ELECTION LAW JOURNAL Volume 3, Number 1, 2004 © Mary Ann Liebert, Inc.

Putting an End to Push Polling: Why It Should Be Banned and Why the First Amendment Lets Congress Ban It

Evan Gerstmann and Matthew J. Streb

Polling has long been an integral part of a robust democracy. It allows politicians and citizens to measure the pulse of public opinion on issues, and it allows candidates to gauge the strengths and weaknesses of both themselves and their opponents. As George Gallup and Saul Rae wrote more than sixty years ago, “The best guarantee for the maintenance of a vigorous democratic life lies not in concealing what people think, but in trying to find out what their ultimate purposes are, and in seeking to incorporate these purposes in legislation.”

Unfortunately, an increasing number of pollsters and candidates are resorting to a particularly unscrupulous negative campaign technique called “push polling.” Push polls are not really polls at all; their object is not to measure public opinion, but to manipulate it by providing as many “respondents” as possible with hypothetical, sometimes blatantly false information, about candidates, political parties or initiatives. Push polling has a detrimental effect on democracy because it makes people question the validity of legitimate polling and, more importantly, adds to many people’s beliefs that politics is dirty, politicians are corrupt, and the electoral process is flawed. Furthermore, the practice is fraudulent: it misleads the listener as to the identity, purpose and reliability of the caller, and it is often used to falsely tarnish the reputation of political opponents.

As a result, the U.S. House of Representatives and many state legislatures have tried to pass—or have passed—laws designed to restrict push polling. We argue that these laws are mostly ineffective and instead advocate a complete ban on the practice of push polling. Such a ban, as we would construct it, would be a constitutionally permissible ban on fraudulent/knowingly false speech.

We begin with a discussion of what push polling is and the efforts that legislatures have made to limit its use. We then suggest legislation that would ban push polling completely and argue that this legislation passes constitutional muster.

WHAT IS A PUSH POLL?

As noted, a push poll is not a poll at all. Instead, it is really political telemarketing under the fraudulent guise of legitimate survey research. A person representing a “polling firm” may tell the listener that she is conducting a poll for the upcoming election and ask the listener to answer a few questions. The call would sound something like the following:

Caller: Are you planning to vote in the Smith-Jones race for senate?

Respondent: Yes.

Caller: And whom do you plan to vote for?

Respondent: Jones.

Caller: Tell me if your vote would be affected definitely, possibly or not at all if you knew that Jones had been charged with passing bad checks?

Respondent: Uh, possibly.

Caller: And, if you knew that Jones had been arrested for drunken driving? Would that affect your vote definitely, possibly or not at all?

Respondent: Oh, definitely.

Caller: Thank you very much. We appreciate you taking the time to help us.3

If the respondent had indicated an intention to vote for Smith, the caller would have thanked the respondent and hung up without asking any other questions. Note that the caller never explicitly said that Jones had written bad checks or had been arrested for drunk driving but merely implied it.

The American Association for Public Opinion Research (AAPOR) defines a push poll as “an insidious form of negative campaigning disguised as a political poll that is designed to change opinions, not measure them.”4 Push polls provide hypothetical, oftentimes blatantly false information, in hopes of “pushing” the respondent away from a candidate the respondent initially supported and toward the candidate conducting the poll or the candidate that an interest group or political party conducting the poll supports. While other organizations, such as the National Council on Public Polls (NCPP) and the Council of Marketing and Opinion Research (CMOR), give slightly different definitions of a push poll than AAPOR’s, they all agree on several defining characteristics.

- Push polls are designed to be quick so they can reach thousands of people per hour. The agreed-upon size of legitimate samples is normally around 1,500 for a national election, 1,000 for a statewide election, and 300 to 600 for a congressional election. Because push polls are disguised forms of negative campaigning, the goal is to reach as many people as possible. Thus, push pollsters are not concerned with a scientific, representative sample as legitimate pollsters are.
- Push pollsters may also be more concerned with targeting certain types of people, such as undecided voters. Unless a legitimate pollster is conducting a poll designed to measure the opinions of a specific group, they will not target certain groups of people.
- Push pollsters usually do not collect or analyze the data. They are simply concerned with getting as much negative information out quickly to the most people possible. They do not care how the respondent answers the questions. Legitimate pollsters always store and analyze collected data.
- Push pollsters often change the script of the interview. If they find a person already supports their candidate, the call usually becomes an advocacy call. If the respondent does not support their candidate or is undecided, then the push questions are asked. At the end of the call, the caller will usually ask the respondent the vote-choice question again.

While push polls have several distinctive characteristics, many people have great difficulty distinguishing between push polling, advocacy calling, and legitimate survey research.5 Candidates regularly claim they have been “push polled” when, in reality, they have not. Candidates often confuse push polling with advocacy calling—a similar practice to push

---

5 Streb and Pinkus, forthcoming.
polling whose message is also designed to reach thousands of people. Pollsters generally agree that advocacy calling is legitimate. As with push polls, the object of advocacy calling is to reach as many people as possible using a short, prepared script disseminating negative information about a candidate. Unlike push polling, however, advocacy calling is not done under the fraudulent guise of legitimate survey research. Candidates are more likely to disseminate negative information through push polls instead of advocacy calls because people are less willing to listen to partisan calls, especially negative ones. Calling under the guise of a poll gives the call legitimacy and misled citizens may be more apt to listen.

Candidates also become upset when legitimate polls present negative information about them and confuse this phenomenon with push polling. Legitimate polling for a candidate’s strengths and weaknesses is an essential aspect of campaign strategy. For example, candidates must be able to ask whether a previous vote by an opponent is popular with the public. The media must be able to do the same. Candidates, however, often are not able to distinguish between push polling and legitimate, negative polling.

THE PROMINENCE AND PROBLEMS OF PUSH POLLING

Unfortunately, push polls are almost as common a feature of elections as stump speeches, debates, and kissing babies. Larry Sabato and Glenn Simpson argue that push polling has become “the rage” in American campaigns. Push polls can trace their history all the way back to Richard Nixon’s 1946 campaign for the House of Representatives, but in the past five–ten years, their use has increased exponentially. Candidates have made accusations of push polling for all levels of offices and push polls have even found their way into some initiative campaigns. Opponents accused Steve Forbes, Bob Dole, and George W. Bush of conducting push polls in the 1996 and 2000 Republican presidential primaries. Allegations of push polling can be found in several high profile races, including the 2000 New York Senate election, the 2001 New York mayoral election, and the 2002 Democratic primary for Maryland’s Eighth District House seat. According to congressional candidates, the use of push polling is far more abundant than just a few examples. Of forty-five candidates for Congress interviewed in 1994, almost 80 percent claimed that their opponents used push polls against them. Push polling has become prominent even in local elections because the lack of media coverage usually lets the polls fly under the radar.

Push polls create three major problems in a democratic society. First, they undermine the public’s faith in legitimate polling. Because of the negative tone of push polls and loaded nature of the push questions, respondents can become skeptical of polls and refuse to participate in future legitimate polls. Pollsters are having increasing difficulty getting willing participants. Karl Feld argues, “U.S. telephone response rates are dropping to a point that threatens the validity of telephone research.” Push polling only accentuates the problem.

Second, push polls likely contribute to the public’s disaffection toward government. “[Push polls] make people more cynical about politics,” said former AAPOR President, Michael W. Traugott, “and that’s something that democracy can’t afford.” Sabato and Simpson argue that the entire purpose of push polling is to suppress voter turnout. While the nature of push polling makes it difficult to em-
Pirically test its effects, research has indicated that negative advertising makes people more cynical about politics, and less efficacious and trusting of politicians.\textsuperscript{14} Certainly negative campaigning should not be regulated; one could argue that negative campaigning is an important, positive aspect of an election because it informs voters.\textsuperscript{15} On the other hand, push polling does little but create hypotheticals and sometimes blatant lies; it brings nothing to the table in terms of legitimate information. If negative advertising has such an adverse effect on the public, we have every reason to believe that push polling does as well. Because of the negative effects of push polling, AAPOR, the NCPP, CMOR, and the Association of Political Consultants (AAPC) have all released statements strongly condemning the practice.

Third, push polls fraudulently mislead the public. While many voters know they should take allegations made by a candidate’s political opponent with the proverbial grain of salt, push polls are designed to suggest to the listener that the allegations or implications come from an objective source. Further, because the content of push polls is not made public, and the target candidate may not be aware of them, there is diminished opportunity to clarify the record or to challenge the push poll’s contents in the marketplace of ideas.

**EFFORTS TO STOP PUSH POLLING**

Members of the House of Representatives have introduced bills in every Congress since the 104\textsuperscript{th} designed to combat push polling, but the bills have never made it out of committee. While the proposed bills have slight variations, they focus on requiring telephone pollsters to identify who is paying for the poll. For example, the most recent bill, introduced by Rep. Thomas Petri (R-WI) and called the “Push Poll Disclosure Act,” requires that each participant in a poll conducted for a Federal office seeking the opinion of more than 1,200 households be told the identity of the survey’s sponsor. It also requires further disclosures when a survey’s results are not to be released to the public. In this case, the cost of the poll and sources of its funding must be reported to the Federal Election Commission, along with a count of the households contacted and a transcript of the questions asked.\textsuperscript{16} Petri believes that the bill has failed to garner significant support because “there is some concern [the bill] could interfere with legitimate polling.”\textsuperscript{17} The Federal Election Commission does not have the statutory power to limit push polling absent congressional authorization.

Many state legislatures have tried—and some have passed—bills similar to the measures introduced in the House. Several states, including Florida, Idaho, Iowa, Nevada, and Virginia, have enacted laws requiring those conducting a poll to disclose the name (and, in some cases, the address) of the person or group paying for the poll. Wisconsin and Nebraska require that the caller identify who is paying for the poll if the respondent so requests. Other states, such as South Carolina and New York, require that the poll—and in some cases the text of the poll—be filed with the state.

Penalties vary by state and often depend on whether the violation is intentional. For example, in Florida a person violating the statute is fined $1,000 per count. In New York, the state’s Board of Elections may impose a civil penalty of up to $1,000 per violation. In Virginia, a person violating the law incurs a civil penalty not to exceed $50, but a willful violation of the law results in a Class 1 misdemeanor.

Three states’ laws, in particular, are worth analyzing in greater detail. West Virginia has


\textsuperscript{17} Petri, Hon. Thomas. 2003. Phone interview by authors. 20 March.
taken the broadest step to combat push polling. The West Virginia law prohibits any poll that is “deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate.” The law defines a poll as the “gathering, collection, and evaluation, of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues.” The West Virginia law, while trying to define a poll explicitly, is problematic because, as Fox notes, “The practical impact of the statute is limited because it lacks objective standards for determining the intent of the poll sponsor.” He continues, “The absence of objective standards, such as sample size or targeting, places the West Virginia Elections Commission in the unenviable position of having to determine the sponsor’s intent in order to find a violation.”

The Nevada law also has intent problems. Nevada’s law forces the disclosure of the name of the candidate, political party, or PAC that requested or paid for the poll, but only in cases when a “persuasive poll” is being conducted. The Nevada statute defines “persuasive poll” as “the canvassing of persons by asking questions or offering information concerning a candidate or ballot measure which are designed to impart information that is negative or derogatory about the candidate, his family, or the ballot measure.” The problem with the definition is, how does one define “negative?” The law may be too vague to be enforced constitutionally.

Like the Nevada law, the Florida law tries to distinguish between push polling and legitimate polling by requiring disclosure only under certain conditions. Unlike the Nevada law, the Florida law does not raise ambiguity and intent questions. It is almost identical to the legislation currently proposed in Congress. According to Fox:

The unique aspect of Florida’s new law is that the statutory criteria for defining a push poll are based on specific objective manifestations of the poll sponsor’s subjective intent, namely, a maximum sample size of 1000 and an average call duration of less than two minutes. The Florida approach provides poll sponsors and pollsters with specific, enforceable guidelines for when a sponsorship disclaimer is required and when it is not. In contrast, the majority of other states’ legislation in this area either seeks to regulate all polls, failing to effectively distinguish between push polls and legitimate surveys, or requires a board or court to determine the subjective intent of the poll sponsor without providing substantive guidelines.

The Florida law, like Congressman Petri’s bill, is a step in the right direction because it attempts to establish criteria for a legitimate poll. One concern people have regarding attempts to regulate push polls is that it is difficult to determine the intent of the poll’s sponsor. As we have said, pollsters certainly must have the ability to ask what opponents might perceive as negative questions. The Florida law removes the subjective element regarding whether a poll is a push poll.

However, the Florida law and disclosure laws in other states, while perhaps better than nothing, do not really combat the problem of push polling. They do not specifically keep pollsters from conducting push polls as long as they disclose the name of the organization paying for the polls. When asked how effective Florida’s legislation has been in combating push polling, Barbara Linthicum, the Executive Director of Florida’s Election Commission, replied “Not that effective.”

Existing legislation does not go far enough in combating push polling. Nothing stops a group from creating an organization that sounds legitimate, but is formed solely for the purpose of conducting the push poll. A phone call from a group called “Citizens for Justice”

---

18 West Virginia Code 3-8-9(10). 1996.
19 Ibid.
20 Fox 1997, 593.
21 Ibid.
23 Fox 1997, 592. See also Florida statute 106.147(1). 1997.
24 Linthicum, Barbara. 2003. Phone interview by authors. 12 March.
certainly sounds legitimate and the respondent may think it is legitimate. As Linthicum said regarding this kind of activity, “It is not difficult [to do]. We can’t even stop that activity in doing advertisements.”\textsuperscript{25} And, even if “Citizens for Justice” is exposed, there are no penalties for their actions because they followed the law. It is not uncommon for organizations to create misleading names. For example, the Black Alliance for Educational Options (BAEO) is a pro-voucher group that accepts “generous funding from a number of largely white, conservative foundations.”\textsuperscript{26} BAEO’s support for school choice initiatives runs contrary to that of other national black advocacy groups, including the NAACP and Urban League who are opposed to school vouchers.

Some may suggest that, instead of calling for an outright ban on push polling, we should strengthen the current disclosure laws. It is not entirely clear that stricter disclosure laws would be any more effective than the ones already on the books in many states. More importantly, stricter disclosure laws could potentially make it more difficult for legitimate pollsters to conduct accurate polls. Identifying that the caller is polling for a Democrat will make it more likely that Republicans will either refuse to participate or purposely lie, and vice-versa. This is one reason why AAPOR does not include disclosure as a criterion for a legitimate poll.

**PROPOSED LEGISLATION**

To effectively reduce the incidence of push polling, we suggest the following legislation. It combines the Florida legislation’s objective approach to defining the practice of push polling with West Virginia’s approach of banning such polls outright, rather than merely requiring disclosure or filing. For the reasons given below, we believe this approach is within the bounds of Congress’ constitutional authority. For the reasons set out in the previous section, mere filing or disclosure requirements are simply too easy to circumvent.

The following federal legislation would be strict enough to substantially curtail push polling, while defining the practice objectively enough to avoid undue burdens upon political speech or legitimate polling:

1) Any person who knowingly conducts a push poll, as defined in paragraph (2) below, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

2) A push poll is a series of telephonic communications of less than 5 minutes in duration to more than 500 people in a congressional district, to more than 1,000 people in a state, or to more than 1,500 people nationally, mentioning the name of a clearly identified candidate for federal office, where the person or persons initiating the telephonic communications hold themselves out as conducting a poll or survey or where a reasonable person would clearly understand the telephonic communication to be such a poll or survey.

3) The FEC shall have authority to revise the definition of a push poll in paragraph 2 and to alter it by regulation in accordance with evolving standards of polling practices should such alterations be required to assure the ability to conduct bona fide polls.

4) Notwithstanding paragraph (2), no series of telephonic communications that merely ask voters whom they intend to vote for, without implying or expressing any other information about any clearly identified candidate shall be deemed a push poll.

5) Notwithstanding paragraph (2), no one shall be liable for knowingly conducting a push poll when the person conducting the poll can demonstrate that data from the series of telephonic communications have been or are in the process of being stored and analyzed according to generally accepted practices of polling data analysis. The FEC shall have the authority to issue guidelines to aid in the clear understanding of what constitutes generally accepted practices.

6) The burden shall at all times remain upon the prosecution to establish each element of this offense.

\textsuperscript{25} Ibid.  
No single piece of legislation will completely eliminate push polling, of course, but the proposed legislation would likely be an effective first step. Because it is a complete ban, it cannot be circumvented by creating innocuous-sounding front organizations to conduct the push polls. Because the definition of push polls is largely objective and easily measurable, the FEC would not have to parse through the semantics of each question to enforce the law.

Further, the proposed legislation would not interfere with the right or ability of any candidate, political party or independent organization to engage in as much legitimate polling as they wish. The minimum time and maximum size limits are based upon widely agreed upon standards within the polling community and leave ample elbow room for pollsters to conduct any legitimate polls they wish at the district, state or national level. Also, even if for some reason a pollster wanted to greatly exceed the sample sizes necessary for reliable polling (which is unlikely since it would increase the cost of the poll), the proposed legislation allows for this as long as the poll results are analyzed by generally accepted methods of polling analysis—standards that are widely agreed upon among experts in the field.

CONSTITUTIONAL ANALYSIS

“The constitutional power of Congress to regulate federal elections is well established . . .” The serious question is whether the proposed legislation runs afoul of the prohibitions of the First Amendment on governmental regulation of speech. Any regulation of push polling must tread carefully because push polling concerns elections and therefore is a form of political speech. We acknowledge that the proposed legislation is a bold proposal that will be a lightning rod for constitutional challenge. “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”

Any attempt to ban even a deceptive and destructive form of political speech faces serious constitutional hurdles. Nonetheless, for reasons explained below, we believe there are strong arguments that our proposed legislation passes constitutional muster. Because existing laws regulating push polls are ineffective, we view our legislation as the best chance of passing both effective and constitutional regulation of the pernicious practice.

PUSH POLLS AS FRAUDULENT SPEECH

Restricting political speech is always controversial. After all, it is political speech that the Founding Fathers believed was essential for a robust democracy. It therefore must be protected except in extreme circumstances. We believe push polling is an extreme circumstance. Push polling is fraud and the courts have clearly held that the First Amendment does not protect fraudulent speech. The only speech prohibited is where the communication holds itself out as a poll or survey while ignoring all the rules and procedures of polling. It is reasonable for Congress to conclude that someone who tells listeners that he or she is conducting a poll while calling far more people than is necessary for an appropriate sample and who does not bother to subject the data to the type of analysis that would yield any useful results is committing a fraud and is acting with reckless disregard for the truth.

It is important to emphasize that we are not arguing that push polls can be banned because they often imply false information about can-
didates (although that is, of course, one concern about them). The proposed legislative ban is not triggered by the content of the questions asked by the push poll. Rather, the ban rests on the fact that push polls are inherently false and misleading simply by holding themselves out as polls. To the extent the proposed legislation is content-based, it distinguishes only between advocacy that fraudulently claims to be a poll and advocacy that does not. Nor are we suggesting that there is a First Amendment exception for “public frauds.” We accept, at least for the purposes of this argument, Charles Fried’s assertion that “the First Amendment precludes punishment for generalized ‘public’ frauds, deceptions and defamation.” The proposed legislation would have no effect on advertisements, speeches or any other statement to the general public. It would only cover situations where one specific person makes a specific fraudulent misrepresentation to another specific person.

It is well settled that the First Amendment protects neither deliberately false nor fraudulent speech. In Cantwell v. Connecticut, the Court remarked: “Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.”

Although the Court shielded speakers from libel suits, absent actual malice, by public officials in New York Times v. Sullivan, 376 U.S. 254 (1964), it clarified that same year that “known lies” are not protected by the First Amendment:

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances that “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .” Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

While the Court has made clear that false speech has no First Amendment value, it has expressed two concerns that mitigate against punishing false speech under certain circumstances. Neither of these concerns is applicable to the proposed legislation. The first concern is to provide sufficient room for true speech, by protecting even some erroneous speech:

Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability of further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

It is extremely unlikely that the proposed legislation would interfere with the “ascertainment and publication of the truth about public affairs.” Because push polls are objectively defined in terms of the number of people called and the time spent on each call, there is very little possibility that legitimate pollsters would

32 310 U.S. 296 (1940).
accidentally run afoul of the proposed legislation. Because the definition of push polling is not tied to the content of the questions asked, there is no reason that pollsters would be afraid to ask certain questions. Further, as long as they do not falsely hold themselves out as conducting a poll or survey, all parties can communicate with as many people as they wish and say anything they wish without running afoul of the proposed legislation.

The other concern of the Court has been one of remedy. The Court has repeatedly averred that the best remedy for false speech is true speech in the open marketplace of ideas. "[The First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office." The open marketplace of ideas may well be the best test of truth, but the very point of push polls is their surreptitious nature. They are not made publicly, but are made in thousands of private telephone calls, below the radar of the media and of political opponents, and are often done at the end of the campaign to make it difficult, if not impossible, to respond. In short, the push polls banned by the proposed legislation are deliberately used to circumvent the marketplace of ideas and the legislation would enhance, not diminish, the robust, free exchange of thought that it is the First Amendment's highest duty to protect.

Finally, the Supreme Court's recent unanimous decision in Madigan v. Telemarketing Associates, Inc. has made it clear that the First Amendment does not protect fraudulent statements and that a carefully crafted prohibition can pass constitutional muster. In Madigan, the Court overturned the Illinois Supreme Court's dismissal of the State Attorney General's suit against telemarketers who led donors to believe that most of the funds solicited by the telemarketer would go to help veterans of the Vietnam War. The Illinois Attorney General argued that such representations were fraudulent because Telemarketing Associates kept 85 percent of the donations for itself.

The state courts had relied upon a string of cases in which the Supreme Court struck down laws that, as prophylactic measures against fraud, banned any charitable solicitation when fundraising cost exceeded a certain percentage of the funds raised. In overturning the high court of Illinois, the Supreme Court clarified that those cases "took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations."

In the earlier cases the Court established the principle that the government could not arbitrarily set a limit on the percentage of solicited funds that could be absorbed by fundraising costs. The Court reasoned that many legitimate explanations might exist for large fundraising costs. For example, the fundraiser might be expending large amounts of money on education and research. Therefore, the percentage limits were "only peripherally" related to the government's legitimate interest in preventing fraud. In Madigan, the Court reiterated the distinction "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." The legislation proposed in this article is aimed directly at fraud. There is no general limit on how many people political operatives can call or how much they can spend to reach their target audience. The proposed legislation only prohibits the misrepresentation by political operatives that they are merely conducting a poll while willfully failing to engage in any of the sampling techniques, analysis or other procedures that make something a poll. If it was ambiguous prior to Madigan, it is now clear that the First Amendment does not protect a speaker who knowingly misleads the listener as to material facts. The Madigan Court said that it was affirmative misrepresentation by the caller that placed the solicitation outside the protections of the First Amendment. Similarly, it is the push poll callers' affirmative representation that they are conducting a poll that triggers the ban of the proposed legislation.

---

39 155 L. Ed. at 808.
Thus, the legislation fits well within the parameters laid out by the Court.

CONCLUSION

Push polls represent a serious and escalating threat to the integrity of federal elections, the ability of legitimate pollsters to do their jobs, and to the marketplace of ideas in the political sphere. While filing and disclosure requirements may be of some use, such measures are inadequate to address the problem in a substantially effective manner. Though the First Amendment wisely protects even false or misleading speech in some cases, none of the reasons that the Court sometimes uses to protect false speech are applicable to push polls. Thus, an outright ban on push polls would protect the political process from the harms caused by push polls without diluting the marketplace of ideas that the First Amendment must protect. The legislation suggested above, while amenable to criticisms, furthers rather than retards the goals of the Court’s First Amendment jurisprudence and would help protect the integrity of federal elections.

Address reprint requests to:
Evan Gerstmann
Department of Political Science
Loyola Marymount University
One LMU Drive
Los Angeles, CA 90045
E-mail: egerstma@lmumail.lmu.edu