra* note 59, at 87 n.27 (emphasis added).

62. 413 U.S. 601 (1973); see also *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (companion case to *Broadrick*).

63. The Court first addressed the issue of political participation by government employees in *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947). In *Mitchell*, the Court held that the Hatch Act's restriction of federal employees' partisan activities did not violate the first amendment because federal employees remained free to express themselves through participation in the voting process. *Id.* at 102-03. See also *Buckley v. Valeo*, 424 U.S. 1 (1976).

64. 413 U.S. at 616.

inherently viewpoint-neutral.⁶⁵

In *Young v. American Mini-Theatres, Inc.*,⁶⁶ a plurality of the Court emphasized the importance of viewpoint neutrality in sustaining a zoning ordinance that required dispersing over a geographic area movie theaters exhibiting sexually explicit films.⁶⁷ A majority of the Court sustained the ordinance despite its content orientation. The plurality interpreted the Court's hostility against content-based restrictions as hostility against regulations aimed at a particular viewpoint, rather than at a general subject area.⁶⁸

As an alternative ground for upholding the ordinance in *Young*, Justice Stevens' plurality opinion articulated a lower-value-speech rationale for upholding reasonable regulations of certain kinds of speech.⁶⁹ Although a majority of the Court has not acceded to the notion that speech may be regulated in relation to its value,⁷⁰ the Court has identified

65. A closely related alternative basis for the Court's tolerance of subject-matter restrictions is that subject-matter restrictions often facilitate government impartiality. In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), for example, the Court determined that the regulation of civil service employees' partisan political speech checked the infiltration of improper influences on the administration of the law—one way to achieve impartiality. Similarly, in *Greer v. Spock*, 424 U.S. 828 (1976), the Supreme Court characterized a restraint on political activities on military bases as a means to maintain a neutral military.

The Court has upheld viewpoint-neutral subject-matter restrictions in several other cases. In *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), for example, the Court upheld a statute that permitted individuals to stop the delivery of mail containing sexually provocative advertising. *Id.* at 738. The Court reasoned that the element of individual discretion prevented the government from arbitrarily discriminating between types of sexually related speech. *Id.* at 737; *see also* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (upholding a subject-matter restriction prohibiting political advertising in public transit cars because the regulation applied evenhandedly to all political advertising).

66. 427 U.S. 50 (1976).

67. *Id.* at 52. Detroit passed the ordinance to mitigate the deleterious effects of adult theatres on the quality of urban dwelling.

A "viewpoint-neutral" statute is one that differentiates treatment on grounds other than viewpoint or opinion. The concept was first articulated by Justice Black in *NLRB v. Fruit Packers Local 720*, 377 U.S. 58, 79 (1964) (Black, J., concurring). The concept of "content neutrality" evolved from Justice Black's original articulation of viewpoint neutrality. *See generally* Note, *Constitutional Law — First Amendment — Content Neutrality*, 28 CASE W. RES. 456 (1978). The Court eventually treated the two concepts quite differently. *Compare* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), *with* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

68. 427 U.S. at 66-71. Justice Stevens explained that the rationale for the rule proscribing content-based speech restrictions was the need for "absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Id.* at 70.

69. *Id.*

70. *But see* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech occupies a subordinate position in the scale of first amendment values).

several categories of speech that have such low value that they are entitled to less protection under the first amendment.⁷¹ These categories include: incitement to violence, libel, obscenity, fighting words, and, most recently, commercial speech.⁷² In determining whether a particular category of speech occupies a subordinate position in the scale of first amendment values, the Court has focused on the extent to which the speech furthers the historical, political and philosophical underpinnings of the first amendment.⁷³ Although the categories of speech entitled to less protection have been treated as a closed class, decisions such as *Young* indicate the Court's increasing recognition of the need to evaluate some speech in relation to the core values underlying the first amendment freedom of speech.⁷⁴ Thus, in *Young*, the plurality concluded that sexually related movies rank low on the hierarchy of protected speech and are therefore subject to reasonable regulation.⁷⁵

III. REGULATION OF ELECTION PROJECTIONS: BALANCING THE CONFLICTING INTERESTS

A ban on the announcement of election projections until polls close everywhere in the country constitutes a subject-matter restraint of speech. As the discussion in Part II reveals, the Supreme Court has failed to articulate a comprehensive standard delineating the scope of permissible subject-matter restrictions.⁷⁶ In some cases the Supreme Court has exhibited considerably less hostility to subject-matter restrictions of speech that advance important governmental interests, evaluating these restrictions as content-neutral.⁷⁷ In other cases, the Court has treated subject-matter restrictions as content-based, requiring the government to demonstrate that the regulation serves a compelling interest and that its provisions are narrowly tailored to achieve the goal of the regula-

71. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth. . .").

72. See Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 280-81 (1981).

73. *Id.*

74. See VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* (1985); see also Stone, *supra* note 59, at 194-95.

75. Justice Stevens maintained that because "few of us would march our sons or daughters off to war to preserve the citizen's right to see [adult films], it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate." 427 U.S. at 70.

76. See *supra* notes 60-68 and accompanying text; see also Stone, *supra* note 59, at 82 n.6.

77. See *supra* notes 62-65 and accompanying text (discussing *Broadrick* and *Greer*).

tion.⁷⁸ The following discussion evaluates the permissibility of a ban on election projections under each approach.

A. Deferential Review of a Ban on Election Projections: A Subject-Matter Restriction on Low Value Speech

The proposed ban on election projections is inherently viewpoint-neutral.⁷⁹ Thus, the interests served by the ban are unrelated to any particular viewpoint or idea expressed by the early projection of election results. A ban on election projections creates no danger of governmental censorship of speech merely because of disagreement with the message conveyed by the projection.

Subject-matter restrictions of speech are permissible when certain government interests are at stake. The interests advanced by a ban on election projections are substantially similar to the interests advanced in *Broadrick* and *Greer*.⁸⁰ In particular, an election projection ban preserves the integrity of the election process by avoiding the exertion of improper influences on voting behavior.⁸¹ The interest in protecting against government partiality, an interest frequently articulated by the Supreme Court in sustaining subject-matter restrictions of speech, is implicated by the election projection ban because the integrity of the voting process is the ultimate check on the exercise of government power in a democratic society.⁸² Consequently, the Supreme Court should not tolerate any practices that undermine the election process or voter confidence in that process.

Finally, a ban on election projections is a subject-matter restriction of arguably low value speech.⁸³ Thus, the proposed election projection reg-

78. See *supra* notes 60-61 and accompanying text (discussing *Mosley*).

79. For a discussion of viewpoint neutrality, see *supra* note 67. A ban on election projections is inherently viewpoint neutral because the ban does not entail the suppression of any viewpoints. In other words, an election projection is merely factual information rather than a distinct idea. Arguably, the networks generate election projections to predict the general viewpoint of the electorate. See *Early Election Returns*, *supra* note 21, at 230 (statement of CBS News' President Bill Leonard). However, a restriction on election projections would only suppress speech impermissibly after this viewpoint is articulated through the voting process. The temporary nature of the restraint — until all polls close — avoids this result.

80. See *supra* notes 62-65 and accompanying text.

81. See also *supra* note 50 (discussing *Buckley* and the important interest in avoiding the appearance of impropriety in the election process).

82. See *supra* notes 43-46 and accompanying text.

83. See *supra* notes 69-75 and accompanying text.

ulation is similar to the regulation sustained in *Young*.⁸⁴ First, the proposed ban on election projections is inherently viewpoint-neutral. Second, election projections constitute speech of low first amendment value.⁸⁵ An election projection does not convey a particular idea; it merely conveys factual information. The networks' interest in broadcasting election projections is clearly economic. The value of the information to the recipient is less clear.⁸⁶ Regardless of the precise value of the speech involved in election projections, the speech restrained in, for example, *Broadrick* or *Greer* was more centrally located in relation to the core values underlying freedom of speech.⁸⁷ Moreover, a ban on election projections prior to the closing of all polls could never have the effect of suppressing particular ideas. The regulations sustained in *Broadrick* and *Greer*, although viewpoint-neutral, effectively prohibited the expression of political viewpoints and ideas.⁸⁸ A fortiori, a subject-matter restriction of speech that is unrelated to any viewpoint is less objectionable.

The Supreme Court should sustain a ban on election projections until all polls close on the grounds that the regulation is a subject-matter restriction of speech that furthers important government interests underlying the election process. Moreover, election projections constitute speech of low first amendment value because such projections convey information, not ideas.

B. *Strict Scrutiny of a Ban on Election Projections*

Some commentators argue that subject-matter restrictions of speech should nevertheless be analyzed under stringent speech-protective stan-

84. *Id.*

85. *Id.*

86. One commentator argues that the only value of election projections is economic — the networks' race to be first with election calls in order to attract more viewers and advertisers. See Barron, *supra* note 4, at 15. Another commentator argues that projections and predictions of election outcomes have informational value, serving to inform and educate the voter in the same fashion as a news report. Fischer, *supra* note 11, at 450-51. He states that potential voters use the information to decide whether or not to vote in a particular election. *Id.* This argument, however, only highlights the negative influence that election projections have on voting behavior and election results.

87. The speech suppressed in *Broadrick* and *Greer* was pure political speech. See *supra* notes 62-65 and accompanying text.

88. In *Greer*, for example, the Court sustained a ban on political speech on military bases. Although the regulation was characterized as viewpoint neutral, the effect of the ban was to suppress the expression of all viewpoints, albeit in an evenhanded manner. Election projections, on the other hand, do not involve the expression of a viewpoint. See *supra* note 79.

dards.⁸⁹ However, even if courts analyze subject-matter restrictions of speech under traditional standards for content-based restrictions,⁹⁰ the regulation of election projections would survive such strict scrutiny. The following discussion asserts that the interests threatened by election projections are compelling interests and that a ban on election projections until all polls close represents the least restrictive means of protecting those interests.⁹¹

1. *The Compelling Interests*

A temporary ban on election projections, that is, a ban until all polls close, requires the government to show that the ban protects and promotes a compelling interest. In 1984, Congress articulated its interest in preserving the integrity of the election process by adopting a resolution requesting the networks to withhold voluntarily election projections.⁹² The Supreme Court has previously defined the interests underlying the right to vote as compelling.⁹³ Congressional investigation revealed that election projections impinge upon these compelling interests in several ways.

Election projections often constructively disenfranchise the voter. Although the projections do not directly impede the voting right, Congress found that the early projections left voters with the impression that their vote did not count.⁹⁴ Congress concluded that this perception of voter incompetency divests citizens of the incentive to vote.⁹⁵ In addition, the integrity of the electoral process is threatened by the appearance of network influence on voter participation and, subsequently, on the outcome of particular races.⁹⁶

A temporary ban on election projections has only a slight effect on free speech. For example, the Court emphasized that although a ceiling on campaign contributions impaired “political communication,” it in no way constrained the donor’s free speech interest in political debate.⁹⁷

89. See Stone, *supra* note 59, at 82.

90. See *supra* notes 60-61 and accompanying text.

91. The Court often looks to the least restrictive alternative test when examining the regulation of individual liberties to ensure proper legislative motives. See, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960).

92. See *supra* text accompanying notes 30-33.

93. See *supra* text accompanying notes 43-51.

94. See *supra* note 33 and accompanying text.

95. See *supra* note 29 and accompanying text.

96. See *supra* notes 21-25 and accompanying text.

97. See *supra* notes 47-51 and accompanying text (discussing *Buckley*).

Similarly, a ban on election projections would not restrain the networks' freedom to discuss candidates, issues, or voter interviews.

2. *The Least Restrictive Alternative*

The final step in analyzing the permissibility of the proposed restriction on election projections entails application of a two-part test enunciated by the Supreme Court. First, the government must show that the ban is narrowly drawn to achieve the desired ends.⁹⁸ Next, the government must demonstrate that no less restrictive alternatives are available to achieve the goals of the ban.⁹⁹

Congress has three possible approaches to resolving the election projection issue. First, Congress could do nothing and rely on the networks to refrain voluntarily from making early projections. Second, Congress could enact a uniform poll closing law. Third, Congress could ban election projections until all polls closed. Voluntary restraint does not work because the networks are not bound to exercise restraint. Furthermore, as the last presidential election demonstrated, the networks are not willing to exercise any self-restraint.¹⁰⁰ For several reasons, a uniform poll closing law also would not solve the problem. This approach presumes that the networks cannot make projections without first obtaining the actual vote count from closed polls. However, networks often use exit polling to make very reliable predictions.¹⁰¹ In addition, the uniform poll closing plan would exclude Alaska and Hawaii.¹⁰² Finally, this approach would require altering long-established voting habits to accommodate the networks.¹⁰³ The drastic change required to implement this

98. See, e.g., *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981).

99. See, e.g., *NAACP v. Button*, 371 U.S. 415, 438 (1962).

100. Moreover, the conditional nature of the networks' 1985 agreement makes it unclear whether the networks will revert to early projections if Congress rejects uniform closings of polls. *Wall St. J.*, *supra* note 2, at 36, col.2. See *supra* note 2 and accompanying text.

101. See Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927 (1985).

102. See, e.g., H.R. 1813, 97th Cong., 1st Sess. (1981) (bill proposing uniform poll closing time of 8 p.m. E.S.T., excludes polls located in the Yukon, Alaska, Hawaii or Bering time zones). Congress has authority to determine the time at which Presidential electors are chosen. U.S. CONST. art. II, § 1, cl. 3. Although Congress has used this power to set the national election date, it has left the times for poll openings and closings up to the states, which have traditionally set the details of the election day process. Fischer, *supra* note 11, at 441-42.

103. Wolfinger & Linquiti, *supra* note 14, at 59. Closing the polls at the same time across the country is supposed to restrict the availability of returns from sample precincts used by the networks to make the projections. Returns across the nation would be unavailable until all polls closed across the country, depriving networks of data necessary to make projections. *Id.*

Proposed solutions stemming from the uniform poll closing alternative include: establish two-day

approach could be expensive and costly in terms of voter participation.¹⁰⁴

A ban on election projections until all polls close is the only practical way to protect the integrity of the electoral process from the inimical effects of election projections.¹⁰⁵ A ban would require neither citizens to change voting habits nor states to make expenditures to accommodate the networks. Also, the ban protects the right to vote, regardless of time zone differences, and protects the electoral process from the influences of the broadcast media. Finally, the proposed ban would apply only until the polls have closed, leaving the networks free to project probable winners after everyone has exercised their right to vote.

IV. CONCLUSION

The election projections issue presents many challenges to the nation's lawmakers. Any attempt to regulate projections necessarily implicates the networks' first amendment rights. Balanced against these rights, however, is the right to vote, the ultimate form of expression in a free society. Unrestricted election projections threaten the meaning of this right. Congress should exercise its authority to regulate election projections to preserve the right to vote.¹⁰⁶

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voting (requiring western states to begin voting the Monday evening before Election Day Tuesday); hold elections on Sunday (to increase voter participation); make Election Day a holiday (to increase voter participation); extend daylight savings time in the western states for two extra weeks (thereby reducing the time zone differential to one hour). Congress found these solutions ineffective because many of them do not consider the reliable predictions available from exit polls. Also, all of the proposed solutions fail to take into account the time zone differences in Hawaii and Alaska. *See also* Comment, *Restricting the Broadcast of Election-Day Projections: A Justifiable Protection of the Right to Vote*, 9 U. DAYTON L. REV. 297, 312 (1984).

104. *See* Wall St. J., *supra* note 2, at 36, col.2. For example, to compensate for the time differential between the East and West Coasts, uniform poll closing would require late poll closings in the east and early poll openings in the west.

105. *See* Fischer, *supra* note 11, at 442; Wall St. J., *supra* note 2, at 36, col. 2.

106. Canada directly regulates election projections. Kushner, *Election Polls, Freedom of Speech and the Constitution*, 15 OTTAWA L. REV. 515 (1983). Although the states ordinarily regulate the election process, the Constitution authorizes Congress to regulate federal elections as well. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court construed Congress' power to include regulation of "the making and publication of election returns." *Id.* at 366.