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Daily Herald Co. v. Munro: 9th Circuit Strikes Down Limits on Election Day Broadcast of Exit Polls

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The broadcast of east coast voting returns before the polls have closed in other time zones has caused considerable debate over the media's social responsibility.[1] It has also led two states to enact legislation limiting the media's access to the polling place.[2] Arguably, these returns give west coast voters the impression that however they vote, their votes will not count because the result has already been decided. Consequently,

1. *See generally*, Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1928-30 (1985); Note, *Curtailment of Early Election Predictions: Can We Predict the Outcome?*, 36 U. FLA. L. REV. 489, 491-92 (1984) (for relevant statistics as to effects on actual outcomes). As Congress stated in H.R. Con. Res. 395, 98th Cong., 2d Sess. (1984), "[i]n 1980, 3 percentum of registered voters in the western United States reported that they did not go to the polls because of early election predictions by television and radio . . . [and] countless eyewitnesses reported individuals leaving polling places following announcements by broadcasters of a projected Presidential winner . . . . Early election predictions do not serve any significant societal purpose and are unnecessary and potentially damaging to the political process and voter participation."

2. Two states have passed legislation addressing this problem. Washington's statute, WASH. REV. CODE § 29.51.020(1)(d), (1)(e) (1983), is the subject of the opinion discussed in this Comment. Florida's legislation, similar to Washington's, FLA. STAT. § 104.36 (1983), was found to be unconstitutional. Clean-Up 84 v. Heinrich, 590 F. Supp. 928 (M.D. Fla. 1984) (The court did not specifically reach the issue of whether delaying of election returns was a permissible purpose.).

Congressional proposals that did not become law include: S. 762, 97th Cong., 1st Sess., 127 CONG. REC. 2483 (1981), that sought to require networks to delay election-night predictions; H.R. 3557, 97th Cong., 1st Sess., 127 CONG. REC. 2167 (1981), that sought to establish a uniform poll closing time prior to which networks would voluntarily withhold exit poll results; and H.R. 3556, 97th Cong., 1st Sess. (1981), that proposed sealing ballots in elections until all polling places were closed. Logistical and constitutional problems may have been the death of these legislative efforts. *See* Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1943-44 (1985). Congress realized that making poll closing times uniform may be useless because networks would still be able to produce predictions within hours after the polls opened. Thus whatever Congress did would necessitate the cooperation of the media. *See* H.R. Con. Res. 321, 98th Cong., 2d Sess., 130 CONG. REC. 2063 (1984).

The last word from the Congress was a congressional resolution asking, but not telling, the media to delay election night predictions until all of the polls have closed. H.R. Con. Res. 321, 98th Cong., 2d Sess., 130 CONG. REC. 2063 (1984) (does not carry force of law and imposes no penalties for noncompliance, unless signed by the President).

voters may choose not to vote at all, leading to a different electoral result or at least a skewed result.[3]

This commentary discusses the basis for a recent decision of the Ninth Circuit Court of Appeals, *Daily Herald Co. v. Munro*,[4] which may sound the death knell for legislation that would seek to limit election day broadcasting.

In *Daily Herald*, the court held[5] that if the purpose of a Washington state statute which prohibited conducting exit polls of voters within 300 feet of the entrance to a polling place was to prevent broadcasting of early election returns, it was unconstitutional.[6] Since it was the early returns from the East that were the primary motivation for this legislation, and this legislation only prevented the broadcasting of Washington's own early returns, the State's purpose was not manifest in the statute anyway. Consequently, the statute failed to provide any justification for what the court decided was an otherwise impermissible restraint on speech.[7] The court also found, however, that the state's desire to insulate voters from outside influences is insufficient to justify the regulation of speech.[8] Such legislation would not be upheld absent a showing that ensuring the integrity of every citizen's vote is a compelling state interest.[9] A compelling state interest is required here because the legislation is not content neutral, and, hence, presumptively constitutes impermissible discrimination against certain types

3. *See* H.R. Con. Res. 321, 98th Cong., 2d Sess. (1984): "(1) in the 1980 and 1982 general elections, broadcasters made projections of election results in many states while polls were still open; (2) those projections may have decreased voter participation and affected close elections."

4. 838 F.2d 380 (9th Cir. 1988).

5. The court also found subsection 1(e) of WASH. REV. CODE § 29.51.020, to be neither narrowly tailored to accomplish a compelling government interest. *Id.* at 385, nor, even if it were content neutral, to be a reasonable time, place and manner regulation. *Id.* at 386. It also found the purpose of protecting voters from broadcasting of early returns to not be sufficiently narrowly tailored. *Id.* at 387. The Court, however, did not address subsection 1(d) of the Code, which more narrowly prohibited "engag[ing] in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place." *Id.* at 384.

6. *Id.* at 387 n.10. The court found that even if the purpose was not to prevent the broadcasting of early returns, the statute was unconstitutional on its face.

7. *Id.* at 387. In any event, as the *Daily Herald* court points out at 387 n.11, even if state legislation were constitutional, any legislation would have to come from the federal government since the federal government generally regulates broadcasting. *See* National Assn. of Regulatory Utility Comm'rs v. F.C.C., 746 F.2d 1492, 1499 (D.C. Cir. 1984).

8. *Daily Herald*, 838 F.2d at 387.

9. *Id.* at 385.

of speech.[10]

Upholding the integrity of the electoral process is an important state interest.[11] However, what is in question here is not so much a disenfranchisement of citizens' votes, but rather a concern over the degree of influence on the voter's choice. Consequently, the interest may not be considered sufficiently compelling.[12] Thus, strictly speaking, piercing the level of protection afforded speech in order to prevent a fraction of the

10. This would be true under either first amendment or equal protection clause analysis. *Id.* at 385 n.6. Here, the particular type of speech under scrutiny was the discussion of election results and the particular speakers, exit pollsters and broadcasters. However, arguably there should only be relaxed scrutiny in that the purpose ultimately is not to suppress expression, but to preserve the integrity of the election. Where the purpose is not to suppress expression, there is not strict scrutiny. *See* Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1932 n.30 (1985).

11. Brown v. Hartlage, 456 U.S. 45, 52 (1982). As Congress put it in H.R. Con Res. 321(4), 98th Cong., 2d Sess., 130 CONG. REC. 2063 (1984): "[E]arly projections undermine belief of individuals in the importance of their votes — a belief that is essential in a democratic society." The weighted vote of those voters living in a certain part of the country may be a violation of the Equal Protection Clause of the 14th Amendment and the one man, one vote concept. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964); Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

Congress, on another occasion, found this interest a compelling one: "[A] decline in voter participation is an unacceptable trend for a healthy, vibrant political environment . . . . [T]he right of American[s] to cast informed and educated votes is the cornerstone of our democracy and freedom of the press is intended to further that basic right . . . . Congress has a *compelling* interest and inherent duty to protect the voting rights of all Americans and to seek an increase in participation in the electoral process . . . ." H.R. Con. Res. 395, 98th Cong., 2d Sess. (1984) (emphasis added). *See also* Reynolds v. Sims, 377 U.S. at 561-62 (1964) for proposition that voting is a fundamental constitutional right.

12. In Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124-26 (1981), the Supreme Court held in effect that a state's interest in preserving the overall integrity of the electoral process did not justify infringement on first amendment rights. The state wanted to require Democratic delegates to the National Convention to be bound to cast votes in the same allocations as the statewide primary, but the Democratic Party successfully argued that this impaired the Party's freedom of political association. This puts in some doubt the prospects of the Supreme Court upholding a suppression of returns, given that the first amendment interest here seems less pressing than in *Daily Herald*, and yet still prevailed.

However, one distinguishing factor of *Democratic Party* was state interference into national politics, and this is absent in the *Daily Herald* situation. Furthermore, as Professor Tribe has stated, "[w]hile the majority's rationale for refusing to characterize Wisconsin's interests as 'compelling' seems flawed, the Court could have easily repeated its reasoning in *Cousins* — that an individual state has an insufficient interest of the selection of candidates in national elections." TRIBE, AMERICAN CONSTITUTIONAL LAW 1115 n.21 (2d ed. 1988).

Indeed, in Buckley v. Valeo, 424 U.S. 1, 29 (1976), the Court found the federal government's interest in preventing corrupt practices from ruining an election compelling enough to justify an incidental restriction on the first amendment. (The Court therein upheld the constitutionality of some provisions of the Federal Election Cam-

population from thinking that their vote does not mean anything does not seem likely to be acceptable. As such, the court was probably right in reaching its conclusion that the first amendment must prevail. However, in looking at the court's reasoning, it can be seen that it is far from clear that this should necessarily be the result.

The court cites just two cases to support its argument that insulating voters from outside influences is insufficient to justify suppressing speech. The first and weightiest one is *Mills v. Alabama*.[13] Though this United States Supreme Court case may stand for the insulation proposition in general, a close reading of the case suggests that the particular factual setting and issues involved were dispositive.[14] In *Mills*, a state statute made it a crime for a newspaper editor to publish on election day an editorial urging people to vote in a particular way. This drastic criminalization of opinion in *Mills*, however, is not the same as temporarily suspending the release of facts, as is the case in *Daily Herald*, because there is neither a crime involved nor any attempt to silence opinion or debate.

The Court pointed out that the question in *Mills* "in no way involves the extent of a state's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there."[15] On the contrary, in *Daily Herald* the state argued that the purpose of the legislation was to prevent disruption at the polls caused by the effect of broadcasting the results.[16] That is, seeking to preserve the decorum or integrity of an election by not releasing the vote until everybody has voted is not the same thing as the suppression of all debate on the issues. To the extent that the delay of returns is only an attempt to ensure that each person's vote counts, the *Mills* court did not suggest that the states would not be free to regulate.[17]

Although it can be argued that prohibiting election news for the suppressed period also stifles debate, inasmuch as opinions

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paign Act.) To what degree, therefore, federal legislation might fare better than state legislation is left open to speculation.

13. 384 U.S. 214 (1966).

14. In *Daily Herald* the court did no more than cite to the case. It did not explain why *Mills* was apposite other than to state its conclusion that insulating voters was just as unconstitutional in the case of suppressing early broadcasting returns as it was with prohibiting election day broadcasts or newspaper editorials.

15. *Mills*, 384 U.S. at 218.

16. *Daily Herald*, 838 F.2d at 385.

17. *Mills*, 384 U.S. at 218-20.

are not valuable without any facts to support them, the intent of the Washington legislature was not to suppress debate.[18] The media is still free to express its opinion on election day and the effect on debate is only indirect. The main issue is the question of the press' right to factual information. The press may not have the same automatic right of access to facts as it does to expression of its opinion.[19]

Daily Herald also differs from *Mills* in regard to the type of influence sought to be imposed on the voter.[20] In *Mills*, the voter's choice of candidates was to be influenced.[21] In *Daily*

18. *Daily Herald*, 838 F.2d at 385.

19. Though a right of access to information has been found to exist in proceedings open to the public, *see generally*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), it is not clear the extent to which this extends to other areas, particularly where there is dispute as to whether the right of access in *Richmond Newspapers* derives from the first amendment or from the public nature of criminal trials. (There was no majority opinion in *Richmond Newspapers*; C.J. Burger took the latter position, J. Brennan, the former.) Furthermore, where government has shown a countervailing compelling interest, a right of access has been limited. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (national security); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("right to speak and publish does not carry with it the unrestrained right to gather information"); and KPNX Broadcasting Co. v. Arizona Superior Court, 459 U.S. 1302, 1306-08 (1982) (Rehnquist, Circuit Justice) (criminal defendant's right to a fair trial).

Surely here too is a situation where the countervailing interest in the workings of the democratic system being at stake must prevail. *See* H.R. Con. Res. 395, 98th Cong., 2d Sess. (1984) (Congress found predictions to be lacking in social function. In other words, this is not a case where the media is facilitating debate on the issues; rather, it is reporting something on election day that it could equally well do on the next day. Nobody in the political process will suffer, as was true in *Mills*.).

Though the court did not specifically reach this issue in *Daily Herald*, it did say that it did "not agree with the state that the conduct here would not be entitled to protection under the right of access' cases . . . ." 838 F.2d at 384 n.3. The concurrence thought the law did impermissibly restrict the media's right of access. *Id.* at 389-90. However, like the majority, it did not say why broadcasting of returns the day of the election was necessary to fostering public debate. Part of the reason for this decision, however, may have been that the judge was considering the larger concern of the statute as a whole, and not specifically the purpose of delaying broadcasting of returns. Consequently, an additional concern over other uses of the information discovered by polls arises, such as to find out why people voted the way they did. *Id.* at 387. This concern would not be present in a narrowly drawn statute. As a result, the balancing in right of access might change.

20. The reporting of election results is significantly different from political campaigns, where "the constitutional guarantee has its fullest and most urgent application." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

A contrary view might be that it is questionable whether election predictions based on returns differ in any degree from earlier preference polls throughout the campaign in producing voter apathy. If the latter are protected, even if they cause such apathy, why should not the election night predictions be protected? *See* Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1941 n.85 (1985).

21. *Mills*, 384 U.S. at 216.

Herald the influence sought to be exerted was not over the voters' political choice or opinion, but over the decision whether or not to vote at all. Thus, the prohibition of announcing early returns should not hurt any of the candidates, as was the concern in *Mills* where one side necessarily lost out. Indeed, that this kind of factual reporting might be prohibited was not entirely refuted by *Mills*.[22] The U.S. Supreme Court suggested that what was unconstitutional about the law was only that the state acted arbitrarily in allowing charges up to election day, which could not then be answered on election day. Such deadlines on debate are arbitrary because they are inherently unfair since no cut off date could work.[23]

Mills, therefore, does not provide a rationale for the *Daily Herald* decision because *Mills* did not address the countervailing interest in protecting the integrity of the electoral process.[24] In *Mills*, the integrity of the election itself was not at issue; the state merely used the integrity of the election argument as a justification for the otherwise restrictive law in question. The *Daily Herald* court also cites *Vanasco v. Schwartz*[25] for the proposition that preserving the integrity of the electoral process is not a sufficiently compelling state interest. As in *Mills*, the subject in *Vanasco* was the severe consequences of prohibiting debate. It did not have to do with the running of the election itself. As the court said, "Nothing in our decision downgrades the State's legitimate interest in insuring fair and honest elections."[26]

The argument that just because there are risks attached to freedom, these risks do not give government the right to dictate what will be heard, is at the heart of the opposition to election regulation in these cases.[27] Citing *Vanasco*, the court in *Daily Herald* stated, "[w]hen the state through the guise of protecting

22. As the Alabama Supreme Court stated in *Mills*, "[i]t is a salutary legislative enactment that protects the public from confusive last minute charges . . . in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." *Mills*, 384 U.S. at 219-220.

23. *Id.*

24. *Id.* at 218-20.

25. 401 F. Supp. 87 (S.D.N.Y. 1975) *aff'd mem*, 423 U.S. 1041 (1976).

26. *Id.*, 401 F. Supp. at 100.

27. *See* 1st National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (prohibiting state curtailment of corporate sponsorship of election, where alleged rationale was that citizens might not be able to evaluate the corporate information); *Daily Herald*, 758 F.2d at 363 (Norris, J. dissenting) (earlier opinion) (1st Amendment in guarantee-

the citizen's right to a fair and honest election tampers with what it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the first amendment."[28]

To some degree by suppressing election returns, states are tampering with the availability of information and thereby taking away people's responsibilities.[29] However, the tampering is only temporary and even during that time the people are still left to decide the merits for themselves.[30] Furthermore, what is being achieved is ensuring that each person has a chance to properly express his opinion through his vote.[31] Therefore, it may be a limiting of the media's speech in the short term, but the more important speech, the people's vote, is being protected in the long term.[32]

Furthermore, there are several instances where it has been considered perfectly acceptable for government to insulate people from speech because of the fear that if it did not, people might not be able to determine the truth for themselves.[33] For example, laws regulating offensive speech have been found

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ing free speech does not leave open to government the choice of suppressing information about the electoral process).

28. *Daily Herald*, 838 F.2d at 387. *See also* Brown v. Hartlage, 456 U.S. 45 (1982) (The Court held that the state interest in protecting an election was not met, for purposes of a compelling state interest, when it did not give sufficient breathing space for candidates' debate, such that a promise to help taxpayers money-wise was considered a bribe so as to invalidate his candidacy.). According to Tribe, a state law like this is trying to balance competing concerns: on one hand, that government not be allowed to perpetuate its power by controlling political campaigns, and on the other, that voters not lose power to make a reasoned choice by the election degenerating due to no regulation. TRIBE, *supra* note 12, at 1130-31.

29. *Daily Herald*, 838 F.2d at 386.

30. The statute limits the restrictions to "the day of any primary, general or special election" and does not address how people should vote, only how pollsters should conduct themselves. WASH. REV. CODE § 29.51.020(1)(e).

31. The state argued that election day broadcasting affected voters' decisions about whether to vote, and that the state had a significant interest in preventing this influence on voting behavior. *Daily Herald*, 838 F.2d at 837.

32. In this regard, the press has no greater right of access to information than those of the people generally. Branzburg v. Hayes, 408 U.S. 665, 684 (1972). If anything, the press' rights may be less inasmuch as its voice is not that of the public, but only of its representative. In any event, as Tribe has suggested, "rights relating to the franchise stand poised between procedural due process . . . and the first amendment . . . ." TRIBE, *supra* note 12, at 1062, and, consequently, may have just as important a constitutional interest as that of the press.

33. As Tribe has stated, "[t]here is little doubt that a state's interest in purging political campaigns of deceptive content far outweighs any marginal interest in disseminating false or misleading information . . . ." TRIBE, *supra* note 12, at 1131. He also

constitutional even though they restrict speech, on the ground that people might not be able to completely turn their eyes away[34] and might be upset by it. As there is some precedent for government channeling of information even when the countervailing government concerns are not that strong, it is not clear to this author why states cannot seek to ensure that an election is not tainted by the media while it is still going on. The only assurance we have now that elections will not be influenced by broadcasting of early election returns is an unenforceable promise from the three major networks that they will not broadcast returns of any state before that state has closed its polls.

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states that courts have upheld restrictions on campaign practices so that the electorate can "make a reasoned choice among the candidates." *Id.* at 1129-30.

As is true in the commercial context, unfair competition laws in general, and trademark laws in particular, exist because of concern that consumers might otherwise be deceived as to the source of the product. *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 758-59 (D.C. Cir. 1977); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-65 (1978) (in reference to attorney solicitation).

34. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986), Erznoznik v. Jacksonville, 422 U.S. 205, 211-12. (1975).