SUPREME COURT OF THE UNITED STATES

No. 90–1056

CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, PETITIONER *v.* MARY REBECCA FREEMAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

[May 26, 1992]

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

The speech and conduct prohibited in the campaign-free zone created by Tenn. Code Ann. §2–7–111 (Supp. 1991) is classic political expression. As this Court has long recognized, ``[d]iscussion 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.''' *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976) (citation omitted). Therefore, I fully agree with the plurality that Tennessee must show that its ```regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.''' *Ante*, at 6 (citations omitted). I do not agree, however, that Tennessee has made anything approaching such a showing.

Tennessee's statutory ``campaign-free zone'' raises constitutional concerns of the first magnitude. The statute directly regulates political expression and thus implicates a core concern of the First Amendment. Moreover, it targets only a specific subject matter (campaign speech) and a defined class of speakers

(campaign workers) and thus regulates expression based on its content. In doing so, the Tennessee statute somewhat perversely disfavors speech that normally is accorded greater protection than the kinds of speech that the statute does not regulate. For these reasons, Tennessee unquestionably bears the heavy burden of demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest.

Statutes creating campaign-free zones outside polling places serve two quite different functions—they protect orderly access to the polls and they prevent last-minute campaigning. There can be no question that the former constitutes a compelling state interest and that, in light of our decision in *Mills* v. *Alabama,* 384 U. S. 214 (1966), the latter does not. Accordingly, a State must demonstrate that the particular means it has fashioned to ensure orderly access to the polls do not unnecessarily hinder last-minute campaigning.

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 opens 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. Indeed, on its face, Tennessee's statute appears informed by political concerns. Although the statute initially established a 100-foot zone, it was later amended to establish a 300-foot zone in 12 of the State's 95 counties. As the State Attorney General observed, ``there is not a rational basis'' for this special treatment, for there is no ``discernable reason why an extension of the

boundary . . . is necessary in'' those 12 counties. Brief in Opposition 4a, Tenn. Att'y Gen. Op. No. 87–185.

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.'' §2–7–111(b). 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.[1] On this record it is far from surprising that the Tennessee Supreme Court—which surely is more familiar with the State's electoral practices and traditions than we are—concluded that the 100-foot ban outside the polling place was not justified by regulatory concerns. This conclusion is bolstered by Tennessee law which indicates that normal police protection is completely adequate to maintain order in the area more than *10* feet from the polling place.[2]

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[1]See 802 S.W.2d 210, 213 (Tenn. 1990) (``The specific testimony of the State's witness about confusion, error, overcrowding, etc. concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls'').

[2]Within the polling place itself, and within 10 feet of its entrance, a prohibition against the presence of nonvoters is justified, in part by the absence of normal police protection. Section 2–7–103(c) provides:

``No policeman or other law-enforcement officer may

Perhaps in recognition of the poverty of the record, the plurality—without briefing, or legislative or judicial factfinding—looks to history to assess whether Tennessee's statute is in fact necessary to serve the State's interests. From its review of the history of electoral reform, the plurality finds that

> ``all 50 States. . .settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this wide-spread and time-tested consensus demonstrates that *some* restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud.'' *Ante*, at 14–15.

This analysis is deeply flawed; it confuses history with necessity, and mistakes the traditional for the indis- pensable. The plurality's reasoning combines two logical errors: First, the plurality assumes that a practice's long life itself establishes its necessity; and second, the plurality assumes that a practice that was once necessary remains necessary until it is ended.[3]

With regard to the first, the 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

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come nearer to the entrance to a polling place than ten feet (10') or enter the polling place except at the request of the officer of elections or the county election commission or to make an arrest or to vote.'' There is, however, no reason to believe that the Tennessee legislature regarded the normal protection against disruptive conduct outside that 10-foot area as insufficient to guarantee orderly access.

[3]I leave it to historians to review the substantive accuracy of the plurality's narrative, for I find more disturbing the plurality's *use* of history.

and by the heightened regulation of the polling place alone, without silencing the political speech *outside* the polling place.[4] In my opinion, more than mere timing is required to infer necessity from tradition.

We have never regarded tradition as a proxy for necessity where necessity must be demonstrated. To the contrary, our election-law jurisprudence is rich with examples of traditions that, though longstanding, were later held to be unnecessary. For example, ``[m]ost of the early Colonies had [poll taxes]; many of the States have had them during much of their histories . . . .'' *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 684 (1966) (Harlan, J., dissenting). Similarly, substantial barriers to candidacy, such as stringent petition requirements, see *Williams* v. *Rhodes*, 393 U. S. 23 (1968), property-ownership requirements, see *Turner* v. *Fouche*, 396 U. S. 346 (1970), and onerous filing fees, see *Lubin* v. *Panish*, 415 U. S. 709 (1974), were all longstanding features of the electoral labyrinth.

In fact, two of our most noted decisions in this area involve, as does this case, Tennessee's electoral traditions. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), which invalidated Tennessee's 1-year residency requirement, is particularly instructive. Tennessee's residency requirement was indis- putably

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[4]The plurality's suggestion that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter," *ante*, at 16, is specious. First, there are obvious and simple means of preserving voter secrecy (*e.g.,* opaque doors or curtains on the voting booth) that do not involve the suppression of political speech. Second, there is no disagreement that the restrictions on campaigning *within the polling place* are constitutional; the issue is not whether the State may limit access to the "area *around the voter*" but whether the State may limit speech in the area *around the polling place*.

``traditional,'' having been in place since 1870. App. in *Dunn* v. *Blumstein*, O.T. 1971, No. 13, p.22. As in this case, the State defended its law on the basis of its interest in ```secur[ing] the freedom of elections and the purity of the ballot box.''' *Id.*, at 23. Again like this case, *Dunn* involved a conflict between two rights—the right to travel and the right to vote. The Court applied strict scrutiny, ruling that residency requirements are ``unconstitutional unless the State can demonstrate that such laws are `*necessary* to promote a *compelling* governmental interest.''' 405 U. S., at 342 (emphasis in original) (citation omitted). Although we recognized that ``[p]reservation of the `purity of the ballot box' is a formidable-sounding state interest,'' *id.*, at 345, we rejected the State's argument that a 1-year requirement was necessary to promote that interest. In doing so, we did not even mention, let alone find determinative, the fact that Tennessee's requirement was more than 100 years old.

In *Baker* v. *Carr*, 369 U. S. 186 (1962), we addressed the apportionment of Tennessee's legislature. The State's apportionment regime had remained unchanged since 1901 and was such that, by the time of trial, ``40% of the voters elect[ed] 63 of the 99 members of the [state] House'' of Representatives. *Id.,* at 253 (Clark, J., concurring). Although, as Justice Frankfurter observed in dissent, ```very unequal' representation'' had been a feature of the Nation's political landscape since colonial times, *id.,* at 307–318, the Court was not bound by this long tradition. Our other cases resemble *Dunn* and *Baker* in this way: Never have we indicated that tradition was synonymous with necessity.

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. See, *e.g.*, *Florida Comm. for Liability Reform* v. *McMillan*, 682 F. Supp. 1536, 1541–1542 (MD Fla. 1988); *Clean-Up '84* v. *Heinrich*, 582 F. Supp. 125 (MD Fla. 1984), aff'd, 759 F.2d 1511 (CA11 1985). Likewise, courts that have invalidated similar restrictions on so-called ``exit polling'' by the news media have, after careful factfinding, also declined to find such prohibitions ``necessary.'' See, *e.g.*, *Firestone* v. *News-Press Publishing Co.*, 538 So. 2d 457, 459 (Fla. 1989) (invalidating Florida's 50-foot zone to the extent that it reaches outside the polling room and noting that ``[a]t the evidentiary hearing, no witnesses testified of any disturbances having occurred within fifty feet of the polling room. . . . The state's unsubstantiated concern of potential disturbance is not sufficient to overcome the chilling effect on first amendment rights.''); *Daily Herald Co.* v. *Munro*, 838 F. 2d 380, 385, n.8 (CA9 1988) (observing with regard to Washington's 300-foot zone that ```[t]here isn't one iota of testimony about a single voter that was upset, or intimidated, or threatened''' (quoting trial transcript)); *National Broadcasting Co.* v. *Cleland*, 697 F. Supp. 1204, 1211–1212 (ND Ga. 1988); *CBS Inc.* v. *Smith*, 681 F. Supp. 794, 803 (SD Fla. 1988). All of these courts, having received evidence on this issue, were far better situated than we are to assess the contemporary necessity of campaign-free zones. All of these courts concluded that such suppression of

expression is unnecessary, suggesting that such zones were something of a social atavism. To my mind, this recent history, developed in the context of an adversarial search for the truth, indicates that, whatever the original historical basis for campaign-free zones may have been, their continued ``necessity'' has not been established. Especially when we deal with the First Amendment, when the reason for a restriction disappears, the restriction should as well.

In addition to sweeping too broadly in its reach, Tennessee's campaign-free zone selectively prohibits speech based on content. Like the statute the Court found invalid in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785 (1978), the Tennessee statute regulates ``the subjects about which persons may speak and the speakers who may address a public issue.'' Within the zone, §2–7–111 silences all campaign-related expression, but allows expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerning issues or candidates not on the day's ballot. Indeed, as I read it, §2–7–111 does not prohibit exit polling, which surely presents at least as great a potential interference with orderly access to the polls as does the distribution of campaign leaflets, the display of campaign posters, or the wearing of campaign buttons. This discriminatory feature of the statute severely undercuts the credibility of its purported law-and-order justification.

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. See App. 22–23. Candidates with fewer resources, candidates for lower visibility offices, and ``grassroots'' candidates benefit

disproportionately from last-minute campaigning near the polling place. See Note, Defoliating the Grassroots: Election Day Restrictions on Political Speech, 77 Geo. L. J. 2137, 2158–2160 (1989) (collecting authorities).

Although the plurality recognizes that the Tennessee statute is content-based, see *ante,* at 5–6, it does not inquire into whether that discrimination itself is related to any pur-ported state interest. To the contrary, the plurality makes the surprising and unsupported claim that the selective regulation of protected speech is justified because, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Ante*, at 16. Yet earlier this Term, the Court rejected an asserted state interest because that interest ``ha[d] nothing to do with the State's'' content-based distinctions among expressive activities. *Simon & Schuster, Inc.* v. *Members of New York Crime Victims Bd.,* 502 U. S. ___, ___ (1991) (slip op., at 13); see also *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 231 (1987). Similarly in *Carey* v. *Brown*, 447 U. S. 455, 464–465 (1980), the Court acknowledged Illinois' interest in ``residential privacy'' but invalidated that State's ban on picketing because its distinction between labor and non-labor picketing could not be ``justified by reference to the State's interest in maintaining domestic tranquility.''

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.

Although the plurality purports to apply ``exacting scrutiny,'' its three marked departures from that familiar standard may have greater significance for the future than its precise holding about campaign-free zones. First, the plurality declines to take a hard look at whether a state law is in fact ``necessary.'' Under the plurality's analysis, a State need not demonstrate that contemporary demands compel its regulation of protected expression; it need only show that that regulation can be traced to a longstanding tradition.[5]

Second, citing *Munro* v. *Socialist Workers Party*, 479 U. S. 189 (1986), the plurality lightens the State's burden of proof in showing that a restriction on speech is ``narrowly tailored.'' In *Munro*, we upheld a Washington ballot-access law and, in doing so, observed that we would not ``requir[e] a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.'' *Id.*, at 194–195. We stated that legislatures ``should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does

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[5]The plurality emphasizes that this case ``force[s] us to reconcile our commitment to free speech with our commitment to other constitutional rights.'' *Ante*, at 6 (citing *Sheppard* v. *Maxwell*, 384 U.S. 333, 361–363 (1966)). Although I agree with the plurality on this matter, this characterization of the controversy does not compel (or even indicate) deference to tradition. Indeed in *Sheppard* itself, the Court did not defer to tradition or established practices, but rather imposed on ``appellate tribunals . . . the duty to make an independent evaluation of the circumstances'' of every case. *Id.*, at 362.

not significantly impinge on constitutionally protected rights.'' *Id.*, at 195–196. I have substantial doubts about the plurality's extension of *Munro*'s reasoning to this case, most fundamentally because I question the plurality's assumption that campaign-free zones do ``not significantly impinge on constitutionally protected rights.'' Not only is this the very question before us, but in light of the sweep of such zones and the vital First Amendment interests at stake, I do not know how that assumption can be sound.

Third, although the plurality recognizes the problematic character of Tennessee's content-based suppressive regulation, *ante*, at 5–6, it nonetheless upholds the statute because ``there is simply no evidence" that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place. *Ante*, at 16. This analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is *on the State.* The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.

In sum, what the plurality early in its opinion calls ``exacting scrutiny,'' *ante,* at 6, appears by the end of its analysis to be neither exacting nor scrutiny. To borrow a mixed metaphor, the plurality's scrutiny is "toothless." *Mathews* v. *Lucas,* 427 U. S. 495, 510 (1976).

Ours is a Nation rich with traditions. Those traditions sometimes support, and sometimes are superseded by, constitutional rules. By tradition, for example, presidential campaigns end on election eve; yet Congress certainly could not enforce that tradition by enacting a law proscribing campaigning on election day. At one time as well, bans on election-day editorial endorsements were traditional in some

States,[6] but *Mills* v. *Alabama*, 384 U. S. 214 (1966), established that such bans are incompatible with the First Amendment.

In *Mills*, we set aside the conviction of a newspaper editor who violated such a ban. In doing so, we declined to accept the State's analogy between the electoral process and the judicial process, and its claim that the State could, on election day, insulate voters from political sentiments and ideas much the same way as a jury is sequestered.[7] We squarely rejected the State's claim that its ban was justified by the need to protect the public ```from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day.''' *Id.*, at 219 (quoting *State* v. *Mills,* 278 Ala. 188, 195–196, 176 So. 2d 884, 890 (1965)). To the contrary, we recognized that it is precisely *on election day* that advocacy and campaigning ``can be most effective.'' *Mills,* 384 U. S., at 219. *Mills* stands for the simple proposition that, tradition notwithstanding, the State does not have a legitimate interest in insulating voters from election-day campaigning. Thus, in light of *Mills*, the fact that campaign-free zones are ``traditional'' tends to undermine, rather than to support, the validity of the Tennessee statute. In short, we should scrutinize the Tennessee statute

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[6]See, *e.g.,* 1913 Mont. Laws §34, pp. 590, 607; 1911 N.D. Laws, ch. 129, §16, pp. 210, 214; 1909 Ore. Laws, ch.3, §34, pp. 15, 29.

[7]``The idea behind [the ban on endorsements] was to prevent the voters from being subjected to unfair pressure and `brainwashing' on the day when their minds should remain clear and untrammeled by such influences, just as this court is insulated against further partisan advocacy once these arguments are submitted.'' Brief for Appellee, O.T. 1965, No. 597, p. 9.

for what it is—a police power regulation that also silences a substantial amount of protected political expression.

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.''' *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988) (citation omitted). 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.

In silencing that sound, Tennessee ``trenches upon an area in which the importance of First Amendment protections is `at its zenith,''' *Meyer* v. *Grant*, 486 U. S. 414, 425 (1988) (citation omitted). For that reason, Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary to protect orderly access to the polls. It has not done so.

I therefore respectfully dissent.