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Note: Exit Polls and the First Amendment

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EXIT POLLS AND THE FIRST AMENDMENT

Although the major television networks have long projected presidential election results before western states closed their polls, NBC's use of exit polls to project the outcome of the 1980 race at 8:15 p.m., a full two hours before many western states closed their polls, has brought election-night projections under fierce attack. Many critics argue that such projections, especially the earlier and more accurate projections made possible by exit polls, discourage voting because people see no reason to vote once the presidential race appears to have been decided. According to these critics, election-night projections devalue the franchise of citizens living in western states.

These and other criticisms have inspired legislative proposals at the state and federal levels. Since the 1980 election, three states have asserted that exit polling disrupts the voting process and have enacted

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2 See N.Y. Times, Nov. 6, 1980, at A32, col. 1. Unless otherwise noted, all times given in this Note are Eastern Standard Time.

One study, however, found no evidence that the early projections decreased voter turnout. See Epstein & Strom, Election Night Projections and West Coast Turnout, 9 Am. Pol. Q. 479, 486, 489 (1981). Other observers have described the problem as minor. See, e.g., 1981 Hearings, supra, at 157 (statement of Prof. Tannenbaum).
laws prohibiting exit polls within three hundred feet of voting areas.\(^5\) Many other states are considering similar restrictions.\(^6\) At the federal level, similar concerns have prompted various congressional proposals, including one that would require networks to delay election-night predictions\(^7\) and another that would establish a uniform poll-closing time prior to which the networks would voluntarily withhold exit poll results.\(^8\)

This Note examines the constitutionality and the wisdom of these state laws and congressional proposals. Part I traces the history of exit polls and election-night projections. Part II argues that restrictions on the collection or dissemination of exit poll data, whether designed to prevent disruption at the voting area or to protect the integrity of the vote, violate the first amendment. Part III concludes that a uniform poll-closing time coupled with voluntary network restraint would both allay legitimate concerns about election-night predictions and comport with first amendment values.

I. THE HISTORY OF ELECTION-NIGHT PROJECTIONS

The charge that election-night projections deter voting is not new. In 1960, the television networks began using actual returns to predict the outcomes of presidential races.\(^9\) On election day at 7:15 p.m., CBS projected a decisive victory for Richard Nixon; by 8 p.m., it had reversed itself, predicting a narrow victory for John Kennedy.\(^10\) The predictions apparently did not discourage voting in western states.\(^11\) On the evening of Lyndon Johnson's 1964 landslide victory, CBS projected Johnson to be the winner at 9:04 p.m., again using actual returns.\(^12\) This early projection prompted concern that some people in western states, where polls remained open for at least an hour after the announcement of Johnson's victory, had not bothered to vote. Most studies, however, found "no evidence" that early pro-

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\(^6\) See Calmes, Method Sought to Restrict Broadcast Vote Predictions, 42 Cong. Q. Weekly Rep. 565, 566 (1984) (reporting that 26 states have enacted or are considering such restrictions).


\(^10\) See T. White, supra note 9, at 12–13.


\(^12\) See N.Y. Times, Nov. 4, 1964, at 34, col. 2.
jections had affected the vote. The 1968 presidential election was too close to call before polls closed in the West. In the landslide 1972 presidential election, however, early projections may have caused a 2.7% decline in voter turnout in western states.

The 1980 election marked the first use of exit polls to predict the outcome of a presidential race. On the basis of exit poll data, NBC predicted Ronald Reagan's victory at 8:15 p.m., when the polls were open in at least twenty-three states. When President Carter made his concession speech at 9:50 p.m., people were still able to vote in several states. These events ignited a furor over exit polling and media predictions generally. Although Carter's speech may have influenced turnout as much as early network projections did, most studies have indicated that the projections caused a perceptible decline in voter turnout in California and other western states. Many Democrats claim that the predictions and the concession speech discour-
aged Democratic turnout more than they discouraged Republican turnout and cost the Democrats at least two congressional seats.\(^2\)

Other recent events have fueled criticism of exit polls. In 1984, using what could be termed an "entrance poll," CBS projected that Walter Mondale would win the Iowa Democratic caucuses. CBS broadcast its projection at 8:12 p.m., before the first actual caucus vote, which could not legally occur before 8:30 p.m.\(^2\) A congressional subcommittee reacted to the Iowa caucus projection by chastizing the media at a hearing on the eve of the New Hampshire primary; two of the major networks responded by promising not to project winners before all of the polls in New Hampshire closed.\(^2\) During the 1984 presidential election, however, all three networks nationally broadcast their projections that President Reagan would be the winner well before western polls had closed,\(^2\) although they did refrain from broadcasting exit poll results from a particular state until that state's polls had closed.\(^2\)

II. THE CONSTITUTIONALITY OF RESTRICTIONS ON THE COLLECTION OR DISSEMINATION OF EXIT POLL DATA

State and federal restrictions on the collection or dissemination of exit poll data may impinge upon first amendment rights under either of two theories. First, laws that exclude pollsters from the voting area infringe on an aspect of freedom of the press — the media's right to gather news.\(^2\) Although courts have not guaranteed the press any special right of access to governmental buildings or proceedings, they

\(^{22}\) See 1981 Hearings, supra note 3, at 217 (statement of Raymond A. Phelps); Calmes, supra note 6, at 565; Wicker, Notes on the Election, N.Y. Times, Nov. 9, 1980, at E19, col. 1. But see Epstein & Strom, supra note 3, at 485–86 (contending that there is no evidence that projections hurt two Democrats who lost by narrow margins). It is not clear that the 1980 election predictions deterred more Democrats than Republicans from voting; indeed, one study suggests just the opposite, although its statistical support is inconclusive. See Jackson, supra note 3, at 630 ("Hearing the projections, or Carter's speech, or both has the greatest impact on the turnout of Republicans and the least effect on Independents.").


\(^{24}\) See id. at 125–46 (committee's criticisms); id. at 143 (NBC's pledge); id. at 144 (ABC's pledge).


\(^{26}\) See N.Y. Times, Jan. 18, 1985, at A1, col. 1.

\(^{27}\) See U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom ... of the press."). The courts have consistently recognized a first amendment right to gather news. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); In re Express-News Corp., 698 F.2d 807, 808 (5th Cir. 1982) (government can promulgate only narrow restrictions on post-verdict
have denied the media access only to places already off-limits to the general public. Because state election laws generally allow the public access to areas outside of election halls, the media must be allowed the same access, and restrictions on media activity within such areas must be subjected to first amendment scrutiny. Second, laws that restrict the collection or dissemination of exit poll data infringe on the first amendment guarantee of freedom of speech. Not only is the dissemination of exit poll results a form of speech, but exit polling itself involves discussions between willing participants on the political issues of the day.

Judicial review of restrictions on the collection or dissemination of exit poll data may proceed along either of two lines of first amendment analysis, depending on the purpose of the restriction. Statutes intended to address noncommunicative adverse effects of exit polls —

interviews with jurors); United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (same); Note, The Rights of the Public and the Press to Gather Information, 87 HARV. L. REV. 1505, 1533 (1974) ("[l]evelsampling from a willing source is a constitutionally protected right . . . "). But cf. Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

The collection of exit poll data for public dissemination is a form of newsgathering and should thus receive first amendment protection. The charge that the networks merely manufacture this information for profit, see Brief of Appellees at 39-40, Daily Herald Co. v. Munro, 747 F.2d 1251 (9th Cir. 1984), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985), even if true, would not lessen first amendment protection for exit polling. The cases limiting first amendment protection for corporate speech have not involved anything resembling a news organization's efforts to gather and report information, but have instead focused on corporations' efforts to sell their product or service. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) (diminished protection for advertising); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (diminished protection for lawyers' solicitation of clients because it is commercial speech). Furthermore, cases involving the media suggest that broadcasters are not likely to receive less protection for their newsgathering activities merely because they publish for profit. Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) ("If . . . profit motive were determinative, all aspects of [a newspaper's] operations . . . would be subject to regulation . . . "); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Daily Herald Co. v. Munro, 747 F.2d 1251, 1259-60 (9th Cir. 1984) (Norris, J., concurring in part and dissenting in part), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985).


28 See, e.g., Daily Herald, 747 F.2d at 1259 (Norris, J., concurring in part and dissenting in part) (Washington statute allows public and press access). State laws may make narrow exceptions for electioneering, see, e.g., Piper v. Swan, 319 F. Supp. 908, 910-11 (E.D. Tenn. 1970) (upholding ban on electioneering within 100 feet of polls), petition for writ of mandamus denied, 401 U.S. 971 (1971), and they may prohibit all activity except voting within a very small radius of the polls, typically 50 feet, see, e.g., City of Phoenix v. Superior Court, 101 Ariz. 265, 419 P.2d 49 (1966) (50-foot zone); Feld v. Prewitt, 274 Ky. 306, 118 S.W.2d 700 (1938) (same); see also Brief of Appellees at 31, Daily Herald (Nos. 84-4005, 84-4063) (media concede that a law excluding all but voters and election workers from the polling building would be constitutional).
such as their alleged tendency to disrupt order and decorum at voting places — are held to a relaxed standard of judicial review. In contrast, statutes designed to address the communicative impact of exit polls — the broadcast of exit poll data and its alleged effect on voter turnout — receive heightened judicial scrutiny. This Part considers whether the two types of restriction on exit polls violate the first amendment.

A. Preserving Order and Decorum in the Voting Area

The constitutionality of state restrictions on exit pollsters' contact with voters is an issue few courts have yet confronted. The major networks and two newspapers have challenged a Washington statute of this type; the case is still pending. States generally justify restrictions on exit polling as means of preventing disruption at election halls. Even if a court accepts this justification as the true legislative purpose, the restriction must nonetheless satisfy a variety of first amendment requirements. Assuming the restrictions are not designed

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31 State exit poll restrictions might also violate the commerce clause, U.S. CONST. art. I, § 8, cl. 3. Because Congress has regulated all phases of television communications, it retains plenary power to regulate broadcasting "exclusive of State action." Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951); see also Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694, 2701, 2703 (1984) (federal preemption of regulation of cable television advertising). By effectively preventing the broadcast of exit poll results, state restrictions would conflict with federal broadcast regulations, which currently allow the broadcast of election-night projections, and would thus violate the commerce clause. Nonetheless, courts have generally not applied commerce clause analysis to other state restrictions that similarly inhibit interstate broadcasts, such as limitations on media access to court proceedings; they have instead limited their analysis to first amendment doctrine. See, e.g., Houchins v. KQED, Inc. 438 U.S. 1, 16 (1978) (applying first amendment analysis to restrictions on media access to county jail).

32 Two state attorneys general have declined to interpret electioneering laws to include exit polling, noting that such an interpretation would implicate first amendment concerns. See Opinion of the Att'y Gen., No. 82-2-1 (Iowa, Feb. 3, 1982) (available on LEXIS, States library, Iowa file); 1980–1981 Op. Att'y Gen. 65 (La. Oct. 8, 1980).

33 See Daily Herald Co. v. Munro, 747 F.2d 1251 (9th Cir. 1984), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985). The two-judge majority in Daily Herald declined to reach the first amendment issue, remanding the case for trial of factual issues. These issues include the precise definition of an exit poll, the nature of media disruptions at polling places, whether exit polls can be conducted outside a 300-foot radius, and the state's motives in enacting the law. See id. at 1252–53.

34 See, e.g., Brief of Appellees at 28, Daily Herald (Nos. 84-4005, 84-4063).

35 The disruption rationale, however, may often mask a state's intent to suppress dissemination of poll results. See infra pp. 1938–39.
to address the communicative impact of exit polls, the state must show that, on balance, they are reasonable\textsuperscript{36} and not overbroad.\textsuperscript{37} If the area around the voting place is deemed a public or quasi-public forum, however, a heightened standard of scrutiny applies.\textsuperscript{38}

States do have legitimate interests that might be served by restrictions on exit polling. The right to vote, enshrined in the Constitution,\textsuperscript{39} is fundamental,\textsuperscript{40} and states have an interest in protecting this right by providing voting places that are safe and accessible.\textsuperscript{41} Exit polling is a complicated process that may interfere with voting. Reporters conducting an exit poll usually stand at selected voting places during the entire period that people are voting, handing "questionnaires" to a random sample of people who have just voted. To fill out the questionnaires, voters sometimes use chairs, tables, and other facilities provided at the election hall. It takes voters three to four minutes to complete the survey, which may closely resemble a ballot.\textsuperscript{42} This process may generate a crowd of voters filling out forms and cause prospective voters to turn away thinking that voting booths are crowded.\textsuperscript{43} In addition, pollsters may annoy voters who do not wish to be interviewed, discouraging them from returning to vote in the next election.\textsuperscript{44} Exit polling may also confuse some voters, especially recently naturalized or illiterate citizens. They may mistake the questionnaire for an actual ballot and thereby neglect to vote, or they may mistake pollsters for government overseers checking on how people vote.\textsuperscript{45} Finally, the noise, crowds, and confusion caused by an exit

\textsuperscript{36} See United States v. O'Brien, 391 U.S. 367, 377 (1968); L. Tribe, supra note 30, § 12-20, at 683.

\textsuperscript{37} See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (observing that a statute is overbroad if it "sweeps within its ambit" activities entitled to first amendment protection).


\textsuperscript{39} See U.S. CONST. art. I, § 2, cl. 1 (providing that the House of Representatives be chosen "by the People"); id. art. II, § 1, cl. 3 (electoral college); id. art. I, § 4, cl. 1 (providing for regulation of time, place, and manner of holding elections); id. amend. XV ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."); id. amend. XVII (popular election of senators); id. amend. XIX (women's suffrage); id. amend. XXIV (prohibition of poll taxes); id. amend. XXVI (voting age).


\textsuperscript{41} See, e.g., Brown v. Hartlage, 456 U.S. 45, 52 (1982); Bell v. Southwell, 376 F.2d 659, 660-61, 665 (5th Cir. 1967) (setting aside state election and ordering a special election where election officials segregated voting lists and booths and where the police "allowed a large crowd of white males to gather near the polls thus intimidating Negroes from voting"); cf. NLRB v. Carroll Contracting & Ready-Mix, Inc., 636 F.2d 111, 113 (5th Cir. Feb. 1981) (Unit B) (setting aside union election because of electioneering).

\textsuperscript{42} See Brief of Appellees at 13, Daily Herald Co. v. Munro, 747 F.2d 1251 (9th Cir. 1984), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985).

\textsuperscript{43} See id. at 34.

\textsuperscript{44} See id.

\textsuperscript{45} See id. at 48-49.
poll might disturb election workers who must manage voting booths and registration lists.

Under minimal first amendment scrutiny, the state's interest in facilitating orderly voting through a particular restriction must outweigh the restriction's infringement on the media's first amendment rights. This infringement is substantial because state restrictions may severely hamper the collection, and ultimately the dissemination, of reliable exit poll data. In the absence of restrictions, pollsters stationed near the exits at an election hall can take a random sample of all who actually vote. The establishment of restricted zones in which exit polling is forbidden may prevent pollsters from questioning voters who leave by car or public transportation, as well as voters who walk off without passing the interviewers. Thus, by decreasing both the size and the randomness of the sample of voters interviewed, restricted zones reduce the accuracy of exit polls. Most important, pollsters stationed at a distance from the voting booths can no longer be sure that each passing person has actually voted. This uncertainty further reduces the accuracy of exit polls, which are

There is anecdotal evidence to support all of these contentions. The primary sponsor of the Washington bill claimed to have received "many calls" from voters, some of whom were "rather confused," and the majority of whom "resented the [exit poll] process and felt intimidated and felt that there was an invasion of their privacy." Id. at 20 (quoting transcript attached to Affidavit of Don Whiting, at 1–2). Other officials have cited similar complaints. See Daily Herald Co. v. Munro, 747 F.2d 1251, 1261 (9th Cir. 1984) (Norris, J., concurring in part and dissenting in part) (describing journalist conducting an exit poll "right next to the ballot box"), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985). The State of Washington intends "to fully establish at trial the disruptive effect" of exit polling. Brief of Appellees at 12, Daily Herald (Nos. 84-4005, 85-4063).


Restricted zones decrease the randomness of the sample because pollsters can question only those voters who happen to leave in a certain direction, making it more difficult to obtain a true cross-section of the actual voting population. See P. Tannenbaum & L. Kostrich, supra note 1, at 137.

See Daily Herald, 747 F.2d at 1257–58 (Norris, J., concurring in part and dissenting in part); cf. Levy, supra note 47, at 66–67 (observing that vast sample size is one of exit polling's great strengths). Although the media could ameliorate some of these problems by stationing more pollsters at the perimeter of the immunized zone, this accommodation would entail much higher, possibly prohibitive, costs. See P. Tannenbaum & L. Kostrich, supra note 1, at 137.

See Daily Herald, 747 F.2d at 1258 (Norris, J., concurring in part and dissenting in part) (citing Affidavit of Adam Clymer, Assistant to the Executive Editor of the New York Times,
unique because "they involve interviews with people who have actually voted, not people who say they will vote, who pollsters expect to vote or who say they have voted."\textsuperscript{51}

The first amendment interests at stake have additional importance because exit polls generate important research data that cannot be obtained in any other way. No other polling method can so accurately measure what people are thinking at the moment they vote.\textsuperscript{52} In addition, exit polls provide unique data on the socio-economic composition of the voting population. Media and academic experts use the poll information to study voting behavior, political trends, and the influence of current events on voters' choices.\textsuperscript{53} The state laws seem unreasonably restrictive because they effectively prevent the use of exit polls not only for election-night projections but also for long-term research.

Moreover, courts assessing the reasonableness of a restriction on exit polling should not ignore the availability of much narrower measures to reduce disruption even if states are not necessarily obligated to employ the least restrictive alternative. States could require pollsters to explain to voters that they may refuse to be interviewed and that the interview is not part of the official balloting process. Interviewers could be required to wear distinctive clothing, as they often do now, that would show they are not government officials. To reduce noise and confusion, states could exclude pollsters from the area immediately around the voting booths or even from the election hall. These measures, together with a general prohibition of disruptive behavior, would eliminate disorder where the voting actually takes place. The only governmental interest in prohibiting polling far away para. 15 [hereinafter cited as Clymer Affidavit); P. TANNENBAUM & L. KOSTRICH, \textit{supra} note 1, at 137; Levy, \textit{supra} note 47, at 66-67 (noting that the "virtually coincidental nature of the interviewing" enhances the reliability of exit polls).

\textsuperscript{51} \textit{Daily Herald}, 747 F.2d at 1258 (Norris, J., concurring in part and dissenting in part) (quoting Clymer Affidavit, \textit{supra} note 50, para. 15). Most pre- and post-election surveys are less reliable because it is uncertain whether the entire sample has actually voted. \textit{See} Busch & Lieske, \textit{Does Time of Voting Affect Exit Poll Results?}, 49 \textit{PUB. OPINION Q.} 94, 104 (1985).

\textsuperscript{52} Telephone polls, based on government records of who voted, are also less accurate because at a remote time and place more people tend to misreport their personal characteristics and views, as well as their voting choices. \textit{See} P. TANNENBAUM & L. KOSTRICH, \textit{supra} note 1, at 138 (observing that in post-election telephone surveys, voters are more likely to "refuse to cooperate" with pollsters, to be "forgetful," or to be "deliberately deceptive"); Busch & Lieske, \textit{supra} note 51, at 104 n.13. "The essence of exit polls is that you catch respondents fresh from their voting experience and that you can use realistic sample ballots that should more readily represent their actual behavior a minute or two earlier." P. TANNENBAUM & L. KOSTRICH, \textit{supra} note 1, at 138.

\textsuperscript{53} Two examples of studies that incorporate exit poll data are Ladd, \textit{On Mandates, Realignments, and the 1984 Presidential Election}, 100 \textit{POL. SCI. Q.} 1, 12-17, 20-22 (1985), and Ladd, \textit{The Brittle Mandate: Electoral Dealignment and the 1980 Presidential Election}, 96 \textit{POL. SCI. Q.} 1, 11-20 (1981). Other studies are cited in Brief of Appellants at 14-16, \textit{Daily Herald} (Nos. 84-4005, 84-4063).
from the voting booths would be to prevent harassment and confusion of citizens generally, concerns that would never justify a ban on any other opinion poll.54

State restrictions on exit polls are also facially overbroad because they prohibit all exit polling within a specified zone, whether or not it is disruptive. Long before state election statutes were amended to restrict exit polls, most such statutes outlawed disruptive behavior around the polls.55 The State of Washington acknowledges that prior to amendment its election law would have prohibited exit polling insofar as it actually interfered with voting, but the state contends that the new statute merely "clarifies" that all exit polling inherently disrupts voting.56 If this claim were true, the statute's exit poll provisions would be merely redundant. But there is no evidence that all, or even many, exit pollsters have disrupted the voting process. The disturbances that have occurred have usually involved polls taken inside the election hall or in the area just outside the building rather than polls conducted at any distance from the voting area.57

If the election hall or the area surrounding it is deemed a public or quasi-public forum, an exit poll restriction must undergo heightened judicial scrutiny. Under such scrutiny, the state must demonstrate that the restriction serves a substantial governmental interest.58 Here the relevant speech interest is not in the dissemination of exit poll

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54 There appear to be no cases challenging laws that restrict telephone polls and other public opinion surveys. It is highly unlikely, however, that a court would uphold a law that generally restricted political poll-taking if the only state interest behind such a law was in preventing possible annoyance to citizens. Even when a statute would serve a state's important interest in ensuring fair elections, the Supreme Court has granted full constitutional protection to speech about public affairs and elections. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 795 (1978) (holding that a statute prohibiting corporations from making expenditures to influence a referendum violated the first amendment); Buckley v. Valeo, 424 U.S. 1, 51 (1976) (per curiam) (holding that a limitation on independent campaign expenditures violated the first amendment).

55 See, e.g., Daily Herald Co. v. Munro, 747 F.2d 1251, 1260 (9th Cir. 1984) (Norris, J., concurring in part and dissenting in part) (Washington election laws already prohibited disruption before enactment of exit polling restriction), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985).

56 Brief of Appellees at 20 n.12, Daily Herald (Nos. 84-4005, 84-4063).

57 See, e.g., Brief of Appellants at 9 n.4, Daily Herald (Nos. 84-4005, 84-4063) (supporters of Washington's law cited only instances of disruption inside polling places); cf. P. Tannenbaum & L. Kostrench, supra note 1, at 140 (suggesting that 500-foot zone would be much larger than necessary to ensure order). Before the states established restricted zones, most pollsters conducted surveys just outside the election hall exits; hence it is unsurprising that there is little information on whether more distant poll-taking would ever disrupt voting. Nonetheless, states shouldered the burden of demonstrating a need for laws that infringe on first amendment rights. See, e.g., Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972) (stating that "the Government has the burden of establishing . . . that the incidental infringement" is tolerable).

The State of Washington has implied that a complete ban on all activity within a sizeable zone would also be constitutional. See Brief of Appellees at 32, Daily Herald (Nos. 84-4005, 84-4063). Such an approach, however, would be even more overbroad, for it would ban all nondisruptive activity outside the voting place, not just peaceful exit polling. Some states do prohibit all activity, but only within a much smaller radius. See supra note 29.

results, but in the collection of exit poll data outside election halls.\textsuperscript{59} The courts have constructed a hierarchy of fora at which the government may restrict expressive activity.\textsuperscript{60} In public places that have traditionally facilitated verbal and physical communication, such as sidewalks and parks, the Constitution tolerates only the narrowest restrictions on expression, even if speakers can find alternative means to communicate their message.\textsuperscript{61} In governmental facilities not designed for public communication, such as hospitals, jails, and military bases, the state has greater power to restrict peaceful expressive activity in order to prevent interference with government business.\textsuperscript{62} In quasi-public fora such as schools and libraries, which promote only particular kinds of expression, "[t]he crucial question is whether the manner of expression [that is restricted] is basically incompatible with the normal activity of a particular place at a particular time."\textsuperscript{63}

The restricted zones established by existing state statutes cover both public and quasi-public fora. An election hall itself probably would not qualify as a full-fledged public forum because its primary purpose is not to facilitate unfettered physical or verbal communication. Still, like a school or library, it promotes a certain kind of expression — voting — and thus qualifies as a quasi-public forum. The grounds surrounding the election hall, like the grounds of a school or library, should be deemed a quasi-public forum as well.\textsuperscript{64} In addition, the sidewalks, streets, and parks surrounding the election hall are public fora and should not lose that status on election day, any more than the sidewalks outside the Supreme Court building lose their public forum status during Court sessions.\textsuperscript{65}

A court might decline to draw such fine lines in assessing a restricted zone and might instead treat an entire voting area as a public or quasi-public forum. Under the standard of review for either type of forum, however, restricted zones would be found unconstitutional. If a court treated the area as a quasi-public forum, a ban on exit polling could be justified only if the polling was found "incompatible" with the activity of voting. Yet nondisruptive exit polling, either within or outside the election hall, is not "incompatible" with voting. A statute that banned only disruptive polling might survive under the "incompatibility" standard, but existing statutes define all polls as per

\textsuperscript{59} See supra pp. 1930–32.
\textsuperscript{60} See Grace, 461 U.S. at 176–78.
\textsuperscript{61} See id. at 177.
\textsuperscript{63} Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).
\textsuperscript{64} Cf. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 & n.6 (1969) (holding that the right of free speech is protected on school grounds outside of classrooms if the speech does not lead to substantial interference with the operation of the school and noting that school grounds are public property).
se disruptive, ignoring the likelihood that most polls would not interfere with voting. Indeed, the presence of reporters near the polls and the exit poll results themselves may provide safeguards against government impropriety in collecting and counting ballots. Exit polling may thus help to promote the state's interest in guaranteeing honest elections. If a court found that a voting place constituted a public forum, a law establishing a restricted zone would be even more likely to be found unconstitutional. Only the most narrow restrictions on speech are permitted in public fora, and disruptive exit polling could be curbed by methods much more narrow than the establishment of restricted zones.

Thus, even if merely designed to reduce disruption, statutes that prohibit all exit polling in a sizeable zone surrounding election halls violate the first amendment. Under the balancing test carried out under minimal scrutiny, the state interest in reducing disruption does not outweigh the drastic abridgement of the media’s first amendment rights. Furthermore, the laws are overbroad because they ban all exit pollsters, and not just disruptive ones, from the voting area. Finally, by forbidding polltaking in quasi-public or public fora, the laws curtail communication in places traditionally reserved for free interchange.

B. Suppressing the Dissemination of Exit Poll Data

Although states might conceivably enact statutes to regulate the disruptive aspects of exit polling, there is good reason to believe that the recently enacted state statutes are in fact designed to serve another purpose — specifically, that they are intended to suppress the dissem-

66 The possibility of government fraud is greater than the possibility that the media might fabricate poll data to influence elections or to cast doubt on official returns because several news organizations now vie to gather exit poll data, whereas the government has a monopoly on the tabulation of official returns. The major networks, the Associated Press, the New York Times, and other newspapers have all taken exit surveys. See Brief of Appellants at 4, Daily Herald Co. v. Munro, 747 F.2d 1251 (9th Cir. 1984), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985); Levy, supra note 47, at 55 & n.2.

67 These safeguards distinguish regulation of the media from regulation of electioneering and other campaign activity around the polls. Courts have upheld restrictions on campaigning outside the polls partly because of the danger that it might coerce or frighten voters. See Piper v. Swan, 319 F. Supp. 908, 910–11 (E.D. Tenn. 1970) (upholding ban on distribution of campaign literature within 100 feet of election building), petition for writ of mandamus denied, 401 U.S. 971 (1971); State v. Black, 54 N.J.L. 446, 452, 24 A. 489, 491 (1892) (same). But this interest in the integrity of elections argues against similar bans on the press, which can police the collection of ballots by watching the voting process, and which can check the government's tabulation by comparing it with exit poll results. Moreover, unlike partisan campaign workers, reporters generally do not attempt to influence voters' decisions; exit pollsters speak with people only after they have voted. See P. TANNNENBAUM & L. KOBRICH, supra note 1, at 140.

68 See supra p. 1937.

ination of exit poll results. The passage of these measures coincides with the recent concern that election-night broadcasts of exit poll results discourage voting, and the statutes are poorly tailored for the purpose of maintaining order at elections halls. The State of Washington, by arguing that preventing the broadcasting of exit poll results justifies its new statute, has virtually admitted that the statute is in fact designed to regulate the content of election-night broadcasts. In view of the strong possibility that such laws are designed primarily to prevent the dissemination of poll data, courts should not hesitate to probe the motives underlying restrictions on exit polling. Although the Supreme Court has in the past suggested that the investigation of legislative motives should play only a limited role in determining the constitutionality of an otherwise valid statute, it has more recently expressed a greater willingness to consider claims of illicit purpose.

If an examination of legislative purpose reveals an intent to prevent the broadcasting of exit poll data, the state must at least show that its regulation is "narrowly tailored to further a substantial governmental interest," the standard for broadcast regulation enunciated in FCC v. League of Women Voters. Indeed, more exacting scrutiny should be applied because existing state restrictions do not merely regulate or delay broadcasting. Rather, they prevent the collection of exit poll data, thereby preventing the data's use for any purpose, whether or not it involves broadcasting. A court would thus be unlikely to treat the state laws as broadcast regulations and would instead apply the standard generally used for nonbroadcasting regulations aimed at the communicative impact of speech. The laws would be subject to the strictest level of scrutiny, which requires states to demonstrate a "compelling" interest.

70 See Daily Herald Co. v. Munro, 747 F.2d 1251, 1263 n.13 (9th Cir. 1984) (Norris, J., concurring in part and dissenting in part) (observing that at oral argument the state relied on this justification "in the alternative"), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985). The American Legal Foundation argued the same point more directly in its amicus brief. See Brief Amicus Curiae at 7, 31-33, Daily Herald Co. v. Munro, No. C83-840T (W.D. Wash. June 29, 1984), rev'd per curiam, 747 F.2d 1251 (9th Cir. 1984), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985).


72 See Washington v. Davis, 426 U.S. 229, 244 n.11 (1976) (observing that legislative intent is relevant in an equal protection challenge and implying that motive is relevant in religion cases and in "constitutional adjudication" generally); Daily Herald Co. v. Munro, 747 F.2d 1251, 1253 (9th Cir. 1984) (per curiam) (reversing summary judgment order upholding state restriction on exit polling because the state may have been "motivated by an intent to suppress" protected expression), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985); see also L. Tribe, supra note 30, § 12-6, at 596-98 (arguing that courts should consider illicit legislative motive in first amendment cases).

73 104 S. Ct. 3106, 3118 (1984). The Supreme Court has generally applied stricter scrutiny to regulation of print media. See infra note 83.

State restrictions are unlikely to further any important government interest because they do little to protect the citizens of the enacting state. Suppressing data from exit polls taken within the state will not prevent voters from hearing the results of exit polls taken in other states. California voters complain not because the networks broadcast projections of results from California, but because the networks predict the outcomes in eastern states first. Similarly, laws that suppress exit poll data from elections held in eastern states might benefit western voters but could not be justified as a way of protecting turnout in the eastern states themselves, because the networks no longer predict outcomes in a given state until its polls have closed.

Although the Framers seem to have left the states free to pass altruistic legislation, conferring a benefit on nonresidents, over whom states have no power, may not qualify as a "substantial" state interest. States might argue, however, that altruism alone does not motivate their restrictions because they indirectly reap benefits from similar laws passed by other states. Although no state acting alone could halt early projections based on exit polls, a collection of states acting together might well succeed.

But even if restrictions enacted by several states were together effective in preventing the broadcast of early projections, they would still not further any compelling, or even substantial, state interest. A congressional requirement that networks delay dissemination of exit

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75 See P. TANNENBAUM & L. KOSTRICH, supra note 1, at 199.
77 Although the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1, forbids a state from discriminating against nonresidents without "substantial reason," see Toomer v. Witsell, 334 U.S. 385, 396 (1948), it probably does not prohibit states from enacting laws to benefit outsiders.
78 Even if such interstate cooperation does not violate the first amendment, it arguably might run afoul of the compact clause of the Constitution, which forbids states from making agreements or contracts with one another without congressional approval. See U.S. CONST. art. I, § 10, cl. 3. The Supreme Court has rejected a literal reading that would require congressional authorization for all joint action and has upheld agreements that do not "impermissibly enhance state power at the expense of federal supremacy." United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978); see also New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976) (holding that a boundary agreement was not a compact because it did not encroach on federal authority). A web of state exit polling bans might impermissibly encroach on federal power to regulate interstate commerce, see supra note 31, and thereby resemble a compact.

It is doubtful, however, that the Court would treat the enactment of such laws as a compact unless the states made explicit agreements, especially because the laws could ostensibly serve purposes other than suppression of exit poll broadcasts. See supra p. 1932. Although the compact clause reaches both formal agreements and "informal" compacts, see Multistate Tax, 434 U.S. at 470-71, compacts have generally involved much more explicit expressions of state assent, see, e.g., Cuyler v. Adams, 449 U.S. 433, 435 n.1, 438 (1981) (holding that an intricate extradition agreement among 48 states and the District of Columbia was a compact).

79 See infra p. 1942.
poll results would similarly fail to serve any substantial federal objective. The leading case on governmental efforts to restrict the media's influence on voting behavior is *Mills v. Alabama*, in which the Supreme Court held that a state's interest in protecting voters from last-minute coercion did not warrant a ban on election-day newspaper editorials. This holding implies that either a ban on or a mandated delay of election-day projections would also violate the first amendment.

A state or the federal government might attempt to distinguish *Mills* by arguing that the standard of review applied there, while appropriate for a case involving the print media, is more strict than the substantial interest standard that should be applied in broadcasting cases. Yet the rationale behind the broadcasting standard—that broadcast channels are scarce and therefore should be subject to greater regulation in order to ensure a balanced presentation of views—does not apply to regulation of election-night projections. The government's concern is not that the networks broadcast biased projections, but that the networks' projections prove all too accurate.

Finally, there is no valid state or federal interest in a ban on or a mandated delay of election-night predictions because the danger posed by such projections does not differ from the danger that accompanies similar speech protected from governmental regulation. Any poll, indeed any political discourse, may discourage voting. Presidential preference polls that for months showed Walter Mondale trailing Ronald Reagan by a wide margin may have induced more apathy in the 1984 presidential election than did the networks' early prediction of the actual 1984 vote. It is unimaginable, however, that the courts

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81 See id. at 218-19.
82 "Just as in *Mills v. Alabama* there was a danger in permitting election day editorials, there is danger in permitting election day projections." Daily Herald Co. v. Munro, 747 F.2d 1251, 1264 (9th Cir. 1984) (Norris, J., concurring in part and dissenting in part), modified, Nos. 84-4005, 84-4063 (Apr. 2, 1985).
84 See *League of Women Voters*, 104 S. Ct. at 3116.
85 See Dubois, *Election Night Projections and Voter Turnout in the West: A Note on the Hazards of Aggregate Data Analysis*, 11 Am. Pol. Q. 349, 358 (1983) (arguing that public opinion polls, not election-night projections, are most likely responsible for decline in turnout in recent presidential elections); cf. Felton, *Public Opinion Polls Play Key, But Also Misunderstood, Role in American Political Arena*, 38 Cong. Q. Weekly Rep. 723, 725 (1980) (contending that pre-election polls may "directly affect the course of campaigns, even if they don't change public opinion"). A 1968 Gallup poll showing Richard Nixon well ahead may have "irreparably
would uphold a ban on pre-election polls or on any other kind of political speculation. Furthermore, the evidence that election-night projections always significantly discourage voting is inconclusive.\(^6\) In a close election, early exit poll results may actually encourage voters to participate by enhancing the perception that individual votes will matter.

In sum, state laws that are designed to suppress the dissemination of exit poll data violate the first amendment because they do not serve a substantial, much less a compelling, state purpose. A federal law requiring that networks delay election-night predictions would be more narrowly tailored than would a state ban because it would allow the eventual publication of election predictions and data on voting behavior. Nonetheless, such a law would share the states' impermissible objective — the suppression of projections — and would therefore fail to serve a "substantial"\(^7\) governmental interest. Any attempt to delay or ban election-night projections would violate the first amendment.

### III. Uniform Poll-Closing Times

Largely because of first amendment concerns, Congress has never voted to ban the broadcast of election-night projections, although individual legislators have proposed such measures.\(^8\) Instead, congressional committees have repeatedly called on the networks for restraint; most notably, Congress passed a resolution in 1984 asking the media to delay election-night projections.\(^9\) By January 17, 1985, the three major networks had promised Congress that they would refrain from predicting election results in any state until that state's polls had closed.\(^0\) The pledges opened the way for a nationwide

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\(^7\) See 1981 Hearings, supra note 3, at 157 (statement of Prof. Tannenbaum); Epstein & Strom, supra note 3, at 486, 489.


\(^0\) See Letter from Roone Arledge, President of ABC, to Reps. Al Swift and William Thomas (Dec. 12, 1984); Letter from Laurence Grossman, President of NBC News Division, to Reps. Al Swift and William Thomas (Dec. 12, 1984); Letter from Edward Joyce, President of CBS,
uniform poll-closing time in presidential elections because they ensured that the networks would not undermine a standard closing time by broadcasting early exit poll results.91

Uniform poll-closing legislation, however, faces many obstacles.92 A serious logistical problem is that if polls are to close at 11:00 p.m. in the East, then they must close at 5:00 p.m. in Hawaii, before many people have finished work. Several solutions to this problem have been proposed. One solution would move Election Day to Sunday,93 but this alternative would conflict with religious observance. Another option would impose the standard closing time only in the contiguous forty-eight states; this solution, however, would have the obvious infirmity of failing to extend the same protections to voters in Alaska and Hawaii. A third proposal would extend daylight savings time for two extra weeks in western states, decreasing the east-west time difference from three to two hours.94 This proposal would alleviate the problem but not solve it. Still another suggestion would require all polls to remain open for a twenty-four-hour period, say from Monday noon to Tuesday noon E.S.T. Under such a system, every voter in the country would have the same selection of hours in which to vote. The main drawback would be the added cost to the states of running the elections, which would cost California alone an additional two million dollars.95 The federal government could alleviate the financial burden on the states by subsidizing the cost, but overnight elections

91 See Wash. Post, Jan. 18, 1985, at A1, col. 4. The emergence of new networks may still undermine efforts to secure restraint from the broadcast media. Although the Cable News Network has thus far complied with congressional entreaties, see H.R. REP. NO. 98-671, 98th Cong., 2d Sess. 15 (1984), there is no guarantee that other, newer networks will follow suit. Moreover, should newcomers begin broadcasting exit poll projections, no principle of contract law can bind the television networks to their voluntary pledge to withhold exit poll data. Cf. E. Far NSworth, Contracts § 2.5, at 46-48 (1982) (gratuitous promises unenforceable). The networks might nonetheless hesitate to repudiate their promise for fear of losing credibility and political capital.

92 Some legislators doubt whether Congress has the constitutional authority to standardize voting times. See Wash. Post, Jan. 18, 1985, at A1, col. 4. Their fears are probably unfounded. Article I, § 4, cl. 1 of the Constitution provides that Congress may establish the "Times" of federal elections. Congress has already wielded this power by establishing the first Tuesday in November as Election Day. See 2 U.S.C. § 7 (1982).

Leaders of the subcommittee estimate the chances that Congress will pass a uniform poll-closing law at a little better than even. See Wash. Post, Jan. 18, 1985, at A1, col. 4. The House Subcommittee on Federal Elections, formerly the House Task Force on Elections, has held hearings on the issue.


94 See 1981 Hearings, supra note 3, at 120-21 (statement of March Fong Eu, Secretary of State of California).

95 See id. at 119.
would still present security problems because state election officials would have to guard the ballots already cast.\textsuperscript{96}

Perhaps the most workable solution would make Election Day a national holiday. The chief advantage of this alternative is that polls in eastern states would not have to remain open late into the night, because polls in western states could close in the late afternoon or early evening, when people would otherwise be working. A second benefit would be that the fanfare and free time created by a national holiday might encourage voter turnout. Although critics charge that this solution could indirectly cost the economy billions of dollars,\textsuperscript{97} the cost could be reduced by making only the afternoon a holiday. Furthermore, the holiday would be necessary only once every four years, for presidential elections. There is no need for a nationwide poll-closing time for midterm elections because the results of eastern congressional races probably do not deter westerners from voting in local elections.

Proposals for a uniform poll-closing time do not violate the media's first amendment rights because they all rest on voluntary cooperation by the networks. It might be argued that the government offends first amendment values when it acts in concert with the media to deny people access to certain information when they vote. After all, Americans, unlike citizens of some other nations, have the right to choose not to vote; their right to exercise this choice may include the right to decide whether to listen to early reports on an election. Nonetheless, if the media agree to withhold predictions, there would be no willing speaker, and therefore no right to hear.\textsuperscript{98} Congress should therefore feel no doubt about the constitutionality of legislation establishing a uniform poll-closing time; indeed, it should pass such legislation promptly.\textsuperscript{99}

\textsuperscript{96} See id.; Light, supra note 93, at 1438.

\textsuperscript{97} See, e.g., P. Tannenbaum & L. Kostrich, supra note 1, at 119.

\textsuperscript{98} See L. Tribe, supra note 30, § 12-19, at 675 (observing that the right to know may at times simply be a listener's right that government not suppress willing speakers); cf. Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) (holding that there is a right to receive mail from willing senders).

\textsuperscript{99} If Congress passed such legislation, its drawbacks might spur states to impose direct controls on exit polls. A poll-closing law that inconvenienced voters, truncated western voting times, entailed exorbitant costs, or exempted Alaska and Hawaii might not satisfy many western states. This possibility alone might convince states that uniform poll-closing and media self-restraint are insufficient.

If courts fail to strike down state restrictions on exit polling, Congress should consider passing a measure that would require states to allow exit polling outside election halls, for otherwise states will thwart the federal policy of standard poll closings coupled with voluntary media restraint. Authority for such a law might rest on congressional power to regulate the "Times, Places and Manner" of federal elections. See U.S. CONST. art. I, § 4, cl. 1. It is not certain that this power includes the power to regulate activity around the voting area, but the Supreme Court has strongly implied as much. See Smiley v. Holm, 285 U.S. 355, 366 (1932)
IV. Conclusion.

This Note has shown that both state restrictions on exit polling and the proposed federal delay of election-night returns would violate the first amendment. To achieve the legitimate governmental goals that motivate these proposals, Congress should instead establish a nationwide uniform poll-closing time and make all or part of Election Day a national holiday in order to accommodate voters in western states. These measures would insulate west coast voters from early election news without infringing the media's right to gather and broadcast exit poll data.

The Constitution requires that the media shoulder the ultimate responsibility for safeguarding west coast voters from early projections. After years of indifference, the media finally appear ready to take that responsibility seriously. The networks' pledge to withhold exit poll data until a state has closed all of its polls represents an important step toward resolution of the problem. Although no legal obligation compels the media to honor the pledge, a weighty moral duty does exist. Should the networks breach that duty, they will not only invite denunciations from citizens and Congress, but they will also fuel the growing cries for greater restrictions on first amendment freedoms. That these angry voices could someday prevail should give the media pause.

(stating in dictum that congressional power extends to "supervision of voting, protection of voters, [and] prevention of fraud and corrupt practices").