

Burson v. Freeman (1992)

In *Burson v. Freeman*, 504 U.S. 191 (1992), the U.S. Supreme Court upheld a provision of Tennessee's Electoral Code prohibiting the solicitation of votes and the distribution or display of campaign materials within a 100-foot radius from the door of the polling place on election day. "Campaign-free zones" such as this—in effect in forty-seven states and varying in distance from twenty-five feet (Missouri) to 1,000 feet (Hawaii)—ostensibly deter fraud and intimidation by insulating individuals from encounters with campaign workers. And yet, as longtime political activist and campaign worker Mary Rebecca Freeman contended, they also prevent advocates from interacting with and persuading undecided voters as they proceed into the polling place. They raise issues of First Amendment freedoms such as the right of free speech.

American elections, originally conducted in public, were altered dramatically by the widespread adoption of the Australian ballot, a system designed to offer voters the increased secrecy of a standard, official ballot and the privacy of individual polling booths. During a period of national electoral reform at the end of the nineteenth century, and in an effort to preserve the "purity" of its elections, Tennessee switched to the Australian system and, in 1972, enacted a comprehensive code to regulate the conduct of elections—the code that included the statute in question.

Inspired by rumors that the state was going to begin *entirely* prohibiting campaign workers from the grounds of the polling place, Freeman and her attorney challenged the statute as facially unconstitutional—an example of pure content discrimination—singling out political speech, purportedly the most protected form of speech, for restriction in this environment. Furthermore, Freeman explained, the point where she could legally interact with voters at her local polling place (the 101st foot) was in the middle of the street. Still, the state alleged, such zones were necessary to prevent the harassment and intimidation of voters—problems perhaps most pronounced in the American South.

In one of the rare instances when a statute satisfied the requirements of "strict scrutiny" review, Justice Harry A. Blackmun, writing for the Court, reasoned

that restrictions on speech and advocacy of this sort were constitutional because they were enacted and enforced to preserve voting rights. Significantly, Justice Blackmun's reasoning traced the history of electoral reform efforts in the United States (and abroad) and concentrated on the intimidation and fraud that have plagued elections in the past.

Yet, this emphasis on historical evidence is what troubled the dissenters. Past practice, Justice John Paul Stevens argued, does not imply present necessity. Certainly "reforms" of this sort were a wise idea at some point, but the state already had laws on the books prohibiting voter fraud and intimidation. Further, by singling out political speech—and prohibiting it within the 30,000 square feet around each polling place—the state, ironically, disfavored the form of expression it was *most* obliged to preserve. *Burson* presents, then, the difficult balancing of competing rights and concerns often seen in cases about freedom of speech. In a literal and figurative sense, where should the line be drawn that preserves both the right to vote and the right to engage in political discourse?

Brian K. Pinaire

See also: First Amendment.

FURTHER READING

- Dunham, Robert Brett. "Note and Comment: Defoliating the Grassroots: Election Day Restrictions on Political Speech." *Georgetown Law Journal* 77 (August 1989): 2137–96.
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- Pinaire, Brian K. "A Funny Thing Happened on the Way to the Market: The Supreme Court and Freedom of Speech in the Electoral Process." Ph.D. diss., Rutgers University, New Brunswick, NJ, 2003.
- Schurr, Richard A. "*Burson v. Freeman*: Where the Right to Vote Intersects with the Freedom to Speak." *Whittier Law Review* 15 (1994): 869–916.

Burton, Harold H. (1888–1964)

As mayor of Cleveland, U.S. senator, and an associate justice of the U.S. Supreme Court, Harold H. Burton

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The Encyclopedia of Civil Liberties in America, David Schalko and John Vile, eds.