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Tuning Out the Electorate: Early Network Projections and Decreased Voter Turnout

by JEFF POLSKY

I
Introduction

The average American household operates a television set for over seven hours a day. Sixty percent of the population relies primarily on television for its news. Clearly, television exerts a significant impact on our ideas and beliefs. Television is particularly influential on those ideas and beliefs which determine how we vote.

Scholars and judges agree that a well-informed public is the foundation of a successful system of self-government. “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.” Accordingly, political speech is granted the highest degree of first amendment protection.

Recently, however, it has been contended that rather than helping people become more knowledgeable voters, television is dissuading them from voting at all. When a presidential

* Member, Third Year Class; A.B., University of California at Berkeley, 1982.
1. TV Viewing Climbs to Historic Level of 7 Hours a Day, San Francisco Examiner, Jan. 25, 1984, at 1, col. 2.
3. Id.
5. Id.
election results in a landslide, the major networks have been able to announce a winner hours before the polls close. There are two techniques available to networks in making their projections. The traditional method is to wait for the votes to be counted in specially selected precincts believed to be representative of larger regions. With the advent of computers and increasingly sophisticated sampling techniques, earlier projections have become possible.

The newest and most controversial technique involves exit polling, which relies on interviews with voters leaving sample precincts. By relying heavily on the results of exit polls in 1980, NBC was able to scoop its competition by over an hour. As other networks start to rely on exit polls, projections can be made earlier and earlier. There is evidence that, by projecting the outcome of presidential elections hours before the polls


11. In 1980, NBC announced a Reagan victory at 8:15 p.m. eastern standard time (EST), almost 3 hours before the polls closed in the West. ABC and CBS followed at 9:52 p.m. and 10:32 p.m. EST, respectively. In 1972, NBC called Nixon the winner at 8:30 p.m. EST, and CBS followed 20 minutes later. Id. at 151-52 (statement of Raymond E. Wolfinger, professor of political science, University of California). The election of 1984 resulted in a landslide of even greater magnitude than those mentioned above, see supra note 10, thus allowing networks to again make their projections before all the polls had closed. The 1984 election raises some interesting questions. For instance, it may be that when one candidate goes into the election with such a commanding lead as that held by President Reagan, the public reaction to early network projections is lessened. It also remains to be seen what impact resulted from the networks making a stronger attempt to encourage people to vote despite the apparent certainty of a Reagan victory. Unfortunately, as this note goes to print, the data required to assess the impact on voter turnout in the 1984 election is not available.

12. Id. at 159 (statement of Percy H. Tannenbaum, professor of public policy and director, Survey Research Center, University of California).

13. Id. at 158.


15. Hearings, supra note 9, at 159 (statement of Percy H. Tannenbaum).

16. Id. See also supra note 11.

close, television networks deter some voters from even going to the polls.\textsuperscript{18} The impact of early projections is most heavily felt in the western part of the nation where a larger percentage of people have not yet voted when the projections are made.\textsuperscript{19}

This note takes a three-pronged approach to the issue of decreased voter turnout resulting from early network projections. First, it discusses the studies and other evidence that identify the effects of early projections to illustrate the significance of the problem. Second, the note then examines possible solutions and determines that the only feasible solution would be direct restrictions preventing the news media from broadcasting their projections before the polls close nationwide. Third, the first amendment ramifications of this suggestion are explored. The note concludes that such direct regulation would in fact serve to protect "the successful operation of the political process,"\textsuperscript{20} which is the primary goal of the first amendment.

II
The Problem

Since 1960, the number of registered voters participating in presidential elections has declined steadily.\textsuperscript{21} Although the problem of decreasing voter turnout is multifaceted, and any attempt to assess the impact of a single factor is a formidable task, the problem has nevertheless been approached from a variety of viewpoints.\textsuperscript{22}

A. Public Opinion Surveys

Shortly after the 1980 election, a national survey conducted

\textsuperscript{18} See infra text accompanying notes 21-58.

\textsuperscript{19} Recent concessions by the networks as a result of bipartisan pressure do not eliminate the problem. ABC and NBC have agreed not to project the outcome of voting in a state before the polls close. See Mayer, supra note 9, at 58, col. 1. Despite these voluntary restraints, networks could still base a projection on voting in the East in time to discourage voters in other parts of the country where the polls are still open. In fact, the projections have traditionally been made after voting has stopped in the East. See supra note 11.

\textsuperscript{20} A. Bickel, The Morality of Consent 62 (1975).

\textsuperscript{21} In 1960, 62.8\% of registered voters cast ballots. By 1980 the figure had dropped to 53.9\%. See Hearings, supra note 9, at 74 (statement of Curtis Gans). Voting in off-year elections, i.e., those without a presidential race, has averaged 13 percentage points lower over the same period. Id. at 151 (statement of Raymond E. Wolfinger).

\textsuperscript{22} Although flaws in the various studies will be identified, detailed analysis of the methodologies used is beyond the scope of this note. See generally P. Tannenbaum & L. Kostrich, Turned-On TV/Turned-Off Voters (1983).
by the Los Angeles Times reported that seventy-one percent of registered voters believed that broadcasters should be prohibited from making projections before the polls close nationwide. This opinion was not isolated to the western states, but was shared by voters across the country. More importantly, according to this study, 2.4% of registered voters reportedly did not go to the polls because of early projections. CBS and the New York Times also conducted a nationwide survey in late November 1980. In this survey, three percent of the registered voters questioned gave early projections as their reason for not voting.

Other surveys were conducted on a local level. In a telephone survey conducted in January 1981 by the Field Institute in San Francisco, ten percent of those who said they were registered but did not vote specifically blamed their failure to vote on the early network projections. That same month a survey conducted by the County of Los Angeles reported that early projections had a negative impact on voter participation of two or three percent.

There are two problems inherent in surveys of this nature. First, nonvoters may be unable to accurately analyze the reasons for their action or, in this case, their failure to act. "A survey instrument no matter how well drawn still suffers from post-election reflection." Second, the group targeted by these surveys, people who were registered but did not vote, is only about ten percent of the sample population. As the sample
size upon which the data is based decreases, the margin of error increases. "[T]he margin of error in a conventional survey is about three percent of the entire sample and considerably larger for parts of the sample." 31

B. The Voter Supplement to the Census Bureau’s Current Population Survey

The Census Bureau conducts a current population survey every month which provides data on over 90,000 people. 32 In November of each election year there is a voter supplement to the survey, which asks, among other things, the time of day at which a vote was cast. 33 Raymond E. Wolfinger and Peter Linquiti, both of the University of California, used the voter supplement data from 1972 and 1974 34 and concluded that there was a 2.7% decrease in voter turnout for those years. 35

A study of this nature avoids the problems discussed with respect to public opinion surveys—voter rationalization of a failure to vote and high margins of error resulting from a small sample size. However, the problem with Wolfinger and Linquiti’s conclusion is the uncertainty involved in attributing a lower-than-expected turnout to the networks’ projections. 36 Their study provided no direct evidence that the decrease in late voting in the Pacific states was due to any one variable. 37 However, by ruling out the most plausible alternative explanations for the decrease—weather, changes in poll closing times, and differences among the types of people who voted—the Wolfinger and Linquiti study does support the inference that early projections are responsible for the decrease. 38

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31. Hearing, supra note 9, at 154 (statement of Raymond E. Wolfinger).
33. Id.
34. Nixon’s landslide victory in 1972 prompted early network projections as seen supra note 11. Of course, 1974 was not a presidential election year, and total turnout in off-year elections is lower, see supra note 21. Nevertheless, Wolfinger and Linquiti contended that the proportion of people voting after six o’clock could be expected to remain the same once other factors are taken into account.
35. Based on findings from 1974, Wolfinger and Linquiti determined what voter turnout should have been in 1972, after six o’clock, in five Pacific states (California, Oregon, Washington, Hawaii, and Alaska). From this they subtracted the actual after-six turnout in those states and attributed the discrepancy to network projections of the outcome of the presidential election. Wolfinger, supra note 32, at 57.
36. Hearing, supra note 9, at 92-93 (statement of Royce Crocker).
37. Id. at 153.
C. University of Michigan Study

The National Election Studies Group of the Center for Political Studies at the University of Michigan conducted perhaps the most comprehensive study of election night reporting and voter turnout. Their 1980 presidential election study involved interviews by phone and in person with a nationally representative sample of voters. The interviews were conducted in 1980 from January-June (primary election interviews), September-October (pre-election), and November-December (post-election). Of the respondents, 1,814 were then reinterviewed by telephone to learn the time of day they had voted and what election coverage they had watched or heard. The Center for Political Studies then used poll books from precincts where their respondents were registered to verify which respondents actually voted and which were eligible to vote.

Several aspects of election coverage were examined: the projections of the outcome itself, reports of actual returns, news of Carter's early concession speech, and newspaper discussions of election information on election day.

According to the study, newspaper coverage and coverage of actual returns "had no appreciable effect on turnout for people who had not voted by the time they were exposed to the news." However, forty-seven percent of the respondents heard . . . [network] projections of the outcome before [poll closing] time. The impact of this information on the likelihood of voting was substantial and significant. Within representative groups of eligible people in [the] sample, who (1) had the average likelihood of voting, who (2) had not voted by the time news coverage began, and who (3) still had until 8 p.m. local time to vote, the estimated proportion voting dropped by 20 to 25 percent if they heard Carter's speech, the projected outcome, or both. If this entire group of possible voters is added to

39. Hearings, supra note 9, at 330-48 (reprinting Election Reporting and Voter Turnout, a study conducted by the Center for Political Studies, University of Michigan).
40. Id. at 334.
41. Id. at 334, 345.
42. Id. at 334.
43. Id.
44. President Carter conceded defeat at 9:45 p.m. EST on election day in 1980. NBC had projected his loss an hour and a half earlier. Id. at 151 (statement of Raymond E. Wollfinger).
45. Id. at 331 (reprinting the University of Michigan study).
46. Id.
the larger group of citizens who had voted before election coverage began, the overall turnout rate for the combined groups dropped by 6 to 11 percent as a result of non-voting among those who had not voted when they heard news of the election outcome.\textsuperscript{47}

It is difficult to quantitatively assess the effect of early network projections on the 1980 election in light of the impact of Carter's concession. Of course, "no one is proposing to muzzle presidential candidates on election night . . . ."\textsuperscript{48} Hearing the concession straight from the horse's mouth would arguably have a greater effect than learning about it from an anchorperson with little at stake on the outcome. However, as previously noted,\textsuperscript{49} NBC viewers had learned of a projected Reagan victory one and one-half hours before Carter conceded.

The University of Michigan study does contend that there is no difference in effect between hearing both the projection and the concession and hearing only one;\textsuperscript{50} it concluded that the projection and concession each had an appreciable effect and, considered independently, accounted for a six to eleven percent decrease in turnout.\textsuperscript{51} Therefore, apart from Carter's concession, the broadcasting of early projections, according to the study, had a significant impact on the election.

D. Summary of Findings

None of these studies flawlessly bridges the gap between cause and effect. However, even if one accounts for the limitations of the research methods employed, these surveys and studies support the proposition that early network projections of the outcome of presidential elections effect a decrease in voter turnout.

The precise number of people affected by network projections is more difficult to estimate. Research conducted by Wolfsinger and Linquiti suggests that in 1972, 454,410 people in the Pacific states (337,000 in California or 7,800 per congressional district) failed to vote as a result of the early network projections.\textsuperscript{52} March Fong Eu, Secretary of State for Califor-
nia, who testified as California's Chief Elections Officer,53 cited figures indicating that 401,000 Californians failed to vote in 1980 because networks had called the outcome early on election night.54

These figures are significant, not because of their effect on a presidential race,55 but rather because of their impact on congressional and local elections. These elections are generally decided much later on election night and by a smaller number of voters. As discussed above, the various studies generally point to a decrease in voter turnout of at least two percent due to early network projections.56 It is unclear how this two percent decrease would affect any particular congressional or local election, since it is impossible to determine how those who failed to turn out would have voted.57 Exit polls, which only question actual voters, are particularly unsuitable for studying which voters were most discouraged by early projections. Nevertheless, many races are decided by far less than two percent.58

A problem regarding early network projections evidently does exist. It therefore becomes necessary to examine the proposed solutions.

III
Possible Solutions

For over fifteen years, Congress has considered numerous proposals for solving the problem of early projections.59 The Senate has twice passed legislation to make projections more difficult, but neither proposal survived consideration by the House.60 One bill, providing for a uniform time for poll closing, was considered in 1972.61 A second bill, in 1973, sought to pro-

53. Hearings, supra note 9, at 114-15 (testimony of March Fong Eu).
54. Id.
55. Presumably, the winners of those races have been determined when the networks project a winner.
56. This is a conservative figure as most of the evidence points towards a greater impact. See generally supra text accompanying notes 22-53.
57. Hearings, supra note 9, at 75 (statement of Curtis Gans).
58. In 1980, the race for the congressional seat in California's 21st District was decided by 752 votes, or approximately one-half of one percent of the total vote. Id. at 117 (testimony of March Fong Eu).
59. Id. at 353.
60. Id. at 63.
hibit disclosure of election results before midnight eastern standard time (EST). After the 1980 election, at least a dozen bills were presented in the ninety-seventh Congress to address the problem, but none has yet been adopted.

The proposals advanced fall into four categories: uniform poll closing hours, limitations on the disclosure of election information by election officials, restrictions on exit polling, and regulations prohibiting the networks from broadcasting their projections until the polls close.

A. Uniform Polling Hours

Most of the proposed solutions focus on the idea that if polls close at the same time nationwide, voters, particularly those in the West, will not be exposed to early projections. These proposals usually contain some added measures to alleviate the disadvantages of closing the polls earlier in the East. One example is a proposal to have Sunday voting, an idea which was greeted favorably by religious leaders and one which has been used successfully in Europe. A similar proposal is to make election day a national holiday, with all polls closing at the same time. Finally, it has been suggested that elections be spread over two days with all polls closing at 9:00 p.m. EST.

A problem shared by all of these proposals is that making early returns unavailable does not prevent the networks from basing projections on exit polls. As mentioned earlier, exit polls were relied on by NBC in 1980 to make its early projection of a Reagan victory at 8:15 p.m. EST. Since "'exit polls' can be completed long before the voting is over," early projections could still be made under any proposal that affected only polling hours. Despite this obvious weakness, uniform poll closing is the solution most frequently advocated by the

65. Hearings, supra note 9, at 109 (testimony of Hon. Vic Fazio).
68. Hearings, supra note 9, at 95 (statement of Royce Crocker).
69. See supra note 11.
70. Wolfinger, supra note 32, at 60.
71. Id.
networks.  

B. Limitations on Disclosure by Election Officials

Another suggestion is to change the time at which the returns become available. Again, such a proposal will not prevent the networks from relying on exit polls. Furthermore, many fear that delayed vote counting would increase the opportunity for fraud. Although increased security might remedy this latter problem, any proposal which does not address the practice of exit polling would be ineffective.

C. Restrictions on Exit Polling

Virtually all states have laws prohibiting certain activities within a specified distance (usually 100 feet) from the polling place. Although the statutes generally do not mention exit polling by name, they effectively prohibit this activity. The State of Washington, however, in its statute specifically prohibits exit polling within 300 feet of a polling place. As a result, the three major networks, the New York Times, and the Everett (Washington) Daily Herald have recently brought suit to overturn the state law.

The plaintiffs in Daily Herald Co. v. Munro claim that the Washington law “impermissibly restricts speech and commentary... about the electoral process... and thus violates the First Amendment.” They assert the importance of information obtained by exit polls and argue that it constitutes political speech, a type of communication traditionally given a high degree of protection.

The data obtained through election day voter polls is used by
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scholars in many disciplines including, inter alia, political scientists, sociologists, and historians to analyze and comment upon how and why people have voted and to identify and comment on social and political trends. . . . [These] polls are the most reliable and accurate method for gathering information from voters themselves on election day about how and why they have voted.84

In addition, the plaintiffs argue that the new law is unconstitutional because it is a restriction impermissibly based on content, rather than one validly regulating the time, place, or manner of an activity.85 In order to constitute a valid time, place, or manner restriction, regulations must "serve a significant governmental interest and leave ample alternative channels for communication."86 The plaintiffs allege that the Washington law fails to meet this standard because it is specifically directed at information concerning election results and thus makes the gathering and reporting of such information impossible.87

The defendants, Munro and the State of Washington, argue that the statute is a constitutionally permissible manner of preventing the plaintiffs from interfering with the rights of voters to exercise their franchise and the rights of states to oversee the administration of the polling place.88 This latter right—to prescribe the "times, places and manner of holding elections"—is guaranteed by the Constitution.89

In order to make more credible its argument that the new law is a permissible time, place, or manner restriction, the State of Washington must minimize the importance of exit polls in analyzing election results. The defendants contend that other sources of information on voting patterns are available and that the plaintiffs overstate the ability to examine exit polls to accurately predict the election outcome.90 The state can be expected to stress that the plaintiffs still have access to voting information through the actual returns and other forms

84. Plaintiffs' Complaint at 8, Daily Herald Co. v. Munro, No. C83-840T.
85. Id. at 9.
87. Plaintiffs' Complaint at 8, Daily Herald Co. v. Munro, No. C83-840T.
88. Defendants' Answer at 4-5, Daily Herald Co. v. Munro, No. C83-840T.
90. Defendants' Answer at 6, Daily Herald Co. v. Munro, No. C83-840T.
of polling which do not disrupt voting. They contend that the plaintiffs are less concerned with accuracy than with the commercial gain that comes from an early projection of the outcome. Network coverage of the November 1981 New Jersey gubernatorial election provides support for the defendants' claim of inaccuracy in exit polling.

If the defendants are able to establish that prohibiting exit polls does not deprive the plaintiffs of access to important information about voting, the Washington exit poll law should be upheld. This argument might succeed if the state emphasizes that alternative methods remain available and that the information is inaccurate to begin with. However, even if the law is found to be valid, and similar or stricter measures are adopted in other states, a solution to the problem of early network projection is still needed:

Exit polling is not . . . the only way to interview voters. If it were made too difficult, the networks doubtless would revert on election day to the telephone interviewing technique they use all through the year for surveys of public opinion and voting intentions. . . . Putting exit polling out of business would not keep the networks from calling an election, but would give them fewer that they could call safely.

Thus, restricting exit polls would be only a partial solution. As it has been shown, the networks are continually advancing quicker and more accurate ways to project the outcome of an election before the polls close. "The networks are very determined, very competitive, very skilled; they are insisting on getting the word out . . . ." Permanent solutions must,

91. Id. at 7.
92. In their answer, "[d]efendants allege that information furnished by plaintiffs from conduct of this allegedly 'reliable and accurate' methodology has been incorrect and is known to plaintiffs to have incorrectly predicted election results on numerous occasions. Despite this knowledge, they have disseminated such information for the purpose of commercial gain." Id.
93. In this extremely close race, all three networks were conducting exit polls. ABC and CBS projected that James Florio, the Democratic candidate, had beaten his Republican opponent, Thomas Keen. Later, CBS withdrew its projection. NBC then announced that Keen had won but subsequently retracted its projection as well. Keen was eventually declared the winner, and the networks were left trying to explain the mishap to their viewers. P. TANNENBAUM & L. KOSTRICH, supra note 22, at 133.
94. Hearings, supra note 9, at 155 (statement of Raymond E. Wolfinger) and 141-42 (testimony of Raymond E. Wolfinger).
95. See supra notes 13, 17. See also Hearings, supra note 9, at 330 (reprinting the University of Michigan study).
96. Hearings, supra note 9, at 141-42 (testimony of Raymond E. Wolfinger).
therefore, do more than merely provide obstacles to early network projections; they must address the problem directly.

D. Prohibiting Early Network Projections

Having determined that the other proposed solutions would be ineffective to reduce television's impact on voter turnout, one must therefore consider direct restrictions on the broadcasting of early network projections. In Consolidated Edison Co. v. Public Service Commission, the United States Supreme Court interpreted the first amendment to allow a regulation when it is a "narrowly tailored means of serving a compelling state interest." Direct regulation must therefore be evaluated according to this standard.

Focusing first on the interest served, one can argue that restricting early network projections can improve voter turnout and thereby help insure that government remains responsible to the will of the majority. "Preserving the integrity of the electoral process . . . and 'sustain[ing] the active, alert responsibility of the individual . . . for the wise conduct of government' are interests of the highest importance." These interests are jeopardized by early network projections when a significant number of potential voters are discouraged from casting ballots.

In order to narrowly tailor the proposed regulation to the problem at hand, the restrictions advocated here would only prevent broadcasting by television or radio of the outcome of presidential elections before the polls close nationwide. Reports of actual returns and newspaper coverage would not be affected, as they cause "no appreciable [decrease in] turnout." Additionally, ample alternative channels of communication would remain available. The only message restricted is

98. Id. at 535.
100. This is not to say that all speech that discourages voters should be restricted. An editorial arguing that individual votes are insignificant or that there is no real choice among candidates may arguably decrease voter turnout. Even if an effect were reliably shown, the problem could not be regulated in a neutral manner. "[A]lthough the government may play a role in regulating the content of broadcast communications, that role must be carefully neutral as to which speakers or viewpoints are to prevail in the marketplace of ideas." CBS v. FCC, 629 F.2d 1, 30 (D.C. Cir. 1980) (Tamm, J., concurring).
101. See Hearings, supra note 9, at 331.
the networks' impression that the race is over while the polls are still open. It is necessary to more fully explore the constitutionality of any direct restriction on the broadcasting of early projections to determine whether first amendment values justify such restrictions.

IV

Restrictions on the Broadcasting of Early Network Projections: First Amendment Ramifications

In 1965, Justice Brennan stated,

[T]he Supreme Court's concern with the true significance of the first amendment has been primarily confined to the last fifty years. That is not a long time in the history of constitutional interpretation, not long enough in any event to justify the assumption that the Court has yet spoken the final word. A principle that is firmly established, however, is the principle that first amendment rights are not absolute. Justice Frankfurter, concurring in Dennis v. United States, pointed out that "[t]he language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." Interpreting these "symbols of historic experience" is a formidable task. The authors of the amendment could not have foreseen how their guarantee of freedom of the press would evolve as it played a fundamental role in our nation's development. Nevertheless, the framers of the Bill of Rights did intend to protect certain specific values, and these values should guide any discussion of the amendment. "[S]o long as first amendment values remain obscure, clarity will never emerge from first amendment analysis."

A. Freedom of the Press and a Democratic System of Government

The courts have frequently stated the paramount impor-

105. Id. at 523 (Frankfurter, J., concurring).
tance of first amendment freedoms in our democratic system. In Mills v. Alabama,\textsuperscript{108} the Court acknowledged the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."\textsuperscript{109} The rationale for this position is that "speech concerning public affairs is more than self-expression; it is the essence of self-government."\textsuperscript{110} Therefore, in order to preserve "an alert and knowledgeable democratic society,"\textsuperscript{111} the Supreme Court and "the Founding Fathers [have given] the free press the protections it must have to fulfill its essential role in our democracy."\textsuperscript{112}

Commentators, such as Alexander Meiklejohn,\textsuperscript{113} have also recognized this critical link. As early as 1948, Meiklejohn stated that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government."\textsuperscript{114} His conclusion was based on an analysis of the structure of the Constitution\textsuperscript{115} and was later echoed by the Supreme Court in Garrison v. Louisiana.\textsuperscript{116} According to Lillian BeVier,

commentators have never seriously questioned [Meiklejohn's] basic conclusion that the constitutional process of self-government provides an indispensable clue to the meaning of the first amendment.

The constitutional establishment of a representative democracy implies certain conclusions about the type of speech the amendment must protect from abridgement. . . . [T]he amendment protects the process of forming and expressing the will of the majority according to which our representatives must govern.\textsuperscript{117}

Another constitutional scholar, Alexander Bickel\textsuperscript{118} has

\begin{itemize}
\item \textsuperscript{108} 384 U.S. 214 (1966).
\item \textsuperscript{109} Id. at 218.
\item \textsuperscript{110} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).
\item \textsuperscript{111} In re American Independent Party, Memorandum Opinion and Order, 62 F.C.C.2d 4, para. 10 (1976) (quoting S. Rep. No. 562, 86th Cong., 1st sess. 10 (1959)).
\item \textsuperscript{112} New York Times, 403 U.S. at 717 (Black, J., concurring).
\item \textsuperscript{113} See generally A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Brennan, supra note 102.
\item \textsuperscript{114} A. MEIKLEJOHN, supra note 113, at 26.
\item \textsuperscript{115} Meiklejohn noted that the Constitution first established a democratic form of government and then, to ensure its effectiveness, protected speech and the press. Meiklejohn, supra note 106, at 254, 264.
\item \textsuperscript{116} Brennan, supra note 102, at 18.
\item \textsuperscript{117} BeVier, supra note 107, at 309. See also A. BICKEL, supra note 20, at 62.
\item \textsuperscript{118} Bickel authored THE MORALITY OF CONSENT, supra note 20, and argued for the petitioner in New York Times, 403 U.S. 713.
\end{itemize}
stated, "[T]he social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number . . . ."119 Our concern here is not whether first amendment protection should be limited to speech which "serves to make the political process work."120 It is enough to note that "'[t]he Amendment has a 'central meaning'—a core of protection of speech without which democracy cannot function.'"121

B. Early Network Projections and First Amendment Values

It is ironic that, by asserting their first amendment rights, the broadcasters may be undermining the very core of first amendment values. As noted, studies and surveys indicate that early network projections of the outcome of presidential elections decrease voter turnout and adversely affect state and local contests, which are often decided much later on election night.122 By decreasing the number of participants in the democratic process to the point where the outcome of an election could be significantly affected, early network projections diminish the integrity of our electoral process.

The problem is really not one of conflicting values,123 but rather, it involves a single value—the successful operation of a system of self-government. Courts and commentators have repeatedly characterized this principle as a primary goal of the first amendment.124 The question then becomes one of how best to achieve it. "[C]onsistency demands that first amendment doctrine respect and seek to maintain the essential integrity of [our democratic system]."125 Since early network projections tarnish this integrity, absolute first amendment

119. A. Bickel, supra note 20, at 62.
120. Id. See also Meiklejohn, supra note 106, at 255; Bork, supra note 107, at 26; BeVier, supra note 107, at 311.
122. See supra text accompanying notes 23-58.
123. Nevertheless, one writer has interpreted the problem as a conflict between the first amendment rights of broadcasters and the public's right to vote. Note, Restricting the Broadcast of Election-Day Projections: A Justifiable Protection of the Right to Vote, 9 U. DAYTON L. REV. 179 (1984). However, even though early projections convince many that it is no longer necessary to vote, such projections do not interfere with the exercise of that right by those who choose to do so.
125. BeVier, supra note 107, at 310.
protection of this practice is contrary to a key value which the amendment intended to preserve.

C. Traditional First Amendment Considerations

Proponents of early network projections argue in terms of traditional first amendment considerations, i.e., the high degree of protection for political speech and the heavy presumption against the imposition of prior restraints.

1. Political Speech

In Consolidated Edison v. Public Service Commission,126 the Supreme Court stated,

The First and Fourteenth Amendments remove “governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .”127

It is hardly surprising that “[a]t the core of first amendment values is the right to espouse political views,”128 particularly when the political views are expressed in connection with elections. In Buckley v. Valeo,129 the Court stated “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”130 The court of appeals echoed this belief in CBS v. FCC,131 in which it pointed out that “the public’s right to be informed is nowhere stronger than in the area of elections.”132

Such a degree of protection is hardly surprising when one considers the first amendment values discussed above. If the goal is a more informed voting public, then it becomes essential that political speech be left unrestricted. However, it is important to note that early projections do not provide information useful to voters in choosing candidates or evaluating issues; they simply tell viewers how the networks have evaluated a random poll of people who voted up to a particular

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127. Id. at 534 (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).
130. Id. at 15 (quoting Monitor Patriot Co. v. Ray, 401 U.S. 265, 272 (1971)).
132. Id. at 24.
point in time. Furthermore, the proposed restrictions on early network projections would not prohibit the broadcasting of the actual results when they become available; only projections would be prohibited, and even these would be allowed once all polls close across the country. Therefore, despite the high degree of protection of political speech, the measures advocated—narrowly tailored to remedy the effects of early network projections—would not significantly interfere with the public's right to be informed; in fact, as previously discussed, they should improve, rather than damage, the integrity of our electoral process.

The notion that certain restrictions on broadcasters enhance, rather than diminish, the values associated with freedom of expression is not new. Congress and the courts have recognized that broadcasters are fundamentally different from the print media and, therefore, must be held to a different standard of accountability. The foundation of this standard is the FCC's mandate that broadcasters act in the public interest. Two manifestations of this requirement are the fairness doctrine and the obligation to provide reasonable access.

The fairness doctrine requires broadcasters to air conflicting views on issues of public importance. One aspect of the fairness doctrine is the requirement that broadcasters give individuals the opportunity to respond to a personal attack. In answer to broadcasters' claims that their first amendment rights were violated by this rule, the Court in Red Lion Broadcasting Co. v. FCC noted that "the right of the viewers and listeners, not the right of the broadcasters is paramount." In answer to broadcasters' claims that their first amendment rights were violated by this rule, the Court in Red Lion Broadcasting Co. v. FCC noted that "the right of the viewers and listeners, not the right of the broadcasters is paramount."

Reasonable access involves the obligation of broadcasters to allow candidates for federal office to purchase reasonable
amounts of air time.\textsuperscript{141} In \textit{CBS, Inc. v. FCC},\textsuperscript{142} the three major networks sought review of a decision by the FCC that they had failed to meet this statutory duty.\textsuperscript{143} The federal court of appeals upheld the Commission's decision as "a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters."\textsuperscript{144}

Of course, encouraging broadcasters to provide coverage of candidates and issues must be distinguished from discouraging networks from making projections of election outcomes before the polls close. Nevertheless, \textit{Red Lion} and \textit{CBS} illustrate that even content-based restrictions can be imposed on broadcasters in order to safeguard first amendment values.\textsuperscript{145} When the public interest conflicts with the editorial discretion of broadcasters, the former is entitled to a higher degree of protection, even in the realm of political speech.

2. \textit{Prior Restraint}

Arguably, any attempt to prevent early network projections would constitute a prior restraint.\textsuperscript{146} The Supreme Court has repeatedly held that there is a heavy presumption against the constitutional validity of any system of prior restraint.\textsuperscript{147} According to Alexander Bickel,

Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremovable loss—a loss in the immediacy, the impact, of speech. . . . Indeed, it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the

\begin{footnotesize}
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\item 142. 629 F.2d 1 (D.C. Cir. 1980).
\item 143. The Carter-Mondale Presidential Committee requested a 30-minute slot between 8:00 PM and 10:30 PM on December 4, 5, 6, or 7 in 1979. The networks refused to make that much time available so early in the campaign. \textit{Id.}
\item 144. \textit{CBS}, 629 F.2d at 25.
\item 145. \textit{Id.} at 29 (Tamm, J., concurring).
\end{itemize}
\end{footnotesize}
immediacy of speech.\textsuperscript{148}

Prior restraints have been allowed in cases involving obscenity\textsuperscript{149} and in those situations where the restraint was found to be reasonably incidental to the attainment of another valid governmental interest.\textsuperscript{150} Thus, "[iT] has never . . . been suggested that all previous restraints on speech are invalid."\textsuperscript{151} "[T]hat the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited . . . is undoubtedly true . . . ."\textsuperscript{152} Therefore, it is necessary to consider whether the interests which justify restricting early network projections are sufficient to overcome the presumption against prior restraints.

The integrity of our elections is not only "basic to a democratic society,"\textsuperscript{153} but also a primary value which the first amendment is intended to preserve.\textsuperscript{154} Furthermore, while restricting early projections would have some impact on the "immediacy of speech," the magnitude of this effect is no greater than that caused by the daily practice of delaying news broadcasts for west coast viewers. Additionally, these restrictions deal with the broadcast, as opposed to print, media. As noted above, restrictions on broadcasters' first amendment rights are more likely to be upheld.\textsuperscript{155} Therefore, when one considers the importance of the interests threatened by early projection, along with the narrowness and brevity of the restrictions advocated, it appears that a prior restraint on early projections can be justified.

\textsuperscript{148} A. BICKEL, supra note 20, at 61.
\textsuperscript{150} See, e.g., Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, 459 F.2d 676 (3d Cir.) (upholding a law prohibiting plaintiffs from receiving literature from North Vietnam in order to prevent that country from deriving economic benefit), cert. denied, 409 U.S. 933 (1972).
\textsuperscript{151} Times Film Corp. v. Chicago, 365 U.S. 43, 47 (1961).
\textsuperscript{152} Near v. Minnesota, 283 U.S. at 715-16.
\textsuperscript{154} See supra text accompanying notes 108-21.
\textsuperscript{155} CBS, 629 F.2d at 30 n.4 (Tamm, J., concurring) (explaining the double standard applied to print and broadcast media and distinguishing Red Lion from Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).
V

Conclusion

Over the years, networks have refined the skills necessary to project the outcome of an election before the polls close. If left unrestrained, they will continue to do so, and as a result voter turnout could decline further. Of the numerous solutions proposed to remedy the problem, most fail to account for the different means available to networks for obtaining the desired information. In this sense, they are easily circumvented. Direct restrictions that would prohibit broadcasters from making projections before polls close nationwide raise important first amendment issues. Nevertheless, despite the fact that such restrictions would impinge on the freedom of the press and rights of viewers to receive information, they would help preserve the primary value protected by the first amendment—the success of our system of self-government.156 This interest outweighs any other first amendment claims by the broadcasters. Claimed first amendment immunity should not be used to defend early projections, if such projections deter people from voting and thereby undermine the integrity of our elections.

156. See supra text accompanying notes 108-21.