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## NOTES

### TOM SWIFT AND HIS ELECTRIC ELECTORATE: LEGISLATION TO RESTRICT ELECTION COVERAGE

#### I. Introduction

In their coverage of the November general elections and of the California Republican Primary in June, the major television networks broadcast computer-based predictions of the outcome of the Presidential election and of major local contests. The predictions were often announced after only small percentages of the vote had been tallied.<sup>1</sup> The effect of these predictions, and of the announcement of election results, in areas where polls remain open during the broadcasts, is the subject of much concern among legislators, commentators and network officials.

Several bills are now pending before Congress which would withhold such information from the public until all the votes are in. Two of these propose amendments to the Communications Act of 1934<sup>2</sup> by the addition of a section 331 to part I of subchapter III. House Bill 11648, introduced by Representative Gubser of California and now pending before the House Committee on Interstate and Foreign Commerce,<sup>3</sup> would read as follows:

SEC. 331. On any day on which United States Senators or Representatives or electors of President and Vice President of the United States are elected, no station licensee shall broadcast or permit the broadcast of any prediction of the results of any election to public office occurring on such day until all places for voting in any such election in the continental United States are closed.

Its counterpart in the Senate, Senate Bill 2927, introduced by Senator Mundt of South Dakota and now before the Committee on Commerce,<sup>4</sup> would provide:

SEC. 331. No licensee shall broadcast the results, including any opinion, prediction, or other matter based on such results, of any election of electors for President and Vice President of the United States or Senators or Representatives in Congress in any State or part thereof until after the latest official closing time of any polling place for such an election in any other State on the same day.

Although the Senate bill would not apply to municipal, county or state elections, as does the bill in the House, it silences the reporting of results as well as of predictions, extending the moratorium on such disclosures until after the polls have closed in Hawaii and the Aleutian Islands.<sup>5</sup> Both bills would render the broadcasts subject to the Federal Communications Commission's power to make rules<sup>6</sup> and issue cease-and-desist orders,<sup>7</sup> and to suspend,<sup>8</sup> revoke,<sup>9</sup> and refuse renewal<sup>10</sup> of licenses for violations of the act.

Alternative proposals have also been offered. S. 3118, introduced by Senator

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1 During the California primary, for example, the polls closed one hour earlier in Los Angeles than in San Francisco and other northern areas. Senator Grant Sawyer of Nevada reports that "[w]hen a Goldwater victory was announced more than half an hour before the polls closed, many voters in both parties refused to vote. There was panic among precinct workers on both sides and many persons changed their votes to catch the winner just as State delegations do at conventions when a trend becomes strong." 110 Cong. Rec. 18486 (daily ed. Aug. 12, 1964) (quoted in remarks of Senator Karl Mundt).

2 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151-609 (1958), as amended, 47 U.S.C. §§ 151-606 (Supp. V, 1964).

3 H.R. 11648, 88th Cong., 2d Sess. (1964).

4 S. 2927, 88th Cong., 2d Sess. (1964).

5 These areas are presumably meant to be excluded from the House bill's coverage by the term "continental United States."

6 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303 (r) (1958).

7 66 Stat. 716 (1952), 47 U.S.C. § 312(b) (Supp. V, 1964).

8 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303(m)(1) (1958).

9 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 312(a) (Supp. V, 1964).

10 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307 (1958), as amended, 47 U.S.C. 307(d) (Supp. V, 1964).

Javits of New York, would fix a uniform closing time for polls throughout the "several States," with adjustments for differences among the time zones.<sup>11</sup> Another Senate bill, by Vermont's Senator Prouty, would prohibit release of information by election officials until after the last poll had closed.<sup>12</sup> These proposals reveal a preference that Congress avoid direct restrictions upon the subject matter that FCC licensees may broadcast. They seem well within the clear power of Congress to regulate the elections of its own members, of Presidents and Vice Presidents.<sup>13</sup> The first amendment's guarantee of freedom of speech and of the press would present no difficulty.

It is quite another matter to forbid news media to publish such information once it has been released. In principle, the FCC may constitutionally supervise the overall program-content broadcast by its licensees.<sup>14</sup> Yet it has not been allowed to censor the content of specific programs,<sup>15</sup> nor has Congress deemed any particular class of news unsuitable for publication. Thus the proposed amendments seem inconsistent with a tradition of free "press" coverage of elections which has survived the advent of every advance in communications technology.

It is the purpose of this note to examine the constitutional context within which these two bills are offered. If these bills depart from traditional notions of freedom of the press, the combination of instantaneous communications and computer analysis is likewise unprecedented. The fate of the proposed laws before Congress and, ultimately, before the Supreme Court, may well depend upon the significance attached to the novelty of the situation, and upon the validity of the claims that the broadcasters' current practices are corruptive of the electoral process. Pending the disclosures of reliable behavioral research and the prudential judgment of Congress, it is submitted that the measures are well supported by the Constitution's delegations of Congressional power, and that they will withstand objections based upon the first amendment.

## II. Sources of Congressional Power: Protection of the Franchise and of the Electoral Process

### A. Constitutional Provisions

Article I, section 2 of the Constitution adopts as the qualifications for electors of members of the House of Representatives the qualifications required in each state for electors of members of the most numerous branch of the state legislature.<sup>16</sup> The same provision is made for Senatorial elections by the seventeenth amend-

11 S. 3118, 88th Cong., 2d Sess. (1964).

12 S. 3115, 88th Cong., 2d Sess. (1964). Senator Prouty explains that his bill sets a uniform "official" closing time, "the hour established for the closing of the last polling place in the United States as designated by the President . . ." while state law would govern actual voting hours. Release of information prior to the "official" hour would be made a crime under title 18 of the United States Code. 110 Cong. Rec. 18478 (daily ed. Aug. 12, 1964) (remarks of Senator Prouty).

13 See text accompanying notes 16-43, *infra*.

14 *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). The constitutionally permissible scope of the FCC's "supervisory" powers over program content is even now unclear. One writer has drawn a distinction between the "composition" and "content" of radio-communications traffic, insisting that the FCC's power extends only to the review of a licensee's overall program and does not include "directorial" power with respect to any given program. Barber, *Competition, Free Speech and FCC Radio Network Regulations*, 12 GEO. WASH. L. REV. 34, 49-50 (1943). See generally Comment, 41 NEB. L. REV. 826 (1962); Note, 77 HARV. L. REV. 701 (1964).

15 Section 326 of the Communications Act of 1934 forbids censorship by the FCC, and prohibits interference by it with the "right of free speech." 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326 (1958).

16 "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art I, § 2.

ment.<sup>17</sup> Once the identity of the electors is determined, they have a constitutional right to vote in Congressional elections which Congress may protect by appropriate legislation.<sup>18</sup> Accordingly, Congress has acted extensively in the past to provide both civil and criminal sanctions against the interference with the right to vote by election officials, by persons acting under color of law, and by private parties.<sup>19</sup> Current statutes dealing generally with constitutional rights have also been applied in a variety of situations to the right to vote.<sup>20</sup> Various provisions relating specifically to interferences with the right to vote are currently in effect.<sup>21</sup>

Article I, section 4 provides that the states shall regulate the time, places and manner of holding Congressional elections, and that Congress may make or alter such regulations.<sup>22</sup> The Supreme Court has held that the power of Congress in this area is coextensive with that of the states,<sup>23</sup> viewing article I as contemplating: a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.<sup>24</sup>

The power of Congress to regulate Presidential elections is derived from article II, section 1, which empowers Congress to determine the time for the selection of electors and to fix the day on which electors throughout the country shall cast their votes.<sup>25</sup> The Constitution does not guarantee that they be chosen by popular vote. The legislatures in each state decide the method of election for themselves.<sup>26</sup> Again, however, duly qualified electors have a constitutional right to vote which Congress may protect.<sup>27</sup>

17 "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. CONST. amend. XVII.

18 *United States v. Classic*, 313 U.S. 299, 315 (1941); *Swafford v. Templeton*, 185 U.S. 487, 493 (1902); *Wiley v. Sinkler*, 179 U.S. 58, 62-63 (1900); *Ex Parte Yarbrough*, 110 U.S. 651, 661 (1884).

19 The use of force, threats or other unlawful means of preventing persons from voting or qualifying to vote at any election has been penalized. Enforcement Act of May 31, 1870, ch. 114, § 4, Rev. Stat. § 5506 (1875). Illegal voting has also been subjected to criminal prosecution. Enforcement Act of May 31, 1870, ch. 114, §§ 19-20, Rev. Stat. §§ 5511-12 (1875). Both criminal and civil sanctions were directed against election officials violating either state or federal duties in conducting Congressional elections. Enforcement Act of May 31, 1870, ch. 114, §§ 2-3, 20, Rev. Stat. §§ 2005-07, 5515 (1875). All were repealed by the Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (1894).

20 18 U.S.C. § 241 (1958) forbids conspiracies to threaten any citizens in the free exercise and enjoyment of rights and privileges secured by the Constitution or laws of the United States. Relatively recent cases involving the franchise include *Fields v. United States*, 228 F.2d 544 (4th Cir. 1955) (mailing fraudulent ballots); *Crolich v. United States*, 196 F.2d 879 (5th Cir. 1952) (casting false ballots); *Prichard v. United States*, 181 F.2d 326 (6th Cir.), *aff'd*, 339 U.S. 974 (1950) (stuffing ballot box). 18 U.S.C. § 242 (1958) punishes deprivations of such rights and privileges by persons acting under color of law. Its predecessor was applied in *United States v. Saylor*, 322 U.S. 385 (1944) (stuffing ballot box), and in *United States v. Classic*, 313 U.S. 299 (1941) (alteration of ballots).

21 *E.g.*, 71 Stat. 637 (1957), 42 U.S.C. § 1971 (1958), as amended, 42 U.S.C. § 1971(c), (e), (f) (Supp. V, 1964).

22 "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law, make or alter such Regulations, except as to the places of choosing Senators." U.S. CONST. art. I, § 4.

23 *Smiley v. Holm*, 285 U.S. 355, 367 (1932).

24 *Id.* at 366.

25 "The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. CONST. art. II, § 1.

26 *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

27 *Ex Parte Yarbrough*, 110 U.S. 651 (1884).

### B. Powers Inherent in the National Government

The Supreme Court has upheld regulatory legislation broader than the language of article II alone would warrant. In *Burroughs & Cannon v. United States*<sup>28</sup> the defendants were charged with violating the Federal Corrupt Practices Act,<sup>29</sup> in that they had not reported contributions received by a political committee formed to influence the Presidential election in more than one state. In reply to their contention that Congress was limited to action expressly authorized by article II, the Court stated:

To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.<sup>30</sup>

Thus the Court has recognized that Congress, quite apart from the established power to protect individual persons in their exercise of the franchise, and in the absence of specific authorization to regulate the "manner of holding elections," has an inherent power, implicit in the Constitutional scheme, to neutralize the effects upon the electoral process of corruptive influences exerted by persons not involved in the mechanics of conducting elections. The idea is hardly a new one. In 1884, the Court reviewed convictions under federal statutes punishing conspiracies to prevent voting in the case of *Ex Parte Yarbrough*.<sup>31</sup> Having assaulted a Negro because he voted in a Congressional election, the convicts challenged the legislation for lack of clear constitutional authorization. The Court replied that it was "a waste of time to seek for specific sources of the power to pass these laws,"<sup>32</sup> quoting Chancellor Kent's commentary on the constitutional jurisprudence of the United States:

"[The national government's] powers apply to those great interests which relate to this country in its national capacity, and which depend for their protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness." 1 Kent's Com. 201<sup>33</sup>

Thus is suggested an answer to one objection to the proposed amendments to the Communications Act—that Congressional power over the "manner of holding elections" does not embrace the reporting of results, with or without interpretation, by news media. If the objection is valid, the legislation still need not stand solely upon Congress' power to protect the right to vote. Congress is not limited to these alternatives, but may also legislate to preserve from impurities the processes by which democratic institutions are maintained.

### C. Applications to the Instant Legislation

In the present context, the "inherent powers" approach is not without its difficulties. Both *Yarbrough* and *Burroughs & Cannon* dealt with legislation designed to prevent active misconduct. The dangers which the Court thought Congress was implicitly authorized to combat were those which threatened the polity by force and fraud. The bills here considered silence the disclosure of predictions and/or results irrespective of any intent to deceive, and without regard to the soundness of the methods by which such predictions may be formulated. Further, insofar as the bills rest theoretically upon the power to protect the right to vote, the question may again be raised—from what may the franchise be protected? Under various statutes, this power has been applied to an assortment of misdeeds ranging

28 290 U.S. 534 (1934).

29 43 Stat. 1070 (1925), 2 U.S.C. § 244 (1958).

30 *Burroughs & Cannon v. United States*, 290 U.S. 534, 545 (1934).

31 110 U.S. 651 (1884).

32 *Id.* at 666.

33 *Ibid.*

from direct physical interventions to the stuffing of ballot boxes to the enforcement of discriminatory eligibility standards.<sup>34</sup> However, there is no precedent for restricting the nonfraudulent dissemination of election information. It is difficult to see how the right to vote is impaired by the broadcast either of results or of predictions, whether the predictions are based upon computer analyses or upon a commentator's personal evaluation of early returns, so long as no attempt is made to deceive the public as to the completeness of the returns or the methods by which the predictions are formulated. Legislation protecting the franchise has been applied only to cases where a person would be deprived of his vote by force or fraud. Nor is analogy to cases of interference with voters by threats and intimidation of much use; the objection remains that the broadcasts lack the element of coercion.

A different view emerges, though, if these precedents are examined not in terms of the acts by which the franchise is impaired, but in terms of the nature of the impairment. The sponsors of the bills appear to be as concerned with the supposed weakening of votes already cast as with the "rights" of those who actually hear the broadcasts. If indeed the "right" to vote has never been thought infringed by merely informative or persuasive speech, it is well established that the franchise includes the right to have a vote counted for its full strength. In *Ex Parte Siebold*,<sup>35</sup> for example, where an act of Congress dealt specifically with breaches of duty by election officials, the Court, presumably aware that perhaps no vote would go uncounted and no voter be denied a ballot, held ballot-box stuffing to be the sort of invasion of constitutional rights that Congress may properly punish. Convictions under statutes more generally protecting "constitutional rights" have been as readily upheld, where tallied votes were "diluted" by false counts,<sup>36</sup> forged and fictitious ballots,<sup>37</sup> and refusals to count votes from particular areas.<sup>38</sup>

Although its decisions have not been confined to infringements upon the *right* to vote, the Court's opinions, if not its actual holdings, make its concept of the "vote" quite plain: a vote is not a vote if its impact has been in any degree affected by the addition or subtraction of other votes; for only in conjunction with other votes does the exercise of the franchise have meaning. The Court's high regard for the "undiluted" vote has been recently re-emphasized in decisions dealing with the apportionment of state legislatures. Beginning with *Baker v. Carr*,<sup>39</sup> the Court has rejected its traditional view that the "weighting" of votes in state legislative apportionment schemes was a "political" matter not properly subject to judicial review. Declaring its willingness to investigate the relationships between apportionment and the individual's franchise, the Court has relied squarely upon considerations such as were mentioned most recently in *Reynolds v. Sims*:<sup>40</sup> "diluting the weight of votes because of place of residence impairs basic constitutional rights . . . just as much as invidious discriminations based upon factors such as race . . . or economic status. . . ."<sup>41</sup>

The implications of such language in the present context are clear. A differential of some three hours separates the Pacific time zone states from those in the Eastern zone. Travellers to Hawaii would turn back their watches another two hours. To the degree that Western votes may be cast not at all or may be cast in support of different candidates than if the broadcasts had not been made, the impact of votes already cast—both in the East and in the West—is altered.

34 *United States v. Saylor*, 322 U.S. 385 (1944) (ballot stuffing); *Guinn v. United States*, 238 U.S. 347 (1915) (enforcement of "grandfather clause"); *Ex Parte Yarbrough*, 110 U.S. 651 (1884) (physical assault).

35 100 U.S. 371 (1879).

36 *United States v. Classic*, 313 U.S. 299 (1941).

37 *United States v. Saylor*, 322 U.S. 385 (1944).

38 *United States v. Mosley*, 238 U.S. 383 (1915).

39 369 U.S. 186 (1962).

40 377 U.S. 533 (1964).

41 *Id.* at 566. Compare *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

Despite the obvious differences between an outright vote theft and the conveying of accurate information or *bona fide* speculations, an Eastern vote is no less impaired by a discouraged Western vote than by one secreted from the ballot box. Thus, the danger thought to inhere in current broadcasting practices is an impairment of the franchise the like of which the Court has consistently condemned.

Although the harm is accomplished here only because responsible citizens freely choose to change or to abandon their votes, government action ought not be precluded against forces which in fact corrupt, simply because no fraud or coercion is involved. Free and rational judgment is presumed of electors no more than of jurors, yet we have long recognized that news coverage of criminal prosecutions may render a "fair" trial impossible.<sup>42</sup> The language in *Yarborough* and *Burroughs & Cannon* clearly suggests that Congress may purge the nation's vital processes from a broad spectrum of impurities. The serious question is not of its basic power to do so but, more narrowly, whether particular legislation violates any particular constitutional restriction.<sup>43</sup>

### III. Radio-Communications Regulation: Program Content

Beginning with the enactment of the Radio Act of 1927,<sup>44</sup> congressional regulations of the radio-communications media, including television, have been premised upon the limited availability of broadcasting frequencies. Systematic allocations have been thought essential to provide maximum beneficial use of the available channels without interference among the broadcasts.<sup>45</sup>

It is established, on this basis, that Congress, through the FCC, may supervise the content of programing, and is not limited to the control of technical matters. Pursuant to this authority, in addition to its regulation of licensees to assure "balanced programming,"<sup>46</sup> the FCC has by various means implemented Congressional enactments dealing with the broadcast of obscene language,<sup>47</sup> lotteries<sup>48</sup> and gambling information,<sup>49</sup> and deceptive quiz shows and other public contests.<sup>50</sup>

In the area of public affairs, the FCC has administered the statutory equal-time requirements for political candidates,<sup>51</sup> and has supervised the "fairness" of broadcasting matters of public controversy. The Supreme Court has upheld the equal-time provision as appropriately promoting the "broadest possible utilization" of broadcast media,<sup>52</sup> thus approving Congress' determination that a balanced presentation of the issues properly necessitates the subordination of the broadcasters' autonomy. Similar purposes were once thought to be served by a blanket restriction restraint upon editorializing — the so-called "Mayflower doctrine" of 1941.<sup>53</sup> However, after eight years of spirited dialogue among broadcasters, members of Congress and the FCC, the doctrine was modified to require "fairness" in the

42 *E.g.*, *Irvin v. Dowd*, 366 U.S. 717 (1961); *Shepherd v. Florida*, 341 U.S. 50 (1951).

43 As Chief Justice Marshall said in another context, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

44 44 Stat. 1162 (1927).

45 See statement of policy for the Communications Act of 1934, 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1958).

46 The bulk of the FCC's regulation of program content is done in terms of categories rather than by scrutiny of particular programs. See generally the materials cited in note 14, *supra*.

47 18 U.S.C. § 1464 (1958). The FCC applies the statute in license proceedings. See Warren J. Currence, 34 F.C.C. 761 (1963).

48 18 U.S.C. § 1304 (1958).

49 18 U.S.C. § 1084 (Supp. V, 1964).

50 *KWK Radio, Inc.*, 34 F.C.C. 1039 (1963) (license revocation). In 1960, Congress explicitly outlawed deceptive quiz programs. 74 Stat. 897 (1960), 47 U.S.C. § 509 (Supp. V, 1964). The law has yet to be applied.

51 48 Stat. 1088 (1934), as amended, 47 U.S.C. 315(a) (Supp. V, 1964).

52 *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 529 (1959).

53 *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-40 (1941).

presentation of controversial subjects.<sup>54</sup> Subsequently, the fair presentation of controversy became something of an affirmative duty, with the enactment in 1959 of section 315, obliging each licensee to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."<sup>55</sup> The scope of this new doctrine is still unclear.<sup>56</sup> Whatever its bounds may ultimately be, the Congressional policy is clearly that the limited facilities for radio and television, unlike other communications media,<sup>57</sup> can be utilized in the public interest only if made subject to a comprehensive and coordinated scheme of regulation.

#### IV. The First Amendment

*"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."*

##### A. Application to Radio-Communications

It has been said that the government "owns" frequencies, just as it owns the facilities for distribution of the mail.<sup>58</sup> In the sense that private enterprise is precluded from such status, the "ownership" concept may be apt. It does not follow, however, that because the government has plenary power over the allocation of frequencies, it may condition their use by private parties as it chooses, or that its authority to determine what shall be broadcast is unlimited. Radio and television broadcasts are within the first amendment's guarantee of free speech.<sup>59</sup> The Supreme Court has held that entertainment, as well as speeches and discussions, is so protected.<sup>60</sup> There is therefore little basis for doubt that election results, and predictions or opinions based thereon, would likewise be covered, be they classified arguendo as "news," "commentary," or even "entertainment." Further, while the use of broadcast media is a "privilege" subject to conditions imposed by the government,<sup>61</sup> and while it is true that licensees acquire no vested rights to broadcast except by the terms of the licenses granted,<sup>62</sup> the "privilege" label is nonetheless of minor significance. It is well settled that such a privilege may not be withheld or conditioned to the detriment of rights guaranteed by the Constitution. The press, for example, has the use of the mails at a subsidized second-class rate; yet that concession may not be withdrawn simply because the government does not approve the contents of a given publication.<sup>63</sup>

Moreover, past restrictions upon the subject matter broadcast by FCC licensees are distinguishable from what is now proposed. No serious first amendment objections seem to have been raised against the restrictions upon broadcasts of lotteries and gambling information. However, the information there suppressed relates to practices otherwise criminal under federal or state law.<sup>64</sup> Statutes prohibiting

54 EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246, 1253 (1949).

55 73 Stat. 557 (1959), 47 U.S.C. § 315(a) (Supp. V, 1964).

56 One case, decided years prior to this latest enactment, hints of a requirement of fair presentation of issues other than those which the public might be expected to resolve by political action, indicating that atheists may be entitled to equal time to answer assaults on their views by advocates of religion. See Robert Harold Scott, 11 F.C.C. 372 (1946).

57 In *Near v. Minnesota*, 283 U.S. 697, 713 (1931), the Supreme Court held the suppression of a newspaper because of previous defamatory publications to be "the essence of censorship." Compare *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954) where, although it was faced with an FCC rule curtailing "give-away" programs which, it affirmed, was too broad, it forsook the clear opportunity to apply the *Near* rule and remained silent on the question of censorship.

58 CUSHMAN, CIVIL LIBERTIES IN THE UNITED STATES 39 (1956).

59 *American Broadcasting Co. v. United States*, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954).

60 *Winters v. New York*, 333 U.S. 507 (1948).

61 See *Television Corp. of Mich., Inc. v. FCC*, 294 F.2d 730, 733-34 (D.C. Cir. 1961).

62 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1958).

63 *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946).

64 A comprehensive scheme to keep lottery materials from the stream of commerce is contained in 18 U.S.C. §§ 1301-04 (1958), as amended, 18 U.S.C. § 1302 (Supp. V, 1964). Gambling information is elsewhere kept from being transmitted by wire or like media *except* from and into states where gambling is legal. 18 U.S.C. § 1084(b) (Supp. V, 1964).

deceptive or "rigged" quiz programs make the "intent to deceive" an essential element of the offense.<sup>65</sup>

The analogies to be drawn between the instant bills and the statute prohibiting the broadcast of obscene language are somewhat persuasive, despite the obvious differences between obscenity and election commentary. Although the law is now included in the Criminal Code, it was originally a part of the Communications Act,<sup>66</sup> and the FCC continues to apply it in license proceedings.<sup>67</sup> Like the legislation here considered, it proceeds upon the premise that at least substantial portions of the public require, though they may not desire, insulation from a given class of communications. In both cases, the assumption is reinforced by the peculiarities of radio communications, by which the objectionable material is brought so rapidly to so many that legal controls are thought necessary. But the case of *Butler v. Michigan*<sup>68</sup> will be of interest here. In that case, a Michigan statute was attacked as violative of the due process clause of the fourteenth amendment. The statute, declaring it a misdemeanor to sell books tending to corrupt the morals of youth, forbade sales to adults as well as children. It was invalidated as not reasonably restricted to the evil with which it was meant to deal, for it reduced "the adult population of Michigan to reading only what is fit for children."<sup>69</sup> Thus, where the inability of the public, or any portion of it, to cope with a given class of "speech" is suggested in defense of a given restraint, the measure will be carefully examined, and the Court will not readily accede to the control of what adults may read or hear.

It is submitted, nonetheless, that the present proposed legislation would withstand any assault grounded in the first amendment.

#### B. "Clear and Present Danger"

The first significant attempt to define a standard for evaluating restraints upon the freedom of speech and press was undertaken by Justice Holmes in *Schenck v. United States*.<sup>70</sup> Speaking for the Court in affirming a conviction for distributing leaflets opposing the draft, Holmes declared: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>71</sup> Holmes and Brandeis subsequently elaborated upon the test in their dissent in *Abrams v. United States*.<sup>72</sup>

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."<sup>73</sup>

For a time the Court seemed willing to accede to reasonable legislative determinations of what constituted a "danger" sufficiently serious and immediate to justify the restraint. In *Whitney v. California*,<sup>74</sup> with Holmes and Brandeis

65 74 Stat. 897 (1960), 47 U.S.C. § 509 (Supp. V, 1964).

66 48 Stat. 1091 (1934).

67 *E.g.*, Walter J. Currence, 34 F.C.C. 761 (1963).

68 352 U.S. 380 (1957).

69 *Id.* at 383.

70 249 U.S. 47 (1919).

71 *Id.* at 52.

72 250 U.S. 616 (1919).

73 *Id.* at 630-31.

74 274 U.S. 357 (1927).

concurring separately, the Court affirmed a conviction under the California Syndicalism Act of one who had participated actively in the affairs of the Communist Labor Party. The majority emphasized the "great weight" to be afforded the legislature's judgment that membership should be punished, without a showing of a clear probability that the defendant's activities would lead to violence.<sup>75</sup> But in *Stromberg v. California*,<sup>76</sup> the Court dug more deeply into the supposed "danger" of displaying a red flag as a symbol of opposition to organized government, and reversed a conviction for the statute's failure to distinguish between peaceful and violent opposition. And in *De Jonge v. Oregon*,<sup>77</sup> a conviction for having presided over a Communist Party meeting was reversed for lack of a specific showing that the meeting was other than peaceable.

During the 1940's, it appeared that the first amendment guarantee of free speech would be afforded something of a "preferred position," so that a law in derogation thereof might be treated at the outset as, for all practical purposes, presumptively invalid. Perhaps the strongest language occurred in *Thomas v. Collins*:<sup>78</sup>

any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.<sup>79</sup>

This opinion of but four members of the Court may never have been the settled view of a Court majority.<sup>80</sup>

In 1951, Chief Justice Vinson undertook a review of the "clear-and-present-danger" precedents in *Dennis v. United States*.<sup>81</sup> In upholding the Smith Act convictions the majority adopted Learned Hand's formulation of a standard apparently less stringent than Holmes and Brandeis might have approved: "In each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>82</sup> Hand's formula seems to call for an even weighing of the free speech interest against the evil sought to be prevented. His approach seems to have guided the Court to date, as it has upheld the Congressional restraint but required fairly strict proof of the elements of the offense. *Yates v. United States*<sup>83</sup> reiterated the *Dennis* approval of the Smith Act itself, but reversed several convictions, rather subtly distinguishing between "incitement to action" and "advocacy of ideas," and finding the latter not within the act.<sup>84</sup>

Just what the current "approach" may be, then, is difficult to say; while seemingly a retreat from the "preferred position" view, it may also signify only the Court's reluctance to settle too firmly upon a particular statement.<sup>85</sup> Uncertainty may be somewhat mitigated in the present context, however, by testing the pro-

75 *Id.* at 371.

76 283 U.S. 359 (1931).

77 299 U.S. 353 (1937).

78 323 U.S. 516 (1945).

79 *Id.* at 530.

80 Cases dealing with the so-called "preferred position" of free speech are collected in the opinion of Justice Frankfurter in *Kovacs v. Cooper*, 336 U.S. 77, 89-97 (1949) (concurring opinion). He argues that it was never a settled doctrine of the Court. 336 U.S. at 94-95.

81 341 U.S. 494 (1951).

82 *Id.* at 510.

83 354 U.S. 298 (1957).

84 In 1961, for an additional example, two cases upheld the "knowing membership" clause of the Smith Act, but divided on the facts peculiar to each on the question whether knowledge of the unlawful aims of the Communist Party had been proven with sufficient force. *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961).

85 Frankfurter's concern in *Kovacs v. Cooper*, 336 U.S. 77 (1949) was principally that "preferred position" was jargon, tending to foster "mechanical jurisprudence." 336 U.S. at 96.

posed legislation against the words of Holmes and Brandeis. These are the basic texts in the area, and suggest a constitutional measure perhaps more demanding of legislation than the Court has unreservedly adopted.

### C. *Passing the Test*

If it is true that broadcasting predictions and early returns appreciably change or discourage votes yet to be cast, the result is a "substantive evil that Congress has a right to prevent." The Court's discussions of the right to an undiluted vote leave little doubt that it would regard the alleged "danger," if proved, a matter of serious concern.

If scientifically respectable studies indicate that the broadcasts have significantly affected voting patterns, the Court might well be persuaded to accede to the proposed moratorium. James G. Hagerty, formerly President Eisenhower's Press Secretary and a Republican campaigner for years, has frankly admitted that early claims of victory, often supported by no evidence of any sort, were a part of Republican strategy in the 1952 general elections, the unquestioned assumption being that significant numbers of voters would be appreciably influenced.<sup>86</sup> The Court might be persuaded to acknowledge, as well, the commentary of such social critics as Max Lerner, who has argued that modern democratic man, beset by a multitude of responsibilities and anxieties, requires a time for reflection—unassailed, if not by the candidates themselves, at least by the counsels of soulless statistics—so that he may cast a ballot worthy of the adjective "free."<sup>87</sup>

Lerner's contention points up a critical weakness in the argument, noted previously, that the harm is done by electors who freely choose to change or abandon their votes. The bills presume that the people either will not or cannot evaluate the broadcasts for themselves and are thus, so the argument runs, inconsistent with orthodox democratic theory. This was essentially the problem in *Butler v. Michigan*, as it is in cases where publicity is claimed to have precluded "fair" trials.<sup>88</sup> Mr. Justice Frankfurter met the issue squarely in a fair-trial decision, with strong words and his reflections merit consideration in the present context:

This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.<sup>89</sup>

Moreover, the core of the problem Congress now faces is that it is thought "immediately dangerous to leave the correction of evil counsels to time." There is *no* time. The broadcasts are transmitted in the waning hours of the election day. However well-publicized be the fallibility of mechanical computations and analyses, it is their relative accuracy that laymen find most striking. The more "reliable" they become, the less effective are non-legal efforts to mitigate whatever undue reliance their credentials may invite.

Perhaps the most deceptive objection to be overcome is not that the danger is either unclear or remote, but simply that the direct suppression of these broadcasts is not "necessary" to prevent it.

<sup>86</sup> 110 Cong. Rec. 18485 (daily ed. Aug. 12, 1964) (quoted in remarks of Senator Mundt). According to Senator Mundt, Hagerty favors "legislation to prevent television networks from announcing election returns while west coast polls are still open." Compare the stand taken by Dr. Frank Stanton, President of Columbia Broadcasting System, Inc.: "there is no necessity for any such radical embargo on news of election results. . . . At that point on election day when that determination is made, it immediately becomes news. And the job of any news organization worth its salt is to report it." 110 Cong. Rec. 18478 (daily ed. Aug. 12, 1964) (quoted in remarks of Senator Prouty).

<sup>87</sup> Lerner, *Beware of TV's Election Monster*, Show, Sept. 1964, p. 29.

<sup>88</sup> See note 42 and text accompanying note 68, *supra*.

<sup>89</sup> *Irvin v. Dowd*, 366 U.S. 717, 729-30 (1961) (concurring opinion of Justice Frankfurter).

It may be argued that Congress could avoid direct first amendment involvements by forbidding the release of information until the last polling place had closed. It is submitted that a choice between these alternatives is properly a matter for the discretion of Congress. Under this proposal, news would be kept from the public as effectively as if the broadcasters themselves had been silenced, and perhaps more effectively. If no information were released anywhere until the last polling place had closed, as Senator Prouty's bill now provides, subsequent delays would be involved for programming the data into computers and for analyses by commentators. In the interim, the public would be without news it would have had more rapidly under the proposed broadcasting restrictions. Conceivably, the releases could be timed so that results could be compiled, and predictions formulated for broadcast as soon as the latest polls close. The practical difficulties would remain, however. Such a law would have to be kept abreast of each development in computer technology, to assure that no broadcast reach the public until after the proper time. Enforcement would involve tracing each "leak" to a particular poll-worker, rather than to a more easily identified broadcaster. At any event, the proposal would result in no less effective a restraint upon the news, so that the question is substantially one of method: if Congress may shroud the elections in utter secrecy, may it not also seek the middle ground in conditioning broadcasts on a moratorium of but a few hours' duration? Surely there would remain the formal restraint upon free speech. Free speech, however, has never been treated as an absolute right. The advocacy of both religious and secular causes has always been subject to reasonable restrictions as to time and place.<sup>90</sup> It has yielded, even though, as in the Communism and criminal anarchy cases, the speech related to what may well have been the speakers' most deeply cherished beliefs.

It is most difficult to justify the proposed broadcasting restrictions when Senator Javits' bill is considered in the alternative. If all polls were closed at 11:00 P.M. Eastern time, news of the election would reach the people several hours earlier than under the bills treated here, with no restraint upon speech. Unless Western voters are to have fewer hours in which to vote than Eastern residents, however, either Eastern polls must open later in the day (inconveniencing those who normally vote early), or Western polls must open at an extremely early hour, or all polls must remain open for 24 hours. Each variant involves its own peculiar practical difficulties and expense. The question is thus, again, whether the broadcasting restrictions are "necessary" for lack of a practical alternative, and the judgment to be made is one for which Congress would seem best qualified.

## V. Conclusion

It is submitted, then, that the first amendment will most probably not defeat the proposed restraints upon radio and television broadcasters. The various safeguards of liberty woven into the constitutional scheme are neither unqualified nor unrelated to one another. They must inevitably conflict, as when freedom of the press is thought to infringe upon the right to a fair trial. No one doubts the importance of a free press in the "open society"; yet none can dispute that all freedom depends ultimately upon the franchise. That which corrupts the electoral process ought not be blindly tolerated in the name of freedom. The ideal of "ordered liberty" demands more sophisticated adjustments to strike a balance, in this context, between the right of the "press" to inform the electorate, and each elector's right to a rational, undiluted vote.

The critical questions are therefore only partly legal. The gravity of the danger alleged, the necessity of the invasion of free speech for lack of a practical alternative — these are questions as much of fact as of law. Certain distinctions may be drawn on the basis of legal standards; for example, the Court will presumably re-

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90 *Gantwell v. Connecticut*, 310 U.S. 296, 303-5 (1940).

quire a stronger justification for the suppression of election results than it will for the silencing of predictions, since the former represent less of an intrusion upon the good judgment of the electorate. Ultimately, however, any estimation of the "danger" itself must rest upon a broad assessment of how people vote and why, and of what protection the franchise requires under circumstances unique in our history—an assessment, in short, of the national human condition. For such a judgment, as for the choice between alternative means, there is ample precedent both within and without the area of free speech for a judicious concession to legislative prudence.

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