AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Minnesota Voters Alliance v. Mansky, \_\_\_ U.S. \_\_\_** (2018)

*The Minnesota Voters Alliance (MVA) is a nonprofit organization that promotes electoral reforms. In 2010 members announced that they planned when voting to wear buttons imprinted with the words “Please I.D. Me,” as well as the organization’s telephone number and web address. Another MVA member planned to wear a “Tea Party Patriots” shirt. This attire violated a Minnesota law declaring a “political badge, political button, or other political insignia may not be worn at or about the polling place.” Persons insist on wearing such attire are permitted to voting, but they may be subject to a reprimand, a civil penalty or tried for a petty misdemeanor. When members of the MVA ran into trouble voting in the November 2010 election, the organization filed a lawsuit against Joe Mansky, the Election Manager of Ramsey County, claiming the law violated the First and Fourteenth Amendments. After a series of procedural decisions, MVA’s claims were rejected by the local federal district court and that decision was sustained by the Court of Appeals for the Eighth Circuit. MVA appealed to the Supreme Court of the United States.*

*The Supreme Court by a 7-2 vote reversed the appeals court decision. Chief Justice John Roberts held that the word “political” as applied by Minnesota elections officials did not provide sufficient guidance to prevent abuse. All nine justices agreed that states could regulate attire and political activities near or in voting areas. Why do they reach that conclusion? Why does Roberts think the word “political” invites abuse? Justice Sonya Sotomayor would have the Supreme Court of Minnesota determine the meaning of “political.” Is that word capable of constitutional definition in this case? What best explains the judicial line-up?*

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Ica6a35b86fb211e89d59c04243316042&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The First Amendment prohibits laws “abridging the freedom of speech.” Minnesota's ban on wearing any “political badge, political button, or other political insignia” plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property.” Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have “not traditionally been regarded as a public forum” but which the government has “intentionally opened up for that purpose.” In a nonpublic forum, on the other hand—a space that “is not by tradition or designation a forum for public communication”—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum “for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.”

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, “no less than a private owner of property,” retains the “power to preserve the property under its control for the use to which it is lawfully dedicated.” “Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.” Accordingly, our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. . . . We therefore evaluate MVA's First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker's political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota's ban on political apparel is “reasonable in light of the purpose served by the forum”: voting.

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point for evaluating a First Amendment challenge to such a restriction is this Court's decision in *Burson v. Freeman* (1992), which upheld a Tennessee law imposing a 100–foot campaign-free zone around polling place entrances. . . . That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee's determination, supported by overwhelming consensus among the States and “common sense,” that a campaign-free zone outside the polls was “necessary” to secure the advantages of the secret ballot and protect the right to vote. . . .

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. . . [W]e see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as “an island of calm in which voters can peacefully contemplate their choices.” Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.

To be sure, our decisions have noted the “nondisruptive” nature of expressive apparel in more mundane settings. *Tinker v. Des Moines Independent Community School Dist.* (1969). But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

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But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. Here, the unmoored use of the term “political” in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Again, the statute prohibits wearing a “political badge, political button, or other political insignia.” It does not define the term “political.” And the word can be expansive. It can encompass anything “of or relating to government, a government, or the conduct of governmental affairs,” or anything “[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state.” Under a literal reading of those definitions, a button or T-shirt merely imploring others to “Vote!” could qualify.

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For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy—which it continues to hold out as authoritative guidance regarding implementation of the statute. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating “support of or opposition to a ballot question.”

But the next example—“[i]ssue oriented material designed to influence or impact voting,” raises more questions than it answers. What qualifies as an “issue”? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy specifically notes that the “Please I.D. Me” buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit “electoral choice” to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a “Support Our Troops” shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a “# MeToo” shirt, referencing the movement to increase awareness of sexual harassment and assault? . . .

The next broad category in the Election Day Policy—any item “promoting a group with recognizable political views.”  Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an “issue[] confronting voters in a given election.” For instance, the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? . . . In the run-up to the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

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“[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” But the State's difficulties with its restriction go beyond close calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views. It is “self-evident” that an indeterminate prohibition carries with it “[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.” Election judges “have the authority to decide what is political” when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as “political.” . . .

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JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ica6a35b86fb211e89d59c04243316042&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ica6a35b86fb211e89d59c04243316042&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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In holding that a polling place constitutes a nonpublic forum and that a State must establish only that its limitations on speech inside the polling place are reasonable, the Court goes a long way in preserving States' discretion to determine what measures are appropriate to further important interests in maintaining order and decorum, preventing confusion and intimidation, and protecting the integrity of the voting process. The Court errs, however, in declaring Minnesota's political apparel ban unconstitutional under that standard, without any guidance from the State's highest court on the proper interpretation of that state law.

. . . . It is a “cardinal principle” that, “when confronting a challenge to the constitutionality of a ... statute,” courts “will first ascertain whether a construction ... is fairly possible that will contain the statute within constitutional bounds,” and in the context of a challenge to a state statute, federal courts should be particularly hesitant to speculate as to possible constructions of the state law when “the state courts stand willing to address questions of state law on certification.” . . .

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It is at least “fairly possible” that the state court could “ascertain ... a construction ... that will contain the statute within constitutional bounds. Ultimately, the issue comes down to the meaning of the adjective “political,” as used to describe what constitutes a “political badge, political button, or other political insignia.” The word “political” is, of course, not inherently incapable of definition. This Court elsewhere has encountered little difficulty discerning its meaning in the context of statutes subject to First Amendment challenges. . . .

Even here, the majority recognizes a substantial amount of speech that “clear [ly]” qualifies as “political,” such as “items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating support of or opposition to a ballot question.” The fact that the majority has some difficulty deciphering guidance to [the Minnesota law] that also proscribes “[i]ssue oriented material designed to influence or impact voting” and “[m]aterial promoting a group with recognizable political views,” does not mean that the statute as a whole is not subject to a construction that falls within constitutional bounds. As this Court has made clear in the context of the First Amendment overbreadth doctrine, the “mere fact” that petitioners “can conceive of some impermissible applications of [the] statute is not sufficient to render it” unconstitutional. That is especially so where the state court is capable of clarifying the boundaries of state law in a manner that would permit the Court to engage in a comprehensive constitutional analysis. 

Furthermore, the Court also should consider the history of Minnesota's “implementation” of the statute in evaluating the facial challenge here. That history offers some assurance that the statute has not been interpreted or applied in an unreasonable manner. There is no evidence that any individual who refused to remove a political item has been prohibited from voting, and respondents maintain that no one has been referred for prosecution for violating the provision. Since the political apparel ban was enacted in the late 19th century, this is the first time the statute has been challenged on the basis that certain speech is not “political.” On the whole, the historical application of the law helps illustrate that the statute is not so “indeterminate” so as to “carr[y] with it ‘[t]he opportunity for abuse.’ ”

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