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EXIT POLLING STATUTE DOESN'T MEASURE UP TO THE FIRST AMENDMENT

I. INTRODUCTION

Exit polling provides the media with information which can be used to project election results before the final tally.¹ The media also uses the data for post-election reports concerning voting behavior and trends. For example, exit poll reports may discuss why voters are more apt to vote for a particular presidential candidate, or if the vice-presidential candidate influenced their vote.

In the past decade, both state and federal legislatures have debated the use of exit polls. Congress has yet to prohibit or limit exit polling. Nevertheless, some state legislatures have charged that exit polls have dissuaded some potential voters in the western states, Hawaii, and Alaska from casting their ballots in 1980 and 1984.²

After the 1980 election, in response to the National Broadcasting Company's ("NBC") early prediction that Ronald Reagan had won, some state legislatures enacted statutes prohibiting exit polls.³ In 1983, Washington's state legislature, fearing election exit poll impact on voting behavior, amended Washington Revised Code section 29.51.020 to prohibit any exit polls or public opinion poll within the prohibitory activity area of voters on the day of any election.⁴ This statute extended the prohibitory activity area, the area in which exit polls could not be con-

1. Judge Tanner of the United States District Court for the Western District of Washington described the practice of exit polling as follows: "Plaintiffs ABC, CBS, NBC, and the New York Times conduct their questioning of voters leaving polling places in a systematic and statistically reliable manner. They do so by requesting certain voters, as they leave a polling place, voluntarily to complete a short questionnaire. The voters asked to complete questionnaires are chosen on the basis of a predetermined numerical sequence." Brief of Appellees at 16, *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984) (No. 86-3641) ("*Daily Herald I*").

2. Walters, *Peacocks Night to Crow*, NEWSWEEK, Nov. 17, 1980, at 82 (1980).

3. *Id.*

4. The amended statute states in its entirety:

- (1) On the day of any primary, general, or special election, no person may, within a polling place, or in any public area within three hundred feet of such polling place:
 - (a) Do any electioneering;
 - (b) Circulate cards or handbills of any kind;
 - (c) Solicit signatures to any kind of petition;
 - (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place; or
 - (e) Conduct any exit polls or public opinion poll with voters.
- (2) No person may obstruct the doors or entries to a building in which a polling place is located or prevent free access to and from any polling place. Any Sheriff,

ducted, from one hundred feet to three hundred feet from the polling places.⁵

The statute was immediately challenged by the Daily Herald Company ("Daily Herald"), American Broadcasting Companies, Inc. ("ABC"), Columbia Broadcasting System, Inc. ("CBS"), National Broadcasting Company, and the New York Times Company ("Times") (collectively hereinafter the "Media Plaintiffs") in *Daily Herald Co. v. Munro* ("*Daily Herald I*").⁶ The Media Plaintiffs alleged that Washington's restriction on exit polling violated the first amendment by restraining free speech.⁷ In early 1988, on a second appeal, the Court of Appeals for the Ninth Circuit agreed with the Media Plaintiffs, holding the statute unconstitutional.⁸

This casenote analyzes the decisions in *Daily Herald I* and *Daily Herald II* in light of past Supreme Court decisions. In the wake of these decisions, this casenote concludes that the *Daily Herald II* court correctly decided that the Washington statute was unconstitutional. It further suggests that both Congress and the state legislatures should abstain from imposing restrictions on exit polls until the first amendment right of newsgatherers are guaranteed. It concludes that legislatures should attempt to pass uniform poll closing times across the country to dissipate any impact exit polls might have on voting behavior in the western states.

II. THE HISTORY OF *DAILY HERALD V. MUNRO*

Daily Herald I

In December 1983, the Daily Herald, ABC, CBS, NBC, and the Times filed an action, pursuant to 42 U.S.C. section 1983, against Ralph

deputy sheriff, or municipal law enforcement officer shall prevent such obstruction, and may arrest any person creating such obstruction.

(3) No person may:

- (a) Except as provided in RCW 29.34.157, remove any ballot from the polling place before the closing of the polls, or
 - (b) Solicit any voter to show his or her ballot.
- (4) No person other than an inspector or judge of election may receive from any voter a voted ballot or deliver a blank ballot to such elector.
- (5) Any violation of this section is a misdemeanor under RCW 9A.20.010, and shall be punished under RCW 9A.20.020(3), and the person convicted may be ordered to pay the costs of the prosecution.

WASH. REV. CODE ANN. § 29.51.020 (West Supp. 1984-85).

5. A violation of the statute constitutes a misdemeanor. WASH. REV. CODE ANN. § 29.51.020(5) (West Supp. 1984-85).

6. Since the district court did not publish its opinion, this casenote refers to both the *Daily Herald I* court and the *Daily Herald II* court for factual support.

7. *Daily Herald I*, 758 F.2d at 353.

8. *Daily Herald Co. v. Munro*, 838 F.2d 380, 388 (9th Cir. 1988) ("*Daily Herald II*").

Munro, the Secretary of State of Washington, and Ken O. Eikenberry, the Attorney General of Washington, as defendants in their capacities as state officers.⁹ As Secretary of State, Munro was the chief election officer of Washington.¹⁰ As Attorney General, Eikenberry was charged with enforcing the criminal laws of the state.¹¹

The Media Plaintiffs sought declaratory relief from the United States District Court in Tacoma alleging that the statutory ban against exit polls within a three hundred foot zone surrounding polling places violated the first and fourteenth amendments.¹² Further, the Media Plaintiffs sought a permanent injunction restraining enforcement of the statute.¹³

The State counterclaimed for an injunction to prevent the Media Plaintiffs from violating the statute, alleging that exit polling infringed upon voters' rights by disturbing the peace, order, and decorum of polling places.¹⁴ In addition, defendants claimed that the plaintiffs' conduct discouraged voting and violated the statutory limitations on exit polling.¹⁵

Shortly thereafter, the Media Plaintiffs filed a motion for summary judgment on which Judge Tanner decided that there were no genuine issues of material fact in controversy between the parties.¹⁶ Judge Tanner held: (1) the statute incidentally restricted the plaintiffs' expressive activities and inconvenienced the plaintiffs' ability to gather news; (2) the State of Washington had a legitimate and compelling interest in maintaining peace, order and decorum in and around the election polling places, to protect the citizens' fundamental right to vote; and (3) the State had met its burden of showing that the statute was the least restrictive way of carrying out the legitimate State interest.¹⁷

The Media Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.¹⁸ Again, the plaintiffs argued that the statute was unconstitutional because it violated the first and fourteenth amendments.¹⁹

9. *Daily Herald I*, 758 F.2d at 353.

10. *Id.*

11. *Id.*

12. *Daily Herald II*, 838 F.2d at 383.

13. *Daily Herald I*, 758 F.2d at 353.

14. *Daily Herald II*, 838 F.2d at 383.

15. *Id.*

16. *Daily Herald I*, 758 F.2d at 354.

17. *Id.*

18. *Daily Herald II*, 838 F.2d at 383.

19. *Id.* at 382.

The parties disagreed about the actual purpose of the statute. The Media Plaintiffs argued that the amended statute's predominant purpose was to inhibit the broadcast of election projections.²⁰ They contended that purpose was achieved by extending the prohibitory area to three hundred feet, thereby denying the Media Plaintiffs any practical method of conducting accurate exit polls.²¹

However, the State contended the statute was intended to preserve peace, order and decorum at the polling places or, in the alternative, to protect the State's interest in preventing adverse effect on voter turnout.²² The State contended that election day projections "cause a decrease in the numbers of people voting."²³

Judges Farris and Alarcon, writing for the majority of the court, neither discussed the purpose of the statute nor its first and fourteenth amendment implications. They remanded the case to the district court, ruling that triable issues of fact existed.²⁴

In a separate opinion, Judge Norris, concurring in part and dissenting in part, expressed his views about the case. Judge Norris agreed with the majority's decision to vacate the summary judgment.²⁵ However, he believed the majority created a "laundry list" of disputed issues to be resolved by the district court.²⁶ Judge Norris believed the constitutional question was whether the Washington statute, "banning all exit polling within 300 feet of the polling place, whether or not disruptive, is unconstitutional because it is not the 'least restrictive means available' to preserve order at the polling place."²⁷ Judge Norris found that the available means depended on whether the ends the statute purported to achieve were constitutional.²⁸

Contrary to the State's contention that the purpose of the statute was to preserve peace, order, and decorum at the polls, Judge Norris concluded that the true purpose of the statute was to prevent early election predictions rather than to preserve peace at the polls.²⁹ Hence, he stated that the statute was in violation of the first amendment right of the media to gather and disseminate news, since the statute was not sup-

20. *Id.* at 386.

21. *Daily Herald I*, 758 F.2d at 362.

22. *Id.*

23. *Id.*

24. *Id.* at 352.

25. *Id.*

26. *Daily Herald I*, 758 F.2d at 352.

27. *Id.* at 354.

28. *Id.*

29. *Id.* at 358.

ported by a compelling state interest and was not the least restrictive means available to accomplish the legislative purpose.³⁰

Judge Norris, quoting from *Police Department Of Chicago v. Mosley*,³¹ stated that first amendment protections mandate that "government has no power to restrict expression because of its message, its ideas, its subject matter or its content."³² Consequently, the government may not restrict collecting and broadcasting information about the political process because of concern about the impact on voter behavior.³³ Judge Norris' opinion, if adopted by the majority, would have concluded the controversy in favor of the Media Plaintiffs.

Daily Herald II

On remand, the judge who had previously ruled the statute constitutional, decided that the State had presented no evidence that the exit polling was disruptive or discouraged voters from casting their ballots.³⁴ He further found that

the media plaintiffs conducted their exit polls in a "systematic and statistically reliable manner"; that information obtained from exit polling could not be obtained by other methods; that the 300-foot limit precluded exit polling; and that exit polling was not *per se* disruptive to the polling place.³⁵

The State of Washington appealed to the Ninth Circuit Court of Appeals, arguing that the district court erred in holding that the statute was not the least restrictive means of advancing the state's interest.³⁶ In February 1988, the court of appeals upheld the district court's decision.³⁷ The appellate court held that exit polling was protected by the first amendment; the statute was a content-based prohibition on speech in a public forum; the statute was not narrowly tailored to accomplish a compelling government interest and was not the least restrictive means available to accomplish the government's goal.³⁸

Judge Reinhardt's concurring opinion emphasized that public debate is the paramount principle underlying the first amendment.³⁹ He

30. *Id.* at 360.

31. 408 U.S. 92 (1972).

32. *Id.* at 96.

33. *Daily Herald I*, 758 F.2d at 362.

34. *Daily Herald II*, 838 F.2d at 383.

35. *Id.*

36. *Id.*

37. *Id.* at 388-89.

38. *Id.* at 388.

39. *Daily Herald II*, 838 F.2d at 389.

stressed that the statute's restriction on the media's right of access to crucial information, violated the principles embodied in the first amendment.⁴⁰ Judge Reinhardt distinguished the public forum approach used by Justice Ferguson in his majority opinion from the public debate approach.⁴¹ He found the statute violated the first amendment under both approaches.⁴²

III. ANALYSIS OF THE MAJORITY OPINION

Is Newsgathering Protected by the First Amendment?

The initial issue in the case was whether newsgathering is a constitutionally guaranteed right.⁴³ The State in *Daily Herald I* argued that newsgathering is not protected by the first amendment because the Washington statute only prohibited the gathering of news, not its dissemination.⁴⁴

However, the court held that the State's contention was unfounded because newsgathering, similar to news dissemination, is protected by the first amendment.⁴⁵

There is ample authority to support the court's position. In *Branzburg v. Hayes*,⁴⁶ the United States Supreme Court held that newsgathering is entitled to first amendment protection, for "without some protection for seeking out the news, freedom of the press could be eviscerated."⁴⁷ The Court held that requiring newsmen to testify before grand juries concerning information obtained from confidential sources does not violate the first amendment.⁴⁸

In the landmark case of *Richmond Newspapers, Inc. v. Virginia*,⁴⁹ Chief Justice Burger, joined by Justices White and Stevens expressly invoked the "right to gather information"⁵⁰ doctrine.⁵¹ The *Richmond*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 389. The Media Plaintiffs admitted that their conduct violated the statute prohibiting exit polls within three hundred feet of a polling place.

44. Brief for Appellants at 39, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

45. *Daily Herald I*, 758 F.2d at 359. See, e.g., *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

46. 408 U.S. 665 (1972).

47. *Id.* at 681.

48. *Id.* at 682.

49. 448 U.S. 555 (1980).

50. According to Professor Nimmer, the right to gather information doctrine should be distinguished from the right of access. The right to gather information doctrine is only the right to seek out information from its source. The right to access is the right to communicate information through existing means of communication controlled by others after the informa-

Court held that the first amendment guarantees the public and the press the right to attend criminal trials.⁵² The *Richmond* Court qualified its holding by stating, "our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute."⁵³

In *Globe Newspaper Co. v. Superior Court*,⁵⁴ the United States Supreme Court applied the principle espoused in *Richmond*. The Court in *Globe Newspaper* held unconstitutional a Massachusetts statute which required exclusion of the press and the public during the testimony of a minor in a sex-offense trial.⁵⁵ According to Professor Nimmer, access to the courtroom is "but a subset of the general right to gather information recognized in *Richmond*."⁵⁶

The *Globe Newspaper* Court held that the first amendment includes "those rights that, while not unambiguously enumerated, are nonetheless necessary to the enjoyment of other First Amendment rights. Underlying the first amendment right of access to criminal trials is the common understanding that a major purpose of that amendment was to protect the free discussion of governmental affairs."⁵⁷

From the decisions in *Branzburg*, *Richmond*, and *Globe Newspaper* the Supreme Court has made it clear that the right of access is fundamentally necessary to the right to gather information. In *Daily Herald* the issue was whether the Washington statute infringed upon the right to gather information when the statute regulated the type of newsgathering activities that journalists may engage in while within the three hundred foot zone surrounding the polling places.⁵⁸

Exit Polls and Traditional Public Forum Analysis

In determining the constitutionality of a speech regulation, the courts apply different levels of scrutiny depending on whether the regulated speech occurred in a traditional public forum or a private forum and whether the statute is content-based or content-neutral.⁵⁹ A content-

tion has been gathered. M. NIMMER, NIMMER ON FREEDOM OF SPEECH, § 4.09[B], at 4-42 (1985) [hereinafter NIMMER].

51. *Richmond*, 448 U.S. at 564.

52. *Id.* at 580.

53. *Id.* at 581 n.18.

54. 457 U.S. 596 (1982).

55. *Id.* at 604.

56. NIMMER, *supra* note 50, § 4.09[B], at 4-45.

57. *Globe Newspaper*, 457 U.S. at 604.

58. *Daily Herald I*, 758 F.2d at 358.

59. *Daily Herald II*, 838 F.2d at 384.

based statute that regulates speech in a public forum will be examined with a higher level of scrutiny than a content-neutral statute.⁶⁰

The Supreme Court has not provided a precise definition of the public forum doctrine. Nevertheless, the Court has elaborated on locations that it considers as traditional public forums. In *Hauge v. C.I.O.*,⁶¹ the Court discussed the public forum doctrine.⁶² The issue in *Hauge* was whether a municipal ordinance forbidding all public meeting in the streets and other public places without a permit was constitutional.⁶³ Justice Roberts wrote:

Wherever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be restricted in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁶⁴

In *United States v. Grace*,⁶⁵ the Supreme Court held that “[t]raditional public forum property occupies a special position in terms of the First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that had been dedicated to a use other than as a forum for public expression.”⁶⁶ In *Grace*, appellees, Mary Grace and Thaddeus Zywicki, challenged the constitutionality of 40 U.S.C. section 13(k) which prohibits the “display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement” in the United States Supreme Court building or on its grounds.⁶⁷ They sought an injunction against enforcement of section 13(k) and declaratory judgment

60. *Id.*

61. 307 U.S. 496 (1939).

62. There was no majority opinion in *Hauge*. However, Justice Roberts wrote a concurring opinion joined by Justice Black.

63. *Hauge*, 307 U.S. at 506.

64. *Id.* at 515-16.

65. 461 U.S. 171 (1983).

66. *Id.* at 180.

67. *Id.* at 172.

that it was unconstitutional on its face.⁶⁸ The government argued that the Supreme Court building and grounds presented a classic illustration of a non-public forum and, that since the statute was content-neutral and the restrictions imposed reasonable, it was constitutional.⁶⁹ The Court rejected this argument. Justice White wrote:

Included within [the geographical reach of the statute] are not only the [Supreme Court] building, the plaza and surrounding promenade, lawn area, and steps, but also the sidewalks. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.⁷⁰

The principles set forth in *Grace* serve as guidelines for the public forum analysis. Applied to *Daily Herald II*, the Washington statute covers within its three hundred foot restricted zone more public sidewalks and public streets than the four sidewalks surrounding the Supreme Court at issue in *Grace*.⁷¹

The area surrounding the voting polls are public forums since often the voting polls are located within public schools, post offices, and similar locations. The voting poll itself is not an issue in *Daily Herald* because the Media Plaintiffs admitted that the State may constitutionally limit their activities inside the polling place.⁷²

Was the Statute a Content-Based or Content-Neutral Regulation?

The distinction between a content-neutral and content-based regulation is that while content-neutral regulations are broad bans on all speech, content-based regulates subject matter of the speech, allowing or disallowing the speech based upon its message.

The Supreme Court in *Nimotko v. Maryland*,⁷³ held that if a statute is not content-neutral, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove of the speaker's view.⁷⁴ "The first amendment's hostility to content-based regulation extends not only to

68. *Id.* at 174.

69. Brief for Appellees at 44, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

70. *Grace*, 461 U.S. at 180.

71. Brief for Appellees at 45, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

72. *Daily Herald II*, 838 F.2d at 384 n. 5.

73. 340 U.S. 268 (1951).

74. *Id.* at 282.

restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic."⁷⁵

Hence, the courts will employ a reasonable time, place, and manner regulation level of scrutiny only if the speech regulation is content-neutral.⁷⁶ Otherwise, the courts will employ heightened scrutiny to a content-based speech regulation.

The *Daily Herald II* court rejected the State's contention that the statute was content-neutral.⁷⁷ The court found that the statute was not content-neutral because it restricted the expression of certain ideas and viewpoints.⁷⁸ Justice Ferguson held the statute was also content-based because it regulated a specific subject matter—the communication between the voter and the pollster.⁷⁹

Even if a speech regulation is not content-based, so that a strict standard of review will not apply, a content-neutral speech regulation must be reasonable in time, place, and manner.⁸⁰

In *Grace*, Justice Marshall, concurring in part and dissenting in part, stated that to be a reasonable time, place, and manner regulation the regulation must not apply at all times, cover the entire parameters of the premises or be overinclusive.⁸¹ The *Daily Herald II* court, without analyzing the facts, held that the statute was not a reasonable time, place, and manner regulation.⁸²

Applying Justice Marshall's standard to *Daily Herald*, Washington's statute was over-inclusive and not limited to express activities defined in the statute. The statute was not a reasonable time regulation because it prohibited exit polls on election days; thereby defeating the purpose of election polls. Further, the statute was not a reasonable place regulation because it prohibited exit polls within three hundred feet of the voting polls. Pollsters would be unable to conduct accurate scientific exit polls from such a distance. Finally, the regulation unreasonably regulated the manner of poll-taking because it prevented the communication between pollsters and voters.

75. Consolidated Edison Co. v. Public Services Comm., 447 U.S. 530, 538 (1980).

76. *Daily Herald II*, 838 F.2d at 386.

77. *Id.* at 385.

78. *Id.* at 386.

79. Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the first amendment. See *Daily Herald II*, 838 F.2d at 385 (citing *City of Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 46-47 (1986)).

80. *Daily Herald II*, 838 F.2d at 386. See *Corenelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

81. *Grace*, 461 U.S. at 185-86.

82. *Daily Herald II*, 838 F.2d at 386.

In addition to disruptive exit polls, the statute limited non-disruptive exit polling.⁸³ Moreover, it did not leave open alternative channels of communication to gather the type of information obtained through exit polling.⁸⁴

Thus, because the statute was not content-neutral, it regulated speech in a traditional public forum, and was an unreasonable regulation on time, place, and manner, a strict level of judicial scrutiny would be appropriate.

Strict Scrutiny

To be constitutional, a content-based statute that regulates speech in a public forum must satisfy three requirements: (1) there must be a compelling governmental interest; (2) it must be narrowly tailored to accomplish a compelling government interest; and (3) it must be the least restrictive means available.

In *Consolidated Edison Co. of New York v. Public Service Commission of New York*,⁸⁵ the Supreme Court held unconstitutional the Commission's suppression of bill inserts that discussed controversial issues of public policy.⁸⁶ The Court reasoned that political speech must be carefully scrutinized to ensure that communication has not been merely prohibited because a political body or government institution opposes a speaker's view.⁸⁷ Finally, the burden of proof rests with the government to demonstrate that the chosen means of furthering its asserted interest imposes the least burden on the first amendment activity.⁸⁸

Compelling Governmental Interest

Behind each statute, a legislature has an interest that it desires to advance. Even though the interest might advance a state's economic or social interests, to survive strict scrutiny the interest must be compelling.

In *Consolidated*, the Commission alleged that the prohibition against bill inserts was necessary for three reasons: (1) to avoid forcing Consolidated Edison's views on a captive audience; (2) to allocate limited resources in the public interest; and (3) to ensure that ratepayers do not subsidize the cost of the bill inserts.⁸⁹ The Court rejected these argu-

83. *Id.* at 385.

84. *Id.* at 386.

85. 447 U.S. 530, 540 (1980).

86. *Id.* at 544.

87. *Id.* at 537.

88. NAACP v. City of Richmond, 743 F.2d 1346, 1354 (9th Cir. 1984).

89. *Consolidated*, 447 U.S. at 540-41.

ments. The Court held that mere speculation of any of these harms is not a compelling governmental interest.⁹⁰

In *Daily Herald I*, Judge Norris stated that the Media Plaintiffs admitted that the State had a legitimate interest in preserving peace, order, and decorum at the polling places.⁹¹ However, in *Daily Herald II*, the court held that even though the State argued that the purpose was to preserve “peace, order, and decorum” around the polls, the true purpose of the statute was to inhibit the broadcast of election projections, which was not a compelling government interest.⁹² Furthermore, even if the interest was compelling, the statute was not narrowly tailored.⁹³

Further, even if the State’s true purpose was to preserve peace, order, and decorum at the voting polls, the State failed to meet its heavy burden of proving a compelling governmental interest. The State did not factually support its contention. Moreover, subsection (1)(d) of the same statute already limited disruptive exit polling. As in *Consolidated*, mere speculation to election poll impact on voting is not a compelling governmental interest.

Narrowly Tailored to Further a Compelling State Interest

A statute is narrowly tailored to advance a governmental interest when the regulation does not regulate any other subject area other than the original governmental interest. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the Supreme Court elaborated on whether an executive order excluding a Legal Educational Fund from participation in a charity drive aimed at federal employees and military personnel was constitutional. The Court held that individuals can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.⁹⁴ Hence, state or federal legislatures must ensure that the regulation achieves only the purported governmental interest. Otherwise, a regulation may be overinclusive and unnecessarily overbroad.

In *Daily Herald*, the State contended that the interest of the State is in “safeguarding the most important right that citizens enjoy, the right to vote free from political annoyance and disruption.”⁹⁵ The court concluded that the statute was not narrowly tailored to advance this

90. *Id.*

91. *Daily Herald I*, 758 F.2d at 359.

92. *Daily Herald II*, 838 F.2d at 387.

93. *Id.* at 385.

94. *Cornelius*, 473 U.S. at 800.

95. Brief for Appellants at 27, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

interest.⁹⁶

In analyzing the *Daily Herald* court's conclusion, even if the purpose of the statute was to prevent disruptions at polling places by preserving "peace, order, and decorum," the statute was not narrowly and precisely drawn to further "peace, order, and decorum" because the state permitted one, ten, or twenty people to stand about a polling place and conduct "interviews" of voters, but prohibited even one pollster from engaging in an exit poll.⁹⁷ For example, there was evidence at the trial that journalists or interviewers could remain within the prohibitory limit all day, but the same reporters were prohibited from conducting exit polls.⁹⁸ In fact, the court recognized that even if the State's interest was to prevent disruption at the polling places by restricting exit polling, the statute was not narrowly tailored since it prohibited non-disruptive exit polling.⁹⁹

Similarly, if the purpose of the statute was to prevent the broadcasting of early returns, the statute was not narrowly tailored since it prohibited poll taking even for those who do not broadcast poll results. For example, the regulation prohibited newspapers, which do not use exit poll data to make election day projections.¹⁰⁰ Further, scholars have used exit poll data to study and report on the American electoral process.¹⁰¹ Hence, exit polls aid political scientists and election scholars to study the relationship between a person's characteristics and voting patterns.

Least Restrictive Means

The means used to advance a state interest are least restrictive when the means are the least intrusive upon the interest or right in question. Hence, even if the legislative purpose is compelling, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breath of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."¹⁰²

The State in *Daily Herald* contended that it had chosen the least restrictive means to advance its interests. However, the *Daily Herald II*

96. *Daily Herald II*, 838 F.2d at 385.

97. Brief for Appellees at 37, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

98. *Id.*

99. *Daily Herald I*, 758 F.2d at 361.

100. *Id.* at 357.

101. *Id.*

102. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

court believed that there were several other less restrictive means of advancing the State's interest. The State could have reduced the size of the restricted area; required the media to explain that the exit poll is completely voluntary; required the exit polling places to have separate entrances and exits; or prohibited everyone except election officials and voters from entering the polling room.¹⁰³

There are several less restrictive means to address perceived disruption, other than intruding into first amendment rights.¹⁰⁴ For example, if disruption and confusion were the perceived problem, the State could have proscribed exit polling that used look-alike election ballot questionnaires and required exit pollers to wear bigger or brighter identification sashes.¹⁰⁵ In fact, the State already had a less imposing provision aimed at ensuring that polling places remain free from disruption.¹⁰⁶ Washington Revised Code section 29.51.020(1)(d) specifically prohibits interference with voters, obstruction of entryways and any practice or conduct that disrupts the administration of the polling place.¹⁰⁷

In sum, the statute did not serve a compelling government interest because preserving peace, order, and decorum at the expense of a speech regulation is not compelling. Even assuming the interest was compelling, the regulation was neither narrowly tailored nor the least restrictive means; the Washington exit polling statute is not only unnecessarily overinclusive, but is repetitious. The State's claimed interest in preventing disruption of the polling places is already largely safeguarded by other statutory provisions.

Alternative Analysis

Notwithstanding the traditional method of analysis, Judge Reinhardt, in his concurring opinion, sought to broaden the scope of the court's holding. Judge Reinhardt contended that not only are exit polls protected as public forums, but that they are protected because of the media's right, and more importantly, the right of society to gather and disseminate information important to the democratic political process.¹⁰⁸ Under Judge Reinhardt's approach not only would the State have a duty not to interfere with the expressive autonomy of individuals, but the State would have an affirmative obligation to preserve open and informed

103. *Daily Herald II*, 838 F.2d at 385.

104. Brief for Appellees at 40, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

105. *Id.* at 26, *Daily Herald II*, 838 F.2d 380 (No. 86-3641).

106. *Id.*

107. WASH. REV. CODE ANN § 29.51.020 (West Supp. 1984-85).

108. *Daily Herald II*, 838 F.2d at 389.

discussions.¹⁰⁹

Justice Brandeis, in his concurring opinion, in *Whitney v. California*,¹¹⁰ provides support for Judge Reinhardt's position. Brandeis stated: [F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is inert people; that public discussion is a political duty; and that this should be a fundamental principle in American government.¹¹¹

Professor Nimmer identified three main elements to this historic passage regarding the functional justifications for freedom of expression in American society. Speech serves as a necessary concomitant of enlightenment, as a self-fulfilling activity, and as a necessary safety valve for the nation.¹¹²

Justice Brandeis believed enlightenment through expression is necessary in order for the populace to make well-informed political decisions.¹¹³ Without free and open dialogue between voters, an individual voter may be unaware of the multitude of crucial political and social issues involved during an election.¹¹⁴ Without freedom to express oneself, whether through speech or assembly, candidates for office would be unable to voice their positions and platforms to the American people. As a result, the voter would be inert and unable to make a well informed political decision.¹¹⁵

According to Professor Nimmer, speech also serves as a necessary safety valve.¹¹⁶ He wrote that without freedom of expression, an avenue of discussion, the populace will be prohibited from expressing themselves legally since the modes of communication would be restricted by the central government through various speech regulations.¹¹⁷ Without a legal mode of communication, the populace will resort to violent means.¹¹⁸

109. *Id.*

110. *Whitney v. California*, 274 U.S. 357 (1927), *rev'd* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

111. *Id.* at 375.

112. *Id.*

113. NIMMER, *supra* note 50, § 2.08[E], at 2-121.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. NIMMER, *supra* note 50, § 2.08[E], at 2-122.

This function can be exemplified by contrasting countries where speech and assembly are permitted and countries where speech and assembly are restricted.

In the instant case, Washington disregards "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."¹¹⁹ The statute prohibits the right to gather and disseminate information crucial to the democratic political process. Without a forum for dialogue, Justice Brandeis' three functional justifications for freedom of expression would be inapplicable to exit polls.

IV. COMMENTS

Even if constitutional, a statute regulating exit polls may not necessarily accomplish its goals. If early projection results actually cause voter apathy in Washington and other western states, the real cause of voter apathy is the exit polls in states east of the Mississippi. The problem, if one actually exists, is in the East, and not in Washington.

In stark contrast to the legislature's fears that exit polls may directly result in apathy, it is quite conceivable that election projection might induce voter turnout. For example, if a large group of American voters decide not to vote because they believe candidate (A) will easily defeat candidate (B), and pre-poll closing projection project candidate (B) will win, the (A) backers who had not voted due to their optimism might go out and vote for (A). The conceivable result is that (A) will win because of early projections by the media.

The hypothetical emphasizes why Justice Reinhardt's concurring opinion should not be undervalued. Our society values public debate of political issues. The first amendment must protect exit polls because exit polls function as a framework for free expression on public issues. In fact, in *Bridges v. State of California*,¹²⁰ the United States Supreme Court discussed the function of the first amendment's freedom of expression. The *Bridges* court reversed a lower court contempt convictions of two newspaper journalists who made an editorial denouncing two members of a labor union awaiting trial.¹²¹ In a five to four decision, Justice Black stated: "[T]he likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press."¹²²

The courts have been unwilling to find a substantive evil to justify a

119. *Daily Herald II*, 838 F.2d at 389.

120. 314 U.S. 252 (1941).

121. *Id.* at 278.

122. *Id.* at 262.

restriction on freedom of speech or of the press. Until data is collected and analyzed to provide evidence that exit polls cause voter apathy, reactions to the effects of exit polls are premature. The Washington statute was a restriction to a problem that has not been empirically documented. The 1988 presidential election might provide information illustrating that there is an actual cause and effect relationship between exit polls and voting trends. If so, the states should seriously consider the significance of the data before acting.

The *Daily Herald II* court does not adequately discuss the conflict and tension between the right to vote and the first amendment guarantee of freedom of expression. Washington's interest in guarding the right to vote free from potential annoyance and disruption, must be balanced against the first amendment right to conduct exit polls.

The solution does not lie with the court, but rather within the federal and state legislatures. Legislatures must extrapolate the principles enunciated by the *Daily Herald II* court and resolve the problem by remaining within the boundaries of the first amendment.

Finally, legislatures must realize that there are a variety of polls. Exit polls are but a subset of public opinion polls. News organizations and political scientists often conduct public opinion polls through either written questionnaires or telephone calls. If exit polls are singled out for scrutiny by state legislatures, state citizens should scrutinize their elected officials for not concentrating on the real solution—uniform poll closing time.

V. CONCLUSION

What is left after *Daily Herald II* is but an amalgamation of cases prohibiting restrictions on speech. Even though election and exit polls are relatively new forms of speech, state and federal legislatures should not be short sighted in restricting exit poll use.

The courts, as illustrated by the *Daily Herald II* court, will be unwilling to permit legislatures to prohibit the individuals right to obtain information crucial to the political process and the press' right to gather newsworthy material.

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