AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech

**Burson v. Freeman, 504 U.S. 191** (1992)

*A provision of the election code of the state of Tennessee prohibited the display of campaign posters or materials or the solicitation of votes within 100 feet of a polling place on election day. Mary Rebecca Freeman was the treasurer for the campaign of a candidate for the city council of Nashville. She filed suit in local court seeking a declaration that this statutory provision violated her First Amendment rights. The trial court upheld the measure as a reasonable time, place and manner regulation, but the state supreme court reversed. The U.S. Supreme Court reversed and upheld the statute. In a 6-3 decision, the U.S. Supreme Court reversed. Although the majority conceded that the election code restricted political speech in a way that was not content neutral, it found that the statute survived strict scrutiny by advancing a compelling government interest of election integrity in a narrowly tailored way.*

JUSTICE BLACKMUN delivered the opinion of the Court.

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The Tennessee statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech. . . .

As a facially content-based restriction on political speech in a public forum, § 2-7—111(b) must be subjected to exacting scrutiny: The State must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." . . .

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Tennessee asserts that its campaign-free zone serves two compelling interests. First, the State argues that its regulation serves its compelling interest in protecting the right of its citizens to vote freely for the candidates of their choice. Second, Tennessee argues that its restriction protects the right to vote in an election conducted with integrity and reliability.

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To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest. While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.

During the colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some. The opportunities that the *viva voce* system gave for bribery and intimidation gradually led to its repeal. . .

Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. . . .

Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. . . .

Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." Often the competition became heated when several such peddlers found an uncommitted or wavering voter. Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. In short, these early elections "were not a very pleasant spectacle for those who believed in democratic government."

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The roots of Tennessee's regulation can be traced back to two provisions passed during this period of rapid reform. Tennessee passed the first relevant provision in 1890 as part of its switch to an Australian system. In its effort to "secur[e] the purity of elections," Tennessee provided that only voters and certain election officials were permitted within the room where the election was held or within 50 feet of the entrance. The Act did not provide any penalty for violation and applied only in the more highly populated counties and cities.

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Today, all 50 States limit access to the areas in or around polling places. . . .

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

. . . . Intimidation and interference laws fall short of serving a State's compelling interests because they "deal with only the most blatant and specific attempts" to impede elections. . . .

. . . . [T]here is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.

. . . . Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that *some* restricted zone around the voting area is necessary to secure the State's compelling interest.

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We do not think that the minor geographic limitation prescribed by § 2-7-111(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." . . .

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*Reversed*.

JUSTICE THOMAS took no part in the consideration or decision of this case.

JUSTICE KENNEDY, concurring.

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. . . . [T]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. That principle can apply here without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote. Voting is one of the most fundamental and cherished liberties in our democratic system of government. The State is not using this justification to suppress legitimate expression. . . .

JUSTICE SCALIA, concurring.

If the category of "traditional public forum" is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from *tradition.* Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, § 2-7-111 does not restrict speech in a traditional public forum, and the "exacting scrutiny" that the plurality purports to apply is inappropriate. Instead, I believe that § 2-7-111, though content based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum. . . .

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Nothing in the public forum doctrine or in this Court's precedents warrants disregard of this longstanding tradition. "Streets and sidewalks" are not public forums *in all places, Greer v. Spock* (1976), and the long usage of our people demonstrates that the portions of streets and sidewalks adjacent to polling places are not public forums *at all times* either. This unquestionable tradition could be accommodated, I suppose, by holding laws such as § 2-7-111 to be covered by our doctrine of permissible "time, place, and manner" restrictions upon public forum speech— which doctrine is itself no more than a reflection of our traditions. The problem with this approach, however, is that it would require some expansion of (or a unique exception to) the "time, place, and manner" doctrine, which does not permit restrictions that are not content neutral*.* It is doctrinally less confusing to acknowledge that the environs of a polling place, on election day, are simply not a "traditional public forum"—which means that they are subject to speech restrictions that are reasonable and viewpoint neutral.

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JUSTICE STEVENS, with whom JUSTICE O’CONNOR and JUSTICE SOUTER join, dissenting.

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Campaign-free zones are noteworthy for their broad, antiseptic sweep. The Tennessee zone encompasses at least 30,000 square feet around each polling place; in some States, such as Kentucky and Wisconsin, the radius of the restricted zone is 500 feet—silencing an area of over 750,000 square feet. Even under the most sanguine scenario of participatory democracy, it is difficult to imagine voter turnout so complete as to require the clearing of hundreds of thousands of square feet simply to ensure that the path to the polling place door remains open and that the curtain that protects the secrecy of the ballot box remains closed.

The fact that campaign-free zones cover such a large area in some States unmistakably identifies censorship of election day campaigning as an animating force behind these restrictions. That some States have no problem maintaining order with zones of 50 feet or less strongly suggests that the more expansive prohibitions are not necessary to maintain access and order. . . .

Moreover, the Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the simple "display of campaign posters, signs, or other campaign materials." Bumper stickers on parked cars and lapel buttons on pedestrians are taboo. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.

The evidence introduced at trial to demonstrate the necessity for Tennessee's campaign-free zone was exceptionally thin. Although the State's sole witness explained the need for special restrictions *inside* the polling place itself, she offered no justification for a ban on political expression *outside* the polling place. . . .

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[T]he fact that campaign-free zones were, as the plurality indicates, introduced as part of a broader package of electoral reforms does not demonstrate that such zones were *necessary.* The abuses that affected the electoral system could have been cured by the institution of the secret ballot and by the heightened regulation of the polling place alone, without silencing the political speech *outside* the polling place. In my opinion, more than mere timing is required to infer necessity from tradition.

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Even if we assume that campaign-free zones were once somehow "necessary," it would not follow that, 100 years later, those practices remain necessary. Much in our political culture, institutions, and practices has changed since the turn of the century: Our elections are far less corrupt, far more civil, and far more democratic today than 100 years ago. These salutary developments have substantially eliminated the need for what is, in my opinion, a sweeping suppression of core political speech.

Although the plurality today blithely dispenses with the need for factual findings to determine the necessity of "traditional" restrictions on speech, courts that have made such findings with regard to other campaign-free zones have, without exception, found such zones unnecessary. . . .

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Tennessee's content-based discrimination is particularly problematic because such a regulation will inevitably favor certain groups of candidates. As the testimony in this case illustrates, several groups of candidates rely heavily on last-minute campaigning. Candidates with fewer resources, candidates for lower visibility offices, and "grassroots" candidates benefit disproportionately from last-minute campaigning near the polling place.

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In this case the same is true: Tennessee's differential treatment of campaign speech furthers no asserted state interest. Access to, and order around, the polls would be just as threatened by the congregation of citizens concerned about a local environmental issue not on the ballot as by the congregation of citizens urging election of their favored candidate. Similarly, assuming that disorder immediately outside the polling place could lead to the commission of errors or the perpetration of fraud, such disorder could just as easily be caused by a religious dispute sparked by a colporteur as by a campaign-related dispute sparked by a campaign worker. In short, Tennessee has failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression.

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In my opinion, the presence of campaign workers outside a polling place is, in most situations, a minor nuisance. But we have long recognized that "`the fact that society may find speech offensive is not a sufficient reason for suppressing it.'" Although we often pay homage to the electoral process, we must be careful not to confuse sanctity with silence. The hubbub of campaign workers outside a polling place may be a nuisance, but it is also the sound of a vibrant democracy.

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