A TIME FOR CHOOSING AND A TIME FOR FREE SPEECH: *MINNESOTA VOTERS ALLIANCE V. MANSKY* AND THE CONSTITUTIONALITY OF ELECTION DAY APPAREL BANS

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ABSTRACT

In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the U.S. Supreme Court held that Minnesota's Election Day polling place political apparel ban violated the First Amendment. Applying a nonpublic forum analysis, Chief Justice Roberts wrote for the Court; he found that, although the ban served a permissible objective, the policy was unreasonable in that it was too subjective by failing to sufficiently define the types of apparel that are prohibited. In a critical analysis of the decision, we find that the Court was correct to find the statute unconstitutional for its lack of clarity in defining the word *political*. However, we also argue that the Court's assessment that every polling place always constitutes a nonpublic forum lacked an understanding of the complexity that is presented by different types of polling places. Furthermore, contrary to the opinion of the Court, we also assert that the First Amendment protects the wearing at a polling place during voting hours on Election Day any political apparel—including apparel displaying logos or names of candidates for elective office—unless the person wearing the apparel is either doing so with intent to intimidate other voters or is being materially and substantially disruptive of the electoral process. Ultimately, we contend that there is a greater threat to both voting rights and the freedom of expression with the Court's standard than what we propose here.

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INTRODUCTION

In *Minnesota Voters Alliance v. Mansky*,[1] the U.S. Supreme Court held by a vote of seven to two that a state's Election Day political apparel ban violated the Free Speech Clause of the First Amendment.[2] Using a forum analysis,[3] Chief Justice John Roberts, writing for the majority, found that a polling place on Election Day constitutes a nonpublic forum.[4] In applying a test for nonpublic forums, the Court held that banning voters from wearing specific types of expressive apparel or accessories while inside a polling place was a reasonable state goal.[5] According to Chief Justice Roberts, at a polling place on Election Day, "[i]t is a time for choosing, not campaigning."[6] However, the Court went on to declare that the state's ban on "political" apparel was unreasonable because of the lack of clarity in that subjective standard.[7] Justice Sonia Sotomayor penned a dissent—joined by Justice Stephen Breyer—where she argued that the case should have been certified to the Minnesota Supreme Court to specifically define what the relevant statute prohibited.[8]

We engage in a critical analysis of the opinion of the Court in *Minnesota Voters Alliance*. We begin by recounting the relevant facts of the case in Part I of this Article. After examining the Court's reasoning on forum analysis, Part II contends that the Court in *Minnesota Voters Alliance* glossed over the complexity of the type of forum that such a location constitutes. In other words, while we generally agree with the Court that the interior of a polling place during voting hours on Election Day is a nonpublic forum, that is not always the case; even when some parts of a building that serve as a polling place may be a nonpublic forum, not all portions of a building that serve as a polling place will always constitute a nonpublic forum.

In Part III, we explain why we believe that the Court was correct to find the statute unconstitutional for its lack of clarity in defining the word *political*, but we also argue that the Constitution protects

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[1] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

[2] *See id.*; *see also Minnesota Voters Alliance v. Mansky*, OYEZ, https://www.oyez.org/cases/2017/16-1435 [https://perma.cc/J72H-PQYF].

[3] *See Minn. Voters All.*, 138 S. Ct. at 1885 (citing Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992)).

[4] *See id.* at 1886.

[5] *See id.* at 1886–88 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985)).

[6] *Id.* at 1887.

[7] *See id.* at 1888, 1889–90, 1891.

[8] *See id.* at 1893 (Sotomayor, J., dissenting).

the freedom of expression more than the Court did in its ruling; we find this to be the case, in part, because of the Court's overly narrow definition of the word *political* in this context.

In Part IV, we assert that the First Amendment protects any political apparel worn at a polling place during voting hours on Election Day—including apparel displaying names or logos of candidates for elective office, political parties, ballot issues, and organizations—unless the person wearing the apparel is either doing so with intent to intimidate other voters or is being materially and substantially disruptive of the electoral process. Put another way, a polling place on Election Day is a time for choosing, but it is also a time for free speech.

I. THE HISTORY OF MINNESOTA'S BAN ON POLITICAL APPAREL AT POLLING PLACES ON ELECTION DAY AND RELEVANT LOWER COURT RULINGS

As explained by the Court in *Minnesota Voters Alliance*, all fifty states plus the District of Columbia have laws that limit expression inside and around polling places on Election Day.[9] Minnesota, like most states, has had restrictions in place that prohibit this type of activity for more than 100 years.[10] The law at issue in *Minnesota Voters Alliance* has multiple parts,[11] but the portion at issue before the U.S. Supreme Court was the third sentence of Minnesota Statute section 211B.11(1),[12] which states that a "political badge, political button, or other political insignia may not be worn at or about the polling place."[13] The restriction in question is applied inside a polling place, thus not limiting expressive activities that occur outdoors.[14] Whether or not anyone at a polling place on Election Day was in violation of the law at issue was decided by state election "judges" who are temporarily hired by Minnesota to work at polling places during elections.[15]

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[9] *See id.* at 1883 (majority opinion); *see also* Kimberly J. Tucker, *"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. MARSHALL L. REV. 61, 62–63 (2006) (describing how all fifty states and the District of Columbia regulate their election process).

[10] *See Minn. Voters All.*, 138 S. Ct. at 1883.

[11] *See id.*

[12] *See id.*

[13] *Id.*

[14] *See id.*

[15] *See id.*

As designed, the law required election judges to ask anyone wearing forbidden items to cover them or remove them.[16] If someone refused to comply with this request, the alleged offender was still permitted to vote (assuming they were otherwise eligible to do so), but the election judge was required to inform the person that incident would be documented and submitted to the Minnesota Office of Administrative Hearings.[17] If that office found at a hearing that a violation of the law occurred, it could "issue a reprimand or impose a civil penalty."[18] The Minnesota Office of Administrative Hearings could also refer the case to a state prosecutor, and if one was convicted of violating the law, it is to be considered a misdemeanor offense, whereby one could face a fine of up to $300.[19] A total of thirty-three states and the District of Columbia have laws prohibiting voters from wearing some sort of apparel or accessory at a polling place on Election Day.[20] More specifically, several states have laws that, like Minnesota, restrict the wearing of political buttons, shirts, and hats in polling places on Election Day.[21]

Prior to the November 2010 election, the Minnesota Voters Alliance (MVA) filed a federal lawsuit claiming that the state's political apparel ban was unconstitutional.[22] The MVA is a "[n]onpartisan organization focusing primarily on election integrity, research, voter education and advocacy," and it "seek[s] to increase voter participation in the election process and raise public awareness of important issues related to elections."[23] According to the MVA, it "is not affiliated with any political party and does not endorse any candidates," but the organization "reserve[s] the right to associate with any candidate, office holder or party who share [their] views on election integrity matters."[24] One of the eventual co-plaintiffs was Minnesotan Andrew Cilek, the founder of MVA and its executive director since 2004.[25] MVA was joined in its lawsuit by other organizations, including Minnesota Majority and Minnesota Northstar Tea Party Patriots; all of them were part of an association

[16] *See id.*
[17] *See id.*
[18] *See id.*
[19] *See id.*
[20] *See id.* at 1892–93.
[21] *See* Tucker, *supra* note 9, at 63.
[22] *See Minn. Voters All.*, 138 S. Ct. at 1884 tbl.1.
[23] *See Mission*, MINN. VOTERS ALLIANCE, https://www.mnvoters.org/about [https://perma.cc/4KCF-45HR].
[24] *See id.*
[25] *See Minn. Voters All.*, 138 S. Ct. at 1884; *Mission*, *supra* note 23.

called the Election Integrity Watch (EIW).[26] Organizations that were a part of EIW intended to have their members wear to the polls in 2010 buttons that stated "Please I.D. Me"[27] in what appears to have been a form of protest against the state's lack of a voter I.D. law.[28] One of the plaintiffs also wanted to wear a "Tea Party Patriots" shirt when voting.[29] The organization and individuals comprising EIW asked a federal district court to enjoin enforcement of the state's restriction on Election Day apparel,[30] but the Court refused to grant a temporary restraining order before Election Day in 2010.[31]

The relevant Minnesota law did not define the word *political*.[32] After the MVA filed its lawsuit against the state, the Minnesota Secretary of State disseminated an "Election Day Policy" (developed by officials in two different Minnesota counties) to election judges, to give them more direction on what the political apparel ban prohibited.[33] According to the policy, the relevant law banned several types of expressive apparel at the polls on Election Day. First, no one was allowed to display apparel with names of political parties that existed in the state, including "the Republican, [Democratic-Farmer-Labor], Independence, Green or Libertarian parties."[34] Second, the law outlawed "[a]ny item including the name of a candidate at any election."[35] Third, the law disallowed "[a]ny item in support of or opposition to a ballot question at any election."[36] Fourth, proscribed was apparel with "[i]ssue oriented material designed to influence or impact voting."[37] For this fourth example, the policy specifically cited "Please I.D. Me" buttons as being banned.[38] Finally, the policy advised that the statute barred the display of "[m]aterial promoting a group with recognizable political views."[39] For the fifth example,

[26] *See* Minn. Majority v. Mansky, 849 F.3d 749, 751 (8th Cir. 2017).

[27] *See Minn. Voters All.*, 138 S. Ct. at 1884.

[28] *See* Laura Yuen, *Judge: Group Can't Wear "Please I.D. Me" Buttons*, MPR NEWS (Nov. 1, 2010, 6:28 PM), https://www.mprnews.org/story/2010/11/01/judge-no-buttons [https://perma.cc/ZR67-9BKR].

[29] *See Minn. Voters All.*, 138 S. Ct. at 1884.

[30] *See* Minn. Majority v. Mansky, 2010 U.S. Dist. LEXIS 116240, at *4 (D. Minn. Nov. 1, 2010).

[31] *See id.* at *10; Yuen, *supra* note 28.

[32] *See Minn. Voters All.*, 138 S. Ct. at 1888.

[33] *See id.* at 1884.

[34] *Id.* (alteration in original).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

items representing the Tea Party or MoveOn.org were cited as specific types of promotional apparel that was prohibited.[40]

On Election Day in November 2010, several individual members of the EIW alliance wore relevant apparel to the polls and experienced problems when voting.[41] One voter, Jeff Davis, was not allowed to wear a Tea Party shirt and a "Please I.D. Me" button at his polling place.[42] Another voter, Dan McGrath, wore the same type of "Please I.D. Me" button. When he refused to cover it, an election judge recorded his name.[43] Similarly, another voter who refused to remove or conceal his Tea Party shirt was stopped while voting and cautioned that failure to comply could result in prosecution.[44] Finally, the aforementioned Andrew Cilek wore both a Tea Party shirt and a "Please I.D. Me" button to the polls.[45] He was twice disallowed to vote by election judges, and it took over five hours at the polls before he was allowed to cast his ballot.[46]

In other cases, though, voters with similar apparel were permitted to vote without incident. For instance, Dorothy Fleming, another plaintiff in the case, wore a "Please I.D. Me" button but was never asked to take it off or conceal it.[47] Some voters were permitted to cast their ballots while wearing attire representing the Sierra Club (which endorses candidates for public office) and Minnesota Common Cause (which lobbies for electoral reforms).[48] Some members of EIW claimed they wished to wear political apparel to vote on Election Day but declined to do so out of fear of potential prosecution.[49]

Legal action continued after the election passed, with the EIW coalition maintaining that the law was unconstitutional and that its application to voters during the 2010 election violated the First Amendment.[50] The U.S. District Court granted the state's motion to dismiss in 2011.[51] The Court of Appeals for the Eighth Circuit

[40] *Id.*

[41] *See* Minn. Majority v. Mansky, 708 F.3d 1051, 1055 (8th Cir. 2013).

[42] *See* Minn. Majority v. Mansky, 789 F. Supp. 2d 1112, 1118 (D. Minn. 2011).

[43] *See id.* at 1118–19.

[44] *See id.* at 1119.

[45] *See id.*; Andrew Chung, *Supreme Court Throws out Minnesota Ban on Voter Political Apparel*, REUTERS (June 14, 2018), https://www.reuters.com/article/us-usa-court-apparel/supreme-court-throws-out-minnesota-ban-on-voter-political-apparel-idUSKBN1JA23A [https://perma.cc/7N6Y-VTPD].

[46] *See Minn. Majority*, 789 F. Supp. 2d at 1119; Chung, *supra* note 45.

[47] *See Minn. Majority*, 789 F. Supp. 2d at 1119.

[48] *See id.*

[49] *See* Minn. Majority v. Mansky, 849 F.3d 749, 751 (8th Cir. 2017).

[50] *See* Minn. Voters All. v. Mansky, 138 S. Ct 1876, 1884 (2018).

[51] *See Minn. Majority*, 789 F. Supp. 2d at 1117.

affirmed this decision in part and reversed it in part in 2013.[52] After the district court granted a summary judgment for the state, the case was appealed again to the Eighth Circuit, which affirmed in 2017.[53] The U.S. Supreme Court then granted certiorari in 2017[54] and found a First Amendment violation in 2018, thus reversing the Court of Appeals.[55]

II. POLLING PLACES ON ELECTION DAY CONSTITUTE NONPUBLIC FORUMS GENERALLY (ASSUMING THE DEFINITION OF "POLLING PLACE" IS NARROWLY CONSTRUED)

The Constitution's First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech."[56] For nearly a century, this right has been held by the U.S. Supreme Court to be incorporated by the Fourteenth Amendment to apply to state governments.[57] Since Minnesota's ban affected a particular setting—the inside of a polling place on Election Day—the Court employed its forum analysis for the freedom of expression.[58] Writing for the Court, Chief Justice Roberts recounted how there are multiple categories at issue with forum analysis: "Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums."[59]

In traditional public forums—which include "parks, streets, sidewalks, and the like"[60]—it is the case that "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."[61] Since the Court's decision in *Hague v. Committee for Industrial Organization*,[62] the First Amendment requires such significant protections for the freedom of expression in a traditional public forum because these

[52] *See* Minn. Majority v. Mansky, 708 F.3d 1051, 1054 (8th Cir. 2013).
[53] *See Minn. Majority*, 849 F.3d at 751.
[54] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 446 (2017).
[55] *See Minn. Voters All.*, 138 S. Ct. at 1892.
[56] U.S. CONST. amend. I.
[57] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").
[58] *See Minn. Voters All.*, 138 S. Ct. at 1885 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

spaces "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[63] As explained by First Amendment scholar Harry Kalven, "[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer . . . ."[64]

In contrast, the Court described designated public forums as "spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose.'"[65] Examples of designated public forums would include municipal auditoriums or classrooms in public schools and public universities.[66] These are facilities that the government is not required generally to have open to the public all of the time, as is typically the case with traditional public forums.[67] However, if one of these designated spaces is opened by the government for expressive activities, identical requirements apply as is the case for traditional public forums.[68]

Finally, there are nonpublic forums, which are spaces that are "not by tradition or designation a forum for public communication."[69] Examples of nonpublic forums in past Supreme Court cases include a public school's internal mail facilities,[70] military bases,[71] and county jails,[72] but many more localities qualify as such forums, as most government property is classified as constituting nonpublic forum space.[73] For nonpublic forums, "the government has much more flexibility to craft rules limiting speech"[74] because the "government may reserve such a forum 'for its intended purposes, communicative

[63] *Id.* at 515.

[64] Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 11–12.

[65] *Minn. Voters All.*, 138 S. Ct. at 1885 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)).

[66] *See* Abner S. Greene, *The Concept of the Speech Platform:* Walker v. Texas Division, 68 ALA. L. REV. 337, 342 (2016).

[67] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing Widmar v. Vincent, 454 U.S. 263, 269 (1981)).

[68] *See Minn. Voters All.*, 138 S. Ct. at 1885.

[69] *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

[70] *See Perry Educ. Ass'n*, 460 U.S. at 48.

[71] *See* Greer v. Spock, 424 U.S. 828, 838 (1976).

[72] *See* Adderley v. Florida, 385 U.S. 39, 47 (1966).

[73] *See* Robert A. Sedler, *The "Law of the First Amendment" Revisited*, 58 WAYNE L. REV. 1003, 1065 (2013).

[74] *Minn. Voters All.*, 138 S. Ct. at 1885 (citing *Perry Educ. Ass'n*, 460 U.S. at 46).

or otherwise.'"[75] Nevertheless, within a nonpublic forum, the government must still respect free speech rights under the First Amendment.[76] According to Chief Justice Roberts in *Minnesota Voters Alliance*, this means that any regulation on speech in this context must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[77] Unlike traditional public forums and designated public forums, where content restrictions are permissible only if they pass strict scrutiny, Chief Justice Roberts explained in *Minnesota Voters Alliance* that "government may impose some content-based restrictions on speech in nonpublic forums."[78]

In *Minnesota Voters Alliance*, Chief Justice Roberts applied a forum analysis developed by the Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[79] where the Court outlined the three relevant forum categories and the rules that apply to each.[80] In fact, Chief Justice Roberts quoted from *Perry Education Ass'n* when describing these three categories in *Minnesota Voters Alliance*,[81] and his understanding of those categories comports with the Court's decision in *Perry Education Ass'n*. In no uncertain terms, Chief Justice Roberts then proclaimed for the Court that "[a] polling place in Minnesota qualifies as a nonpublic forum."[82] He reasoned for the Court that "at least on Election Day," a polling place is "government-controlled property set aside for the sole purpose of voting."[83] After citing the Minnesota statute that limits activities at polling places on Election Day,[84] Chief Justice Roberts declared that such spaces were nonpublic forums because "[r]ules strictly govern who may be present, for what purpose, and for how long."[85]

Although the sidewalks and streets outside of a polling place may constitute a traditional public forum,[86] it is reasonable for the Court to declare that indoor polling places are generally nonpublic forums

[75] *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

[76] *Id.*

[77] *See id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

[78] *See id.* at 1885–86 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009); Cornelius v. NAACP Legal Def. Educ. Fund, 473 U.S. 788, 806–11 (1985); Greer v. Spock, 424 U.S. 828, 831–33, 838–39 (1976); Lehman v. Shaker Heights, 418 U.S. 298, 303–04 (1974)).

[79] *See Minn. Voters All.*, 138 S. Ct. at 1885 (citing *Perry Educ. Ass'n*, 460 U.S. at 46).

[80] *See Perry Educ. Ass'n*, 460 U.S. at 45–46.

[81] *See Minn. Voters All.*, 138 S. Ct. at 1885.

[82] *Id.* at 1886.

[83] *Id.*

[84] MINN. STAT. § 204C.06 (2011).

[85] *Minn. Voters All.*, 138 S. Ct. at 1886.

[86] *See* Burson v. Freeman, 504 U.S. 191, 196 (1992) (plurality opinion) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

on Election Day during voting hours. Putting aside substantial concerns about how the Court's forum analysis provides the government with a significant amount of power in determining what shall constitute a public, designated, or nonpublic forum,[87] Chief Justice Roberts was right to conclude that this type of space on Election Day should generally be considered a nonpublic forum according to the Court's precedents. Chief Justice Roberts, though, did not go into detail on the specific requirements of the relevant Minnesota statute governing conduct at the polls;[88] that statute lends itself to a conclusion that the polling place is, generally speaking, a nonpublic forum.[89]

Titled "Conduct in and Near Polling Places," Minnesota Statute section 204C.06 declares that "[a]n individual shall be allowed to go to and from the polling place for the purpose of voting without unlawful interference."[90] The statute goes on to limit who may stand within 100 feet of the building during voting hours on Election Day,[91] and it restricts who may enter a polling place during voting hours to certain government and election officials, poll workers, ballot challengers, voters while casting their ballots, voters while registering to vote, and persons assisting disabled voters or voters unable to read English.[92] "[E]lection judges may appoint a sergeant-at-arms" to keep order and provide needed assistance,[93] but if not "summoned by an election judge" for the specific purpose of restoring the peace, no other law enforcement officer may be present "in a polling place or . . . within 50 feet of [an] entrance."[94] Election officials are required to wear identification badges while at the polling place.[95] Members of the news media may be present to observe during voting hours, but they are required to present photo identification and a media credential to an election judge;[96] media representatives are also under strict requirements obliging them to refrain from approaching within six feet of a voter, conversing with

[87] *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 188 (1992); Eric D. Strand, *The Supreme Court's Misapplication of Public Forum Doctrine Creates Governmental Veto of Political Speech by Ballot-Qualified Candidates*—Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998)*, 73 TEMP. L. REV. 331, 376 (2000).

[88] *See Minn. Voters All.*, 138 S. Ct. at 1886.

[89] *See id.*

[90] MINN. STAT. § 204C.06(1) (2011).

[91] *See id.*

[92] *See id.* § 204C.06(2)(a).

[93] *Id.* § 204C.06(5).

[94] *Id.* § 204C.06(6).

[95] *See id.* § 204C.06(2)(c).

[96] *See id.* § 204C.06(8).

any voter in the polling place, making a list of voters, or interfering with voting in any way.[97]

These restrictions on who may be present, for how long, and for what purposes are very different from the open access that citizens have to traditional public forums, such as parks or sidewalks—places "generally open for assembly and debate"[98]—where people are normally free to enter, stay, and leave at will. These restrictions also go well beyond the rules one would have to follow if the public is permitted "general access" to a classroom or auditorium for a speech, debate, forum, or similar activity,[99] meaning such a polling place is also *not* generally a designated public forum. Instead, access to the polling place on Election Day is on a "selective access" basis.[100] Thus, on the whole, a polling place on Election Day, particularly during voting hours, would qualify as a nonpublic forum in Minnesota.

The fact that all fifty states today (and for decades) have similar restrictions on who may be present, for how long, and for what purposes[101] suggests that, in general, polling places on Election Day are nonpublic forums throughout the country. In *Minnesota Voters Alliance*, Chief Justice Roberts explained that the reasoning behind these restrictions is the well-documented history of "chaotic" activity, including crowds of people who would "gather to heckle and harass voters who appeared to be supporting the other side" before the introduction of the secret ballot.[102]

Putting the relevant history of voting access aside (which we will explore more in Part IV), the reasonableness of restrictions on expression at polling places during voting hours on Election Day cannot be understood as a one-size-fits-all approach. Put another way, not every polling place looks the same. A sampling of polling places in just the state of Minnesota reveals that they are located in a variety of places, including city hall buildings,[103] community and recreation centers,[104] public schools,[105] public colleges and

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[97] *Id.*

[98] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983).

[99] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998).

[100] *See id.*

[101] *See* Minn. Voters All. v. Mansky, 138 S. Ct 1876, 1883 (2018); Burson v. Freeman, 504 U.S. 191, 206 (1992) (plurality opinion).

[102] *See Minn. Voters All.*, 138 S. Ct. at 1882–83.

[103] *See Polling Places*, RED WING, https://www.red-wing.org/234/Polling-Places [https://perma.cc/Q7ZG-DTVX].

[104] *See id.*

[105] *See id.*

universities,[106] public libraries,[107] courthouses,[108] apartment complex community rooms,[109] fire stations,[110] police stations,[111] and churches.[112] This diversity of polling location type is not unique to Minnesota, as it occurs in many states throughout the country.[113]

If "polling place" is not strictly and narrowly defined, it could create an unreasonably large area in an otherwise public space as a nonpublic forum. Indeed, as the Court stated in *United States v. Grace*,[114] a traditional public forum "will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression."[115] This could also include public buildings that are otherwise designated public forums.[116] Put another way, if the "polling place" is only one area or room of an otherwise large public building—such as a high school, a university student union, a courthouse, or a city hall—and if the relevant law does not make any distinction between the polling place area and the remainder of the building, it could result in areas that should be traditional or designated public forums being turned into nonpublic forums. A law restricting expression in a polling place on Election Day may be overbroad if it applies to portions of a building where there is no voting, voter registration, or lines for people waiting to engage in these activities.[117]

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[106] *See City of Moorhead Polling Locations for the 2019 Special Election*, MOORHEAD, https://www.cityofmoorhead.com/home/showdocument?id=2464 [https://perma.cc/6SRT-N8UP]; *Polling Places*, *supra* note 103.

[107] *See Polling Places*, *supra* note 103.

[108] *See Township and City Information*, BECKER CTY., https://www.co.becker.mn.us/dept/auditor_treasurer/twp_city_info.aspx?Entity=00&Info=POLL [https://perma.cc/TV9S-XGHZ].

[109] *See Polling Places*, *supra* note 103.

[110] *See Polling Locations*, SHAKOPEE, https://www.shakopeemn.gov/government/mayor-city-council/elections/polling-locations [https://perma.cc/5A9Q-7LD5].

[111] *See id.*

[112] *See City of Apple Valley 2018 Polling Places*, APPLE VALLEY, http://www.ci.apple-valley.mn.us/DocumentCenter/View/73/Polling-Places?bidId= [https://perma.cc/HXH4-V9PR]; *City of Moorhead Polling Locations for the 2019 Special Election, supra* note 106; *Polling Places*, *supra* note 103.

[113] *See* Jonah Berger et al., *Contextual Priming: Where People Vote Affects How They Vote*, 105 PNAS 8846, 8848 (2008); Abraham M. Rutchick, *Deus Ex Machina: The Influence of Polling Place on Voting Behavior*, 31 POL. PSYCHOL. 209, 214 (2010); Eric Chemi, *The Place Where You Vote Affects What You'll Vote For*, CNBC (Nov. 8, 2016, 8:39 AM), https://www.cnbc.com/2016/11/08/my-polling-place-your-voting-location-affects-how-you-vote.html [https://perma.cc/Z5FD-3USR].

[114] United States v. Grace, 461 U.S. 171 (1983).

[115] *Id.* at 180.

[116] *See id.* at 179–80.

[117] *See id.* at 180–81.

For example, if a polling place is in part of city hall, and a person arrives not to vote but to pay a relevant bill or to pay taxes, could that person be punished for walking past the polling area while wearing a cap with a sports team's logo, assuming there is a stadium referendum on the ballot? For another illustration, if a polling place is in part of a public school, what if a parent arrives not to vote but to pick up a child? If the parent walks past the polling area while wearing a T-shirt bearing the name of the local high school, and there is a school referendum on the ballot, could the parent be punished? If the polling place is a public university's student union, could a student who wears a T-shirt bearing the logo of an organization (assuming the organization endorses candidates or takes stances on issues of public policy) be punished for walking past the polling place to the organization's meeting or while attending the meeting in the same building? For a final problematic hypothetical, imagine a polling place located at a church and a parishioner not planning to vote enters the church while wearing a crucifix. If there are issues related to religious freedom that were discussed by candidates for office on the ballot, would that parishioner be subject to state prosecution under Minnesota's law for refusing to remove or cover the crucifix? We will contend in Part III that examples like this are still constitutionally problematic for voters waiting in line at the polls, but they are especially egregious for persons who plan to enter a building housing a polling place with the intention of going there for some reason unrelated to the election.[118] These are not persons who have arrived to vote or even campaign at the polls, but their expressive activities could be restricted and even prosecuted according to the wording of the relevant Minnesota statute.[119] For this reason, the specific definition of "polling place" should be narrowly construed, and it cannot, as a general matter, simply be the entire building where voters are casting their ballots in the Court's forum analysis.

III. A BLANKET BAN ON POLITICAL APPAREL AT A POLLING PLACE IS UNREASONABLE AND UNCONSTITUTIONAL

Setting aside the Court's glossing over of the complexities of which parts of buildings containing polling places constitute nonpublic versus other types of forums, the Court went on in *Minnesota Voters*

[118] *See* Minn. Voters All. v. Mansky, 138 S. Ct 1876, 1885–86 (2018).
[119] *See id.* at 1883, 1886.

Alliance to examine the constitutionality of prohibitions on voters wearing expressive apparel or accessories to polling places on Election Day. Chief Justice Roberts here harkened back to *Burson v. Freeman*,[120] a case where the Court upheld a ban on active solicitation 100 feet from entrances to polling places in Tennessee.[121] The regulation of expression in and around polling places was a constitutional question left open from *Mills v. Alabama*,[122] where the Court struck down a law that prohibited publishing newspaper editorials on Election Day that urged readers to vote in a certain way.[123] In *Mills*, the Court specifically noted that its decision "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."[124] In *Burson*, a plurality opinion sustained the solicitation ban outside of Tennessee polling places, in part, because of the history of partisans being able to bribe or intimidate voters before the establishment of the secret ballot in the United States.[125] As the *Burson* Court described, "Approaching the polling place under this system was akin to entering an open auction place. . . . Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition."[126] For these reasons, the Court in *Burson* concluded as follows:

> [T]he exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.[127]

Thus, even under the *Burson* Court's employment of strict scrutiny (because the solicitation ban took place outside in a traditional public

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[120] *See id.* at 1882, 1886 (citing Burson v. Freeman, 504 U.S. 191, 193–94 (1992) (plurality opinion)).

[121] *See Burson*, 504 U.S. at 211.

[122] *See* Mills v. Alabama, 384 U.S. 214 (1966).

[123] *See id.* at 215.

[124] *Id.* at 218.

[125] *See Burson*, 504 U.S. at 193, 206, 211.

[126] *Id.* at 202.

[127] *Id.* at 211.

forum),[128] the Court found the speech restrictions at issue to be constitutional due to the past electoral dishonesty in and around polling places before the use of the secret ballot.[129]

The *Minnesota Voters Alliance* Court relied heavily on *Burson* when explaining why states generally have power to restrict the apparel that voters wear to the polls on Election Day. In *Minnesota Voters Alliance*, Chief Justice Roberts cited *Burson*'s recounting of electoral history[130] before emphasizing how in *Burson* the Court stressed "the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past."[131] Writing for the Court, Chief Justice Roberts cited *Burson* several more times.[132] Commenting specifically on Minnesota's decision to restrict apparel choices at polling places on Election Day,[133] Chief Justice Roberts referred to *Burson* to sustain the following argument: "Other States can see the matter differently, and some do. The majority, however, agree with Minnesota that at least some kinds of campaign-related clothing and accessories should stay outside. That broadly shared judgment is entitled to respect."[134]

However, the *Minnesota Voters Alliance* Court placed too much reliance on *Burson*. As even Chief Justice Roberts noted in *Minnesota Voters Alliance*, the *Burson* Court dealt with a Tennessee prohibition on "active campaigning" by persons approaching voters, while the Minnesota law targeted "'passive, silent' self-expression by voters themselves when voting."[135] As a general matter, the wearing of passive apparel is not the equivalent of approaching a voter and interacting with them for the express purpose of intimating them, trying to buy their vote, or even making statements to persuade them;[136] furthermore, these latter scenarios seem much less likely after the installation of the secret ballot. This is reason enough for offering more protection to the expression at issue in *Minnesota Voters Alliance*. In *Tinker v. Des Moines Independent Community School District*, the Court held that punishing students for wearing a

[128] *See id.* at 196, 198.

[129] *See id.* at 206, 211.

[130] *See* Minn. Voters All. v. Mansky, 138 S. Ct 1876, 1882–83 (2018) (first citing *Burson*, 504 U.S. at 191, 202, 203–05 (plurality opinion); then citing *id.* at 214–15 (Kennedy, J., concurring)).

[131] *Id.* at 1886 (citing *Burson*, 504 U.S. at 200–04 (plurality opinion)).

[132] *See id.* at 1886–88, 1892.

[133] *See id.* at 1888.

[134] *Id.*

[135] *Id.* at 1887.

[136] *See Minn. Voters All.*, 138 S. Ct. at 1887 (first quoting Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987); then citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

"silent, passive" armband in school was "offensive to the Constitution's guarantees" under the First Amendment.[137] As we will explain in Part V, the standard the Court employed in *Tinker* should be used for evaluating restrictions on apparel at polling places during voting hours on Election Day.

Nevertheless, Chief Justice Roberts found "no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place."[138] Even with regard to an apparel ban, he reasoned that "[c]asting 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."[139] Thus, he held for the Court that a "State may reasonably decide that the interior of the polling place should reflect that distinction."[140]

Chief Justice Roberts's analogies are poor ones to prove his point in this context, however. For instance, there are significant differences between voting in an election and the return of a jury's verdict. When a jury returns a verdict, it is reporting its decision after deliberations and vote counting, and its verdict takes mere seconds to report. Relatively few people are required (or are even physically able) to be present in a courtroom at any given moment.[141] Particularly when deciding a criminal case, where victims may be present and where a defendant's life, liberty, or property may hang in the balance, there can be an expected level of decorum that allows for restrictions on expression during the brief moments when the verdict is announced in a room with doors that close it off from the rest of the courthouse.[142]

That is quite dissimilar to a polling place on Election Day, where voting occurs over an extended period of hours (sometimes more than

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[137] *Tinker*, 393 U.S. at 514.

[138] *Minn. Voters All.*, 138 S. Ct. at 1887.

[139] *Id.*

[140] *Id.*

[141] *See, e.g.*, FED R. CRIM. P. 43(a) (requiring defendant's presence only in very limited circumstances during a criminal proceeding); *The Players in a Trail Courtroom*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/guidetoazcourts/The-Players-in-a-Trial-Courtroom [https://perma.cc/N4FF-P94B] (noting the few key parties required during a trial in Arizona state court).

[142] *See* Mezibov v. Allen, 411 F.3d 712, 717 (6th Cir. 2005) (explaining that courts have been reluctant to allow the First Amendment to intrude into the courtroom); *see, e.g.*, FED R. CRIM. P. 42(b) (allowing summary punishment of a person who commits criminal contempt in front of a judge); Stephen Gruber-Miller, *Women Jailed for Contempt After Court Outburst*, DES MOINES REG. (Feb. 26, 2018, 1:54 PM), https://www.desmoinesregister.com/story/news/crime-and-courts/2018/02/26/woman-jailed-contempt-court-after-outburst-sentencing-grandfather-who-abused-6-year-old/373946002/ [https://perma.cc/53AY-H8JD] (reporting on a woman jailed for contempt after courtroom outburst during sentencing).

twelve hours per day)[143] in a relatively large area, and where lines may extend over a significantly larger area; thousands of people from the entire community or precinct are eligible to cast their ballots, and the results are not known until sometime after the polls have closed. Interestingly enough, if the votes are being tallied and announced to the public after the polls have closed, it is not clear that Minnesota law restricts political apparel among those who might be present at that time;[144] this is the moment that is most akin to a jury returning its verdict, but the state's interest in prohibiting political apparel after the polls close would appear to be quite weak, as no voters could be induced to vote a certain way or be intimated from voting altogether at that time.

As for the analogy to a representative voting on legislation, the Court fails to point to any restriction on political apparel for either members of a legislature or citizens observing in a legislature's gallery. Granted, courts have found that more active forms of expression—such as chanting or unfurling large banners—can be constitutionally banned in legislative galleries because of the disruptive effect on the legislative process.[145] However, the wearing of political apparel like a button or a T-shirt does not interfere with the ability of a legislative body to conduct its business.[146] Put another way, there are no constitutional reasons to ban the wearing of such apparel short of them being disruptive to the legislative process. Thus, if both legislators and observers are generally allowed to wear passive political apparel in that context and they also appear to have a constitutional right to do so, it makes for a poor analogy to restrict political apparel at the polls.

Nevertheless, Chief Justice Roberts proceeded to describe the situation in *Minnesota Voters Alliance* to be without equal in this

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[143] In Minnesota, the polls are open from 7:00 a.m. to 8:00 p.m. on Election Day; exceptions can be made for very small municipalities. *See Voting Hours*, OFF. MINN. SEC'Y STATE, https://www.sos.state.mn.us/elections-voting/election-day-voting/voting-hours/ [https://perma.cc/Q68B-2JZY]. Across the fifty states, polling places are generally open for approximately twelve hours on Election Day. *See What Time Are My State's Election Polls Open?*, ABC NEWS (Nov. 10, 2019), https://abcnews.go.com/Politics/OTUS/time-states-election-polls-open/story?id=17646583 [https://perma.cc/FY63-EGNC].

[144] See MINN. STAT. § 211B.11(1) (2019), which makes it illegal to "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place . . . on primary or election day to vote for or refrain from voting for a candidate or ballot question." In the next sentence, the statute lays out the prohibition on wearing political apparel, thus leading to the conclusion that the prohibition was meant only to apply to attempts to persuade voters before the polls have closed.

[145] *See* State v. Linares, 655 A.2d 737, 759 (Conn. 1995).

[146] *See* Kimberly A. Altschul, *The Viewing Gallery of the House of Representatives: A First Amendment Public Forum?*, 76 B.U. L. REV. 705, 731–32 (1996).

regard, advising his readers of the "unique context of a polling place on Election Day," where he proclaimed, "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."[147] He then asserted that a "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."[148]

Where the Chief Justice and the Court have misplaced their understanding of elections is in their notion that it is a duty of the government to enforce rules of decorum that promote harmony if doing so infringes on passive forms of freedom of expression. Indeed, regardless of the Court's statement that a state "may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand,"[149] such a prohibition cannot unduly restrict political speech. The Court in *Citizens United v. FEC*,[150] held that political speech "is central to the meaning and purpose of the First Amendment," particularly within the context of an election.[151] The *Citizens United* Court specifically derided a federal law that "stifled" a "speaker's ability to engage in political speech that could have a chance of persuading voters."[152]

Likewise, writing for the Court in *McCutcheon v. FEC*,[153] Chief Justice Roberts struck down an aggregate limit on campaign contributions, even though "[m]any people might . . . be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects."[154] Despite the fact that some voters may not like some of the political messages other people have on their shirts or buttons, that alone provides no reason to ban such expression if the Court is to afford people wearing messages on their apparel the same status it gives to persons of

[147] Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1887–88 (2018).
[148] *Id.* at 1888.
[149] *Id.*
[150] *See* Citizens United v. FEC, 558 U.S. 310 (2010).
[151] *Id.* at 329 (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)).
[152] *See id.* at 333–34.
[153] *See* McCutcheon v. FEC, 572 U.S. 185 (2014).
[154] *Id.* at 191.

wealth spending on campaigns or giving money to candidates for public office.[155]

Although many voters at the polls on Election Day have presumably made up their minds for whom they are voting, they may still be undecided on at least some issues or candidates in the moments before they cast their ballots.[156] A voter is free to change one's mind up until the point when they have submitted their ballot;[157] in some states, including Minnesota, someone who votes early can even return to their polling place on Election Day to change their vote.[158] A passive statement on apparel worn by someone else in line with them may cause the voter to think differently about a candidate or a ballot question at an election, or perhaps even jog that voter's memory about a candidate or issue.[159] As stated by the Court in *Connick v. Myers*,[160] "[S]peech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and [it] is entitled to special protection."[161]

Political speech or speech on matters of public concern does not, as a general matter, need to avoid being objectionable to all citizens.[162] As Chief Justice Roberts noted in *Snyder v. Phelps*, "Such speech cannot be restricted simply because it is upsetting or arouses contempt."[163] Indeed, the Court held in *Texas v. Johnson* that it is a "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[164] Thus, the First Amendment limits the ability of the government to restrict expression that is divisive or that promotes discord. The passive types of political apparel that were at issue in *Minnesota Voters Alliance* were much less upsetting or offensive than the Westboro Baptist Church's anti-gay, anti-Catholic, and anti-military

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[155] *See id.* at 194, 227 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)) (striking down a statute imposing aggregate individual political contribution limitations of $123,200 as an intrusion on a citizen's ability to exercise their most fundamental First Amendment rights).

[156] *See* André Blais, *How Many Voters Change Their Minds in the Month Preceding an Election?*, 37 POL. SCI. & POL. 801, 802 (2004).

[157] *See id.*

[158] Laura Jarrett, *Want to Change Your Vote? Some States Say No Problem*, CNN POL. (Oct. 31, 2016, 4:21 PM), https://www.cnn.com/2016/10/31/politics/changing-early-vote-cast/index.html [https://perma.cc/EUQ6-WVDX].

[159] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1886–88 (2018).

[160] *See* Connick v. Myers, 461 U.S. 138 (1983).

[161] *Id.* at 145 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

[162] *See McCutcheon*, 572 U.S. at 191 (citing Snyder v. Phelps, 562 U.S. 443 (2011); Texas v. Johnson, 491 U.S. 397 (1989); Nat'l Socialist Party v. Skokie 432 U.S. 43 (1977) (per curiam)).

[163] *Snyder*, 562 U.S. at 458.

[164] *Johnson*, 491 U.S. at 414.

messages protected in *Snyder*,[165] and they were less prone to draw observers' ire compared to the controversial practice of burning the U.S. flag that was protected in *Johnson*.[166]

Even if the state should have a role in promoting electoral harmony at the polls, particularly since they constitute a nonpublic forum, a complete ban on any political apparel goes too far. This can be proven as an empirical matter. As observed by the Court, there are several states that permit the wearing of such apparel at the polls during voting hours on Election Day.[167] For instance, Alabama permits voters to "wear campaign buttons or T-shirts with political advertisements" on them.[168] Rhode Island lets voters wear buttons, badges, and other items promoting political parties, candidates for public office, or other electoral issues, as long as those voters "immediately exit the polling location without unreasonable delay" after they have cast their ballots.[169] Similarly, Virginia allows voters to wear "a shirt, hat, or other apparel on which a candidate's name or a political slogan appears" or place "a sticker or button [on one's] "apparel on which a candidate's name or a political slogan appears."[170] There is no indication that these states have descended into the type of Election Day bedlam that plagued polling places before the introduction of the secret ballot. Without evidence that these states' actions are leading to chaos at the polls, a complete ban on political apparel is unreasonable.

Although the Court made a mistake in holding that a ban on political apparel at the polls during voting hours on Election Day can be reasonable in light of the purpose of the forum (which is voting),[171] the Court correctly found that the line drawn by Minnesota in

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[165] The Westboro Baptist Church's signs that were at issue in the case included placards that read the following: "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Fag Troops,' 'Semper Fi Fags,' 'God Hates Fags,' 'Maryland Taliban,' 'Fags Doom Nations,' 'Not Blessed Just Cursed,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'You're Going to Hell,' and 'God Hates You.'" *Snyder*, 562 U.S. at 454.

[166] *See Johnson*, 491 U.S. at 399. In addition to burning an American flag, Johnson chanted the following slogans during the protest where he was arrested: "'Reagan, Mondale which will it be? Either one means World War III'; 'Ronald Reagan, killer of the hour, Perfect example of U.S. power'; and 'red, white and blue, we spit on you, you stand for plunder, you will go under.'" *Id.* at 431 (Rehnquist, C.J., dissenting).

[167] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018).

[168] *Id.* n.2.

[169] *Id.*

[170] *Id.*

[171] *See id.* at 1886, 1887–88.

Minnesota Voters Alliance was unreasonable.[172] As explained by Chief Justice Roberts, Minnesota's law was subject to "haphazard interpretations," in part, because the relevant statute failed to define the word *political*.[173] Chief Justice Roberts proceeded to offer two different definitions of *political*: one from *Webster's Third New International Dictionary* ("of or relating to government, a government, or the conduct of governmental affairs")[174] and a second from the *American Heritage Dictionary* ("[o]f, relating to, or dealing with the structure of affairs of government, politics, or the state").[175] Accordingly, Chief Justice Roberts wrote for the Court that "[u]nder a literal reading of those definitions, a button or T-shirt merely imploring others to 'Vote!' could qualify."[176] While Minnesota law specifically protects the wearing of "I Voted" stickers[177]—a form of informational, as opposed to persuasive, expression—at polling places on Election Day, the Court, quite reasonably, expressed disapproval for a law that could be read to ban such a broad amount of persuasive political speech.[178]

Chief Justice Roberts is on the right track here, although even the general dictionary definitions of *political* fail to fully encompass the implications of that word. Among political scientists, *politics* is often defined along the lines of Harold Lasswell's famous description that it is the determination of who gets what, when, and how.[179] This definition includes a wide-range of social behaviors, including the exercise of power in nearly any situation where two or more humans are interacting with each other.[180] As famously put by Carol Hanisch, the personal is political,[181] applied here to mean that issues and concerns in the traditional "private" sphere of life also have political elements to them. Thus, virtually any display on any clothing or accessory—including the name brand of one's clothing, a display of a

[172] *See id.* at 1888 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 808–09 (1985)).

[173] *Minn. Voters All.*, 138 S. Ct. at 1888.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *See* MINN. STAT. § 211.B11(1) (2019).

[178] *See Minn. Voters All.*, 138 S. Ct. at 1891, 1892 (quoting Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion); Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

[179] *See* Eric T. Kasper, *Are Judges Politicians?: An Analysis of* Williams-Yulee v. The Florida Bar *and Its Constitutional Impact on Judicial Independence and Judicial Ethics Codes Across the U.S.*, 47 U. MEM. L. REV. 1085, 1111 (2017). *See generally* HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936).

[180] *See* Kasper, *supra* note 179, at 1111.

[181] Carol Hanisch, *The Personal Is Political*, *in* NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION 76 (Shulamith Firestone & Anne Koedt eds., 1970).

sports team logo, or even the style of clothing itself—could be considered to be political. In this way, banning "political" apparel has implications that extend far beyond the problems that were described by the Court. This concern is particularly acute if poll workers engage in political bias, both infringing on political expression *and* denying the right to vote to people based on expressions on their clothing because they have made assumptions about how that person is likely to vote. This type of partisan, viewpoint discrimination could weaponize one's own speech against oneself to deny one the franchise in violation of the Constitution.

Indeed, what if an overzealous election judge found a voter wearing a hijab to the polls was political because the election judge holds views similar to those of Fox News Channel host Jeanine Pirro, who rhetorically asked on her national news program in 2019 if the wearing of a hijab by Representative Ilhan Omar, a member of the Minnesota delegation to the U.S. House of Representatives, was "indicative of her adherence to sharia law, which in itself is antithetical to the United States Constitution?"[182] Since an overwhelming majority of Muslims vote for Democrats over Republicans,[183] a biased election judge deeming such apparel political could be used to not just deny First Amendment rights but the right to vote as well.

Since active members of the U.S. military are prohibited from campaigning while in uniform,[184] and since association with the military is typically seen as conveying a political message,[185] could a biased poll worker attempt to deny the opportunity to vote to a servicemember in uniform because the apparel is deemed political? Since a sizeable majority of persons who have served in the military

[182] Reis Thebault, *Fox News Bumps "Judge Jeanine" After Remarks About Rep. Omar's Hijab. Trump Wants Her Back on Air.*, WASH. POST (Mar. 17, 2019, 11:54 AM), https://www.washingtonpost.com/arts-entertainment/2019/03/17/fox-news-bumps-judge-jeanine-after-remarks-about-rep-omars-hijab-trump-wants-her-back-air/ [https://perma.cc/CB27-JMUY].

[183] *See For the Record: CAIR Releases Results of Presidential Election Exit Poll*, COUNCIL ON AM.-ISLAMIC RELATIONS (Nov. 22, 2016), https://www.cair.com/for_the_record_cair_releases_results_of_presidential_election_exit_poll [https://perma.cc/LYV5-EMEB]; Naaz Modan, *CAIR Releases Results of Midterm Election Exit Poll of Muslim Voters Showing High Turnout*, COUNCIL ON AM.-ISLAMIC REL. (Nov. 7, 2018), https://www.cair.com/cair_releases_results_of_midterm_election_exit_poll_of_muslim_voters_showing_high_turnout [https://perma.cc/LFM5-QV7D].

[184] *See* Donna Miles, *Rules Restrict Political Activity by DOD Personnel*, AM. FORCES PRESS SERV. (Jan. 5, 2012), https://www.army.mil/article/71574/rules_restrict_political_activity_by_dod_personnel [https://perma.cc/RYY3-U3FZ].

[185] *See* Andrew Exum, *The Dangerous Politicization of the Military*, THE ATLANTIC (July 24, 2017), https://www.theatlantic.com/politics/archive/2017/07/the-danger-of-turning-the-us-military-into-a-political-actor/534624/ [https://perma.cc/NUQ7-HZLK].

vote for Republicans over Democrats,[186] this could be another case where an election judge deems one's attire political to deny them not only expressive rights but also the right to vote.

If one could be considered to be making a "political" statement in the Hanisch sense by wearing clothing not traditionally associated with the sex one was assigned at birth,[187] could a transgender person's wearing of clothing that correlates with their identity be deemed to be in violation of such a statute? Since a large majority of transgender voters cast their ballots for Democrats over Republicans,[188] this is yet another example where biased poll workers could potentially deny one the right to free speech *and* the right to vote.

Given the partisan implications of colors associated with political parties,[189] could someone wearing the tie representing the color of a political party be denied the vote until the offending article of clothing is removed? If the wearing of a business suit has political implications,[190] could simply wearing this attire—or other clothing that may indicate one's economic class—constitute an impermissible form of political apparel? As in the examples above, could a biased election judge deny one the right to wear such apparel to the polls and cast a ballot?

Although the Minnesota Secretary of State eventually distributed a policy on the meaning of the word *political* that narrowed this definition beyond the examples here,[191] the relevant statute did *not* define that word more narrowly.[192] Thus, a ban on political apparel could be interpreted to prohibit—and perhaps selectively prohibit—people from wearing such attire at the polls. Setting aside the implications for voting rights that go beyond the scope of this article, denying someone's expression rights based on their perceived

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[186] *See Exit Polls*, CNN (Nov. 23, 2016, 11:58 AM), https://www.cnn.com/election/2016/results/exit-polls [https://perma.cc/NBK5-3UJN]; *Exit Polls*, CNN, https://www.cnn.com/election/2018/exit-polls [https://perma.cc/39GF-CTBV] (last visited July 12, 2019).

[187] SUSAN STRYKER, TRANSGENDER HISTORY 17–18 (2008).

[188] *See* Jon Huang et al., *Election 2016: Exit Polls*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/interactive/2016/11/08/us/politics/election-exit-polls.html [https://perma.cc/ZV27-84G5].

[189] *See* Robert Roy Britt, *Red vs. Blue: Why Necktie Colors Matter*, LIVE SCI. (Mar. 1, 2017), https://www.livescience.com/3281-red-blue-necktie-colors-matter.html [https://perma.cc/FY3W-74YB].

[190] *See* Robin Givhan, *The Fashion of Politics*, WASH. POST (Jan. 27, 2016), https://www.washingtonpost.com/graphics/lifestyle/political-fashion/ [https://perma.cc/C2CM-A3UK].

[191] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1884 (2018).

[192] *See id.* at 1888.

political beliefs would clearly constitute viewpoint discrimination.[193] According to *Perry Education Ass'n*, in a nonpublic forum like a polling place on Election Day, the government may not engage in viewpoint discrimination: "the State may reserve the 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."[194] Thus, the state's enforcement of laws that protect the right to vote must be done in a way that also protects the First Amendment on a non-partisan, viewpoint neutral basis.

If we take it as granted that the word *political* was defined as announced by the Minnesota Secretary of State, which limited it to apparel with party names, candidate names, support or opposition to any ballot question, "[i]ssue oriented material designed to influence . . . voting," or "[m]aterial promoting a [political] group with recognizable political views,"[195] then the Court was right to find that this was still overly broad and unconstitutional. Although Minnesota argued before the U.S. Supreme Court that the ban was meant to prohibit "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place,"[196] even the more limiting description did not do this. Indeed, although the Minnesota Secretary of State's office banned apparel that referred to political parties in Minnesota,[197] no such limiting restriction was in place for the other examples of what was prohibited, such as "[a]ny item in support of or opposition to a ballot question in *any* election,"[198] or "[a]ny item including the name of a candidate at *any* election."[199] Put another way, if a voter wore to the polling place apparel supporting a candidate on the ballot in an election in another state, or if a voter wore apparel supporting or opposing a ballot question in another state, even under the narrower restriction offered by the Secretary of State's office, one could be in violation of the statute. At the very least, the state requirement was confusing, due to the fact that the restriction on partisan apparel was limited to political parties in

[193] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 61–62 (Brennan, J., dissenting).

[194] *Id.* at 46 (majority opinion) (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

[195] *Minn. Voters All.*, 138 S. Ct. at 1884.

[196] *Id.* at 1888–89 (alteration in original).

[197] *See id.* at 1884.

[198] *Id.* (emphasis added).

[199] *Id.* (emphasis added).

Minnesota, but the other restrictions had no such qualifier.[200] For this reason, the Court was right to question Minnesota's assertion that the law was limited to apparel that "convey[ed] a message about the electoral choices at issue" in a Minnesota election.[201] If we take Minnesota at its word—that the law restricted solely apparel that relates to the state's "electoral choices"[202]—the standard is still unconstitutional. As pointed out by Chief Justice Roberts, the Minnesota Secretary of State specified that "[i]ssue oriented material designed to influence or impact voting" was banned at the polling place, but it is not clear at all what counts as a relevant "issue."[203] The Court concluded that, based on Minnesota's argument and briefing, what Minnesota meant by this was apparel depicting "any subject on which a political candidate or party has taken a stance."[204] This is, in its own right, a sweeping definition. As Chief Justice Roberts explained, Minnesota specified that "Please I.D. Me" buttons were banned[205]—even though a voter identification law was not on the ballot in 2010—simply because a preference on that issue had been expressed by candidates for governor and secretary of state.[206] Since "[c]andidates 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,"[207] the list of possible apparel items that would be banned is, at best, unclear and, at worst, inexhaustive. As explained by Chief Justice Roberts, this could prohibit the wearing of a shirt stating "Support Our Troops" or "#MeToo" as long as a candidate for public office "brought up" the topic during the election.[208]

Over the course of an election season that takes several or many months, an untold number of issues could be brought up by a candidate for office. Take our example from earlier: a religious freedom issue is discussed at least once by at least one candidate running for office, and a parishioner (or even a voter) wears a crucifix to a polling place located in a church or, for that matter, any polling

[200] *See id.*
[201] *See id.* at 1888–89 (citing Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 575–76 (1987)).
[202] *See Jews for Jesus*, 482 U.S. at 575–76.
[203] *Minn. Voters All.*, 138 S. Ct. at 1889 (alteration in original).
[204] *Id.*
[205] *Id.*
[206] *See id.*
[207] *Id.* at 1889–90.
[208] *Id.* at 1890.

place.[209] Under the state's definition, such attire could also be restricted.[210] The same problem would exist for our other examples from Part II as well.[211] For instance, a voter would be in jeopardy for wearing a baseball cap with the logo of a local sports team during an election when there is a referendum question related to public financing of a new stadium for that team.[212] Likewise, a voter could potentially be stopped for wearing a shirt with the name of the local high school (or even the likeness of its mascot) when a referendum on the ballot is asking if the school district's voters will finance renovations for the high school.[213] Similarly, a student could be banned from wearing a shirt with an organization's logo (assuming that organization endorses candidates or takes stances on public issues) when attempting to vote before attending that organization's meeting on campus.[214] The possibilities of issues that are related to an election are potentially endless, thus meaning that the state's potential restrictions on speech could be endless.

The Chief Justice also took aim, on the Court's behalf, at Minnesota's restriction on apparel "promoting a group with recognizable political views," finding that the list of such organizations is prohibitively large, including "the American Civil Liberties Union, the AARP, the World Wildlife Fund, . . . Ben & Jerry's . . . [and] the Boy Scouts of America," as well as the AFL-CIO and the Chamber of Commerce, as all of those organizations "have stated positions on matters of public concern."[215] Such a standard was clearly overbroad: even assuming that the state could place a ban on "political" apparel at the polls on Election Day, this standard would have prohibited much more than was reasonable. It also required "an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot," making it clearly unreasonable.[216] As described by the Court in *United States v. Williams*,[217] "[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas."[218] Similarly,

[209] *See supra* text accompanying notes 117–119.
[210] *See Minn. Voters All.*, 138 S. Ct. at 1888–89, 1890.
[211] *See supra* Part II.
[212] *See Minn. Voters All.*, 138 S. Ct. at 1889–90.
[213] *See id.* at 1890.
[214] *See id.*
[215] *Id.*
[216] *Id.* at 1889.
[217] *See* United States v. Williams, 553 U.S. 285 (2008).
[218] *Id.* at 292.

as the Court observed in *United States v. Stevens*,[219] "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[220] Between the restrictions on attire referring to both issues and organizations, the Minnesota law was clearly overbroad, restricting any number of forms of attire with logos of interest groups, not-for-profit groups, and businesses.

Beyond the overbreadth issue with the Minnesota Secretary of State's standard was the closely related problem of vagueness. Chief Justice Roberts properly explained that even the supposedly narrower "electoral choices" standard proffered by Minnesota "poses riddles that even the State's top lawyers struggle to solve."[221] At oral argument, Minnesota represented that a shirt stating "All Lives Matter" or "National Rifle Association" would not be allowed, but a shirt with a rainbow flag could be displayed by a voter "*unless* there was an issue on the ballot . . . related . . . to gay rights."[222] And in an ironic twist that truly showed the capriciousness of the political ban, Minnesota contended at oral argument that a shirt displaying the Second Amendment's text would be banned, but a shirt exhibiting the text of the First Amendment would be permitted at the polls.[223] Beyond the issue of vagueness, allowing a First Amendment shirt but not a Second Amendment shirt at the polls could be an attempt to silence persons representing a particular political viewpoint (in this case likely favoring a liberal viewpoint over a conservative viewpoint).[224] As noted above, such viewpoint discrimination is prohibited even in a nonpublic forum.[225]

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[219] *See* United States v. Stevens, 559 U.S. 460 (2010).

[220] *Id.* at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

[221] *Minn. Voters All.*, 138 S. Ct. at 1891.

[222] *Id.*

[223] *Id.* U.S. CONST. amend. II states the following: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. I states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[224] *See* Christopher Ingraham, *One in Five Americans Wants the Second Amendment to be Repealed, National Survey Finds*, WASH. POST (Mar. 28, 2018, 11:40 AM), https://www.washingtonpost.com/news/wonk/wp/2018/03/27/one-in-five-americans-want-the-second-amendment-to-be-repealed-national-survey-finds/ [https://perma.cc/2PDB-DC7K] (showing much greater support for the Second Amendment among Republicans than among Democrats).

[225] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 46 (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 37, 131 n.7 (1981)).

A lack of clarity in what the statute requires raises the threat of a chilling effect on protected expression.[226] The Court clarified the problems of vagueness at length in *FCC v. Fox Television Stations, Inc.*:[227]

> [T]he void for vagueness doctrine addresses at least two connected but discrete . . . concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.[228]

Both of these concerns were at issue in *Minnesota Voters Alliance*. As noted above, there were voters who chilled their own desired expression by not wearing certain attire out of fear that it might affect their right to vote or because they could be punished after-the-fact.[229] Additionally, even beyond the problems revealed when Minnesota tried to explain what the law prohibited at oral argument,[230] the trial record revealed that the law was applied in an arbitrary, and perhaps discriminatory manner, as some voters wearing the same attire were allowed to vote without incident and others were not.[231] In addition, although voters with some attire were told to remove the offending material, other voters wearing attire of groups with different political messages were not halted.[232]

All told, whether it is the "political" standard, the "electoral choices" standard, or the examples Minnesota offered for either approach, it is clear that, as explained by the Court, there was a lack of "objective, workable standards," allowing the dangerous scenario where "an election judge's own politics may shape his views on what counts as 'political.'"[233] The Court rightly found Minnesota's law to violate the First Amendment. Furthermore, even in nonpublic forums the legislature must still establish that the wearing of passive, nondisruptive, political messages was significant to warrant reasonable restrictions; the lack of any cases of disruption in those

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[226] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871–72 (1997) (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1048–51 (1991)).

[227] *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012).

[228] *Id.* at 253 (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

[229] *See* Minn. Majority v. Mansky, 849 F.3d 749, 751 (2017).

[230] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1889–90, 1891 (2018).

[231] *See* Minn. Majority v. Mansky, 789 F. Supp. 2d 1112, 1118–19 (D. Minn. 2011).

[232] *See id.*

[233] *See Minn. Voters All.*, 138 S. Ct. at 1890–91.

states which permit political apparel suggests that even if objective, workable standards were forthcoming, the state would continue to find it difficult to argue that it had a significant interest in banning them.

IV. A BETTER STANDARD: BANNING APPAREL THAT IS TRULY INTENDED TO INTIMIDATE OR THAT IS MATERIALLY & SUBSTANTIALLY DISRUPTIVE OF THE VOTING PROCESS

Although the Court was correct in striking down the law at issue in *Minnesota Voters Alliance*, the Court nevertheless positively reviewed similar laws in other states;[234] without passing official judgment on them, the Court declared that "[o]ther States have laws proscribing displays (including apparel) in more lucid terms,"[235] holding that "if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernable approach" than Minnesota did.[236] However, as noted above, even a more specific standard banning any type of "political" apparel inevitably risks being either overbroad or unreasonably vague because of the expansive interpretation one can give to the term *political*. Furthermore, even if narrower lines can be drawn, they will still restrict core political speech that is passive in nature, which is unconstitutionally problematic.

The history recounted by Chief Justice Roberts of the past discord at polling places, including a "chaotic" atmosphere with crowds that "gather[ed] to heckle and harass voters who appeared to be supporting the other side,"[237] cannot be forgotten. Nevertheless, the Court provided no evidence that these types of settings existed after the introduction of the secret ballot,[238] and there is no proof that such heckling has taken place at polling places in any widespread manner in the modern era,[239] making the modern polling place a rather calm location by comparison. Granted, it would be undesirable to return to a system of voting in which one would be required to exhibit "courage" to cast one's ballot on Election Day.[240] However, there are

[234] *See id.* at 1891.
[235] *Id.*
[236] *Id.*
[237] *Id.* at 1882–83.
[238] *See id.* at 1883.
[239] *See id.*; *see also* 18 U.S.C. § 594 (2019) (prohibiting "voter intimidation" in federal polling locations).
[240] *See Minn. Voters All.*, 138 S. Ct. at 1883.

two problems with Chief Justice Roberts summarily propping up these historical cases to justify the government's power to regulate passive expression at polling places today.

First, expressing oneself through passive apparel is a far cry from the mob of people who would tend to harass and heckle other voters before the introduction of the secret ballot;[241] that all forms of expression in this context (including passive expression) must be treated the same is illogical. Second, the notion of using political apparel to "heckle" those voting for another party's candidates makes little sense today. With the introduction of the secret ballot, no one knows for whom you will be voting unless you choose to tell them, through your apparel, your words, or other communicative means. Indeed, the threat of heckling someone who plans to vote for the candidate of your choice–and then potentially causing that voter to leave without voting–would make such action counterproductive. Furthermore, although there are a very small number of cases we discuss below where one's apparel could be used to intimidate voters, passive apparel cannot be used to "heckle" in the sense that direct words and actions did before the introduction of the secret ballot. Thus, the entire project of using pre-secret ballot examples to justify a post-secret ballot regulatory scheme is misplaced.

All told, the promotion of order at the polls on Election Day cannot be done at the expense of First Amendment rights, particularly if it will be used as a weapon to try to silence particular viewpoints. The matter is complicated further if one's speech could be used as a reason to deny the right to vote. Although the Minnesota statute did not directly provide that refusal to remove offending apparel should result in the denial of the right to vote,[242] being asked by an election judge to conceal or remove clothing was the first step that state officials could take,[243] and this could scare a voter into leaving the polls. Furthermore, the record of the case demonstrates that one voter was denied the right to vote twice because of what he wore to the polls, and he was permitted to vote only some five hours after first being asked to remove the offending apparel.[244]

Indeed, Chief Justice Roberts's history of discord at the polls is incomplete, in that it failed to recognize an undeniable assertion: State governments in the United States have a long history of

[241] *See id.* at 1882–83 (quoting Burson v. Freeman, 504 U.S. 191, 202 (1992) (plurality opinion)).

[242] *See id.*

[243] *See id.*

[244] *See* Minn. Majority v. Mansky, 789 F. Supp. 2d 1112, 1119 (D. Minn. 2011).

denying, or attempting to deny, citizens the right to vote for a variety of reasons.[245] Although the Court has held since *Yick Wo v. Hopkins*[246] that "the political franchise of voting . . . is regarded as a fundamental political right, because [it is] preservative of all rights,"[247] that has not stopped state government from long attempting to restrict that right.[248] This history has been well-documented.

For instance, for several decades after American independence, many states had in place property qualifications that required voters to own large tracts of land.[249] This was a continuation of a British practice, and on the eve of American independence, all thirteen colonies possessed some form of requirements that a voter own land to be eligible to vote.[250] Pennsylvania became the first state to eliminate this prerequisite to voting in 1776.[251] These requirements took decades to eliminate in a state-by-state piecemeal process, with most states ending them by the 1830s.[252] However, it was not until 1857 that North Carolina—the last state to have property qualifications for voting[253]—formally and completely abolished this requirement.[254]

Racial restrictions on voting extend much closer to the present day. No formal constitutional right to vote existed for non-whites until the ratification of the Fifteenth Amendment in 1870.[255] Even after this constitutional change was ratified, a variety of direct tactics were employed by some state governments for nearly a century denying the right to vote based on race.

Grandfather clauses were a way of trying to prohibit blacks from voting in various states by requiring one's grandfather to have been

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[245] *See, e.g.*, Maya Rhodan, *The Voting Rights Act at 50: How the Law Came to Be*, TIME (Aug. 6, 2015) https://time.com/3985603/voting-rights-act-1965-history/ [https://perma.cc/S39W-SYVF].

[246] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[247] *Id.* at 370.

[248] *See, e.g.*, Rhodan, *supra* note 245.

[249] *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 164, 189, 341 (2005).

[250] JUSTIN MOELLER & RONALD F. KING, REMOVAL OF THE PROPERTY QUALIFICATION FOR VOTING IN THE UNITED STATES: STRATEGY AND SUFFRAGE 1 (2019).

[251] *See id.* at 1, 134.

[252] *See id.* at 1, 132–34; WILENTZ, *supra* note 249, at 116–25.

[253] *See* MOELLER & KING, *supra* note 250, at 1.

[254] *See id.*

[255] U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

eligible to vote before the Civil War,[256] which excluded anyone whose ancestors were slaves. The U.S. Supreme Court found grandfather clauses to be unconstitutional in *Guinn v. United States*.[257] The use in some states of the white primary ensured that people of color could vote in the general election, but in the one-party South of the late nineteenth and early twentieth centuries, the primary was the real election.[258] The U.S. Supreme Court struck down the white primary as unconstitutional in *Smith v. Allwright*.[259]

Poll taxes were used as a method of restricting African Americans'—and in certain places Latinos'—access to the ballot in for decades.[260] (It also had the effect in some areas of denying impoverished whites from voting.)[261] The poll tax existed in parts of the United States until eliminated in federal elections by the ratification of the Twenty-Fourth Amendment in 1964[262] and ruled unconstitutional in state elections by the U.S. Supreme Court in *Harper v. Virginia Board of Elections*.[263] Literacy tests were used to exclude people from voting based on ethnicity and race until the passage of the Voting Rights Act of 1965.[264]

Women campaigned for decades for the franchise before the ratification of the Nineteenth Amendment in 1920.[265] Similar to property qualifications for voting, women in different states gained the right to vote earlier in American history.[266] Wyoming was the first state to protect women's voting rights in 1890.[267] A total of just

[256] *See* GLORIA J. BROWNE-MARSHALL, THE VOTING RIGHTS WAR: THE NAACP AND THE ONGOING STRUGGLE FOR JUSTICE 42 (2016).

[257] *See* Guinn v. United States, 238 U.S. 347, 365 (1915).

[258] MICHAEL PERMAN, PURSUIT OF UNITY: A POLITICAL HISTORY OF THE AMERICAN SOUTH 179 (2009).

[259] *See* Smith v. Allwright, 321 U.S. 649, 666 (1944).

[260] *See* BROWNE-MARSHALL, *supra* note 256, at 117; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 111–12 (2000).

[261] *See* KEYSSAR, *supra* note 260, at 112–13.

[262] U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax."); *see* BROWNE-MARSHALL, *supra* note 256, at 118.

[263] *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

[264] *See* BROWNE-MARSHALL, *supra* note 256, at 109–10, 133. The first record of a literacy test was to exclude Irish Catholic immigrants from casting ballots in Connecticut in 1855. *See id.* at 23. After the ratification of the Fifteenth Amendment, literacy tests were frequently used against African Americans. *See id.* at 26, 106; 109–10, 133.

[265] U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *see* KEYSSAR, *supra* note 260, at 200, 218.

[266] *See* KEYSSAR, *supra* note 260, at 186, app. tbl.A.20.

[267] *See id.*

fifteen (mostly western) states extended the franchise to women before the Nineteenth Amendment was ratified.[268]

A default minimum voting age of 21 was another British practice that caught hold in the American colonies.[269] Although there were movements during most major conflicts to lower the voting age to the draft age[270]—thereby giving those deemed to be mature enough to serve their country in battle the right to determine who would have the political power to take the country to war[271]—those efforts failed for almost two centuries.[272] Young people subject to the military draft during the Vietnam War were finally able to convince Congress to lower the voting age to eighteen in 1970;[273] however, several states successfully challenged that federal law in *Oregon v. Mitchell*,[274] and the voting age was not permanently lowered to eighteen until the ratification of the Twenty-Sixth Amendment in 1971.[275]

In the current day, there are questions that continue to be raised over some states' use of the law to restrict access to the ballot, including in the denial of voting rights to felons[276] and in requirements of voters to provide certain forms of identification at the polls.[277] Some states have closed a significant number of polling places in recent years, creating a threat to the exercise of the franchise;[278] there is evidence in some cases that this may be motivated by a goal to strategically deny this right to classes of citizens.[279]

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[268] *See id.*

[269] *See id.* at 277.

[270] *See id.* at 277–78, 279, 280–81.

[271] *See id.*

[272] *See id.* at 278, 280.

[273] *See* ROBERT P. SALDIN, WAR, THE AMERICAN STATE, AND POLITICS SINCE 1898, 200–01 (2011).

[274] *See* Oregon v. Mitchell, 400 U.S. 112, 117–18 (1970).

[275] U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age.").

[276] *See* Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 612 (2004).

[277] *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634–35 (2007); Sally Harrison, Comment, *May I See Your ID? How Voter Identification Laws Disenfranchise Native Americans' Fundamental Right to Vote*, 37 AM. INDIAN L. REV. 597, 597 (2013).

[278] *See* Christopher Ingraham, *Thousands of Polling Places Were Closed Over the Past Decade. Here's Where.*, WASH. POST (Oct. 26, 2018, 5:00 AM), https://www.washingtonpost.com/business/2018/10/26/thousands-polling-places-were-closed-over-past-decade-heres-where/ [htpps://perma.cc/D4YE-HRFS].

[279] *See id.*; *see also* Matt Vasilogambros, *Polling Places Remain a Target Ahead of November Elections*, STATELINE (Sept. 4, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/04/polling-places-remain-a-target-ahead-of-november-elections [https://perma.cc/2RZJ-TRKV].

Furthermore, legal restrictions on voting have historically been mirrored by a corresponding use of intimidation from private citizens,[280] intimidation which all too often was tacitly permitted or even encouraged by some state governments.[281] Thus, as much as Chief Justice Roberts decried in *Minnesota Voters Alliance* the disorder that long ago characterized polling places in the United States,[282] there is a much longer and ongoing history of state actors and their surrogates making attempts to restrict access to the polls.[283] Indeed, prospective voters may already believe that their political efficacy is low when they must maneuver through a voter registration process[284] and provide a form of voter identification[285] at a polling place that may be located a significant distance from their home,[286] and they must do this after observing a campaign where large amounts of money (beyond the average person's financial capacity) are spent[287] in elections for legislative seats that could be gerrymandered based on partisan interests.[288] A government official using the purported political messages on one's apparel as an opportunity to suppress the vote is a significant danger that cannot be permitted or discounted, particularly given these other political and legal realities. Put another way, voters attempting to exercise their free speech rights by wearing a T-shirt or button to the polls should have their First Amendment rights protected as much as wealthy, corporate, and union donors who wish to spend large

[280] *See* Melissa J. Marschall & Amanda Rutherford, *Voting Rights for Whom? Examining the Effects of the Voting Rights Act on Latino Political Incorporation*, 60 AM. J. POL. SCI. 590, 593 (2016).

[281] *See* Sarah R. Young, *Southern Poverty Law Center (SPLC)*, *in* THE 21ST-CENTURY VOTER: WHO VOTES, HOW THEY VOTE, AND WHY THEY VOTE 399, 399–400 (Guido H. Stempel III & Thomas K. Hargrove eds., 2016).

[282] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1882–83 (2018) (citing Burson v. Freeman, 504 U.S. 191, 202 (1992) (plurality opinion)).

[283] *See, e.g.*, Young, *supra* note 281, at 400; Vasilogambros, *supra* note 279.

[284] *See, e.g.*, Asma Khalid, *Election Laws May Discourage Some From Voting, Even if They are Allowed*, NPR (Sept. 13, 2018, 5:00 AM), https://www.npr.org/2018/09/13/646314446/election-laws-may-discourage-some-from-voting-even-if-they-are-allowed [https://perma.cc/89PW-9NMD] (showing that voter registration processes often make it difficult for individuals to register despite being qualified to participate in an upcoming election).

[285] *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204 (2008) (upholding the constitutionality of an Indiana voter identification law).

[286] *See* Ingraham, *supra* note 278.

[287] *See* McCutcheon v. FEC, 572 U.S. 185, 191, 193, 194–95 (2014).

[288] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019) (holding that partisan gerrymandering claims are political questions).

amounts of money on independent expenditures[289] or contribute directly to politicians' campaigns.[290]

How, then, can one take seriously the protection of political speech under the First Amendment while also ensuring the franchise and avoiding a return to the types of discord that typified polling places in the past? We argue that political apparel–including apparel displaying names or logos of candidates for elective office, political parties, ballot issues, and organizations–is protected by the First Amendment at a polling place on Election Day unless the person wearing the apparel is acting with intent to intimidate other voters *or* is being materially and substantially disruptive of the electoral process. Both of these standards are clearer than any type of "political" ban, and they prohibit expression that is not subject to constitutional protection.

The First Amendment allows a state to ban a "true threat."[291] The U.S. Supreme Court defined *true threats* in *Virginia v. Black*[292] as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[293] According to *R.A.V. v. St. Paul*, "threats of violence are outside the First Amendment" because there is a public interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[294] As the Court explained in *Black*, speech is not constitutionally protected even if a "speaker [does] not actually intend to carry out the threat."[295] Instead, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[296] Advocacy of violence is protected by the First Amendment unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[297] Indeed, generalized advocacy of violence may simply be non-serious

[289] *See* Citizens United v. FEC, 558 U.S. 310, 364–65 (2009).
[290] *See McCutcheon*, 572 U.S. at 227 (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976)).
[291] *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).
[292] *See Black*, 538 U.S. at 359.
[293] *See id.* (citing *Watts*, 394 U.S. at 708; R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).
[294] *R.A.V.*, 505 U.S. at 388 (citing *Watts*, 394 U.S. at 707).
[295] *Black*, 538 U.S. at 360.
[296] *Id.*
[297] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

or it could be political rhetoric.[298] In addition, the Court has been careful to point out that "political hyperbole" may not be constitutionally banned.[299] Threatening a specific person or persons with actual violence falls outside of First Amendment protection though.[300]

For these reasons, laws banning apparel that can reasonably be perceived to intimidate other voters–in that the apparel's message is one that would reasonably be seen as an attempt to immediately threaten bodily harm or death to another voter–would be constitutional. This is the type of ban that aims at Chief Justice Roberts's concerns about people needing "courage" to cast their ballot at an earlier time in American history,[301] but it does not restrict a vast array of passive political expression. The types of expression that would qualify as attempting to intimidate voters would be apparel that is associated in some way with voter suppression or realistic threats of violence. For instance, if a person entered a polling place on Election Day wearing a replica of a Nazi uniform with a swastika arm band, it would signal an intent to intimidate people from voting, due to the violent history of the Nazi regime.[302] Likewise, given the long history of voter suppression and violence associated with the Ku Klux Klan,[303] someone entering a polling place on Election Day wearing a white robe with Klan insignia and/ or a pointed white hood would clearly be making an attempt to intimidate voters. However, wearing a "Please I.D. Me" button would not raise to the level of intimidating other voters, as it simply asks a voting official to take action with regard to the person wearing the button, and it does not threaten other persons. Similarly, a T-shirt with the logo of a political party or the text of the First Amendment or the Second Amendment would not be a type of true threat that could be banned.

In addition to banning true threats to intimidate, states may also under the First Amendment ensure that peace and order is maintained at a nonpublic forum like the polling place.[304] Imposing

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[298] *See* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 543 (2004).

[299] *See Watts*, 394 U.S. at 708.

[300] Elrod, *supra* note 298, at 543.

[301] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1882–83 (2018).

[302] *See* GEOFF ELEY, NAZISM AS FASCISM: VIOLENCE, IDEOLOGY, AND THE GROUND OF CONSENT IN GERMANY 1930-1945, 36 (2013) (describing violence as a vital core of Nazism).

[303] *See* DAVID CUNNINGHAM, KLANSVILLE, U.S.A: THE RISE AND FALL OF THE CIVIL RIGHTS-ERA KU KLUX KLAN, 14, 98 (2013).

[304] *See Minn. Voters All.*, 138 S. Ct. at 1885.

a rule that apparel may not cause a material and substantial disruption of voting on Election Day would, therefore, also be constitutional. This reasoning can be traced back to *Tinker*, where the Court found a First Amendment violation in the suspension of students for wearing a black armband with a peace symbol on it.[305] The Court reasoned that the school's action was unconstitutional given that the students engaged in "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[306] Mindful of "the special characteristics of the school environment,"[307] this type of expression was found to be protected absent "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."[308]

The Court has maintained this First Amendment right to passive political expression in schools even after finding students' free speech rights were not violated when they were punished for expressing themselves in more active and direct ways.[309] For instance, in *Bethel School District v. Fraser*,[310] the Court upheld the school's decision to suspend a student for stating several explicit sexual metaphors at a schoolwide assembly.[311] Likewise, in *Morse v. Frederick*, the Court upheld the suspension of a student who, at a school event, unfurled—and refused to take down—a large banner that was interpreted as advocating illegal drug use.[312] Although the Court has not always explicitly applied the *Tinker* material and substantial disruption standard in school speech cases,[313] one can reason that wearing

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[305] *See* Tinker v. Des Moines. Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
[306] *Id.* at 508.
[307] *Id.* at 506.
[308] *Id.* at 513.
[309] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 409–10 (2007).
[310] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
[311] *See id.* at 685. The student's language included the following spoken words:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring) (alteration in original).
[312] *Morse*, 551 U.S. at 396–98 (2007). The banner read "BONG HiTS 4 JESUS." *Id.* at 397.
[313] *See* Melinda C. Dickler, *The* Morse *Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 364–67 (2007).

passive political apparel like an arm band with a peace symbol is much less disruptive than giving a sexually charged speech to high school students or attempting to display a large banner.

For another context, in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, the Court struck down as overboard a government resolution that banned all "First Amendment activities" at the Los Angeles International Airport.[314] In doing so, the Court held that "[m]uch nondisruptive speech–such as the wearing of a T-shirt or button that contains a political message–may not be 'airport related,' but is still protected speech even in a nonpublic forum."[315] This case remains good law even though the Court ruled in *International Society for Krishna Consciousness, Inc. v. Lee* that a ban on distribution of literature and active solicitation at an airport is constitutional because of "the disruptive effect that solicitation may have on business."[316] Like with the school speech cases, the Court distinguished the more passive wearing of a T-shirt or button (hypothetically alluded to in *Jews for Jesus*) with the more active undertaking of approaching of others in *International Society for Krishna Consciousness* that the Court found could cause congestion and possible delays.[317]

Although we would argue that leafletting at an airport and the unfurling of a banner at a school event outside of the classroom should be protected by the First Amendment,[318] *Tinker*, *Jews for Jesus*, and their progeny demonstrate why *Burson* is distinguishable from *Minnesota Voters Alliance*. Indeed, *Minnesota Voters Alliance* involves prohibitions on the types of passive political apparel (T-shirts and buttons)[319] that the Court found constitutionally protected in *Tinker* (armbands)[320] and that the Court described as the types of apparel that could not be restricted by the unconstitutionally overbroad regulation in *Jews for Jesus* (T-shirts and buttons).[321] On the other hand, the more active forms of expression that the Court found could be banned in *Fraser* (a sexually explicit speech given by

[314] *See* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 570, 577 (1987).

[315] *Id.* at 576 (citing Cohen v. California, 403 U.S. 15 (1971)).

[316] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992).

[317] *See id.* at 683–85; *Jews for Jesus*, 482 U.S. at 576 (citing *Cohen*, 403 U.S. at 25–26).

[318] For an argument on why airport solicitation should have been found to be protected expression, see Mark W. Shaughnessy, Comment, *Constitutional Law—No First Amendment Protection for Solicitation of Money in Publicly-Operated Airport Terminal*–International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992)*, 27 SUFFOLK U. L. REV. 941, 949–50 (1993).

[319] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1887–88 (2018).

[320] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[321] *See Jews for Jesus*, 482 U.S. at 576 (citing Cohen v. California, 482 U.S. 569 (1971)).

a student at an official high school event),[322] *Morse* (a student unfurling a large banner referring to illegal drugs), and *International Society for Krishna Consciousness* (active solicitation of airport patrons)[323] are much more akin to what the Court also permitted to be banned in *Burson*: actively approaching a voter and interacting with them, potentially in an attempt to intimidate them, buy their vote, or verbally persuade them how to the exercise of the vote.[324] In this way, the Court should employ the same standard it used in *Tinker* to laws like the one at issue in *Minnesota Voters Alliance*. Thus, a ban on apparel that would materially and substantially disrupt the work of the polling place—the orderly facilitation of voting—would be constitutional.

This means that passive political apparel not causing that type of disruption at a polling place on Election Day should be protected by the First Amendment. Indeed, using schools (*Tinker*) and airports (*Jews for Jesus*) as analogies shows that the banning of passive political apparel generally cannot be permissible at polling places on Election Day, as it would not be materially and substantially disruptive. Political apparel is something that is generally protected in schools[325] (among minor students who have fewer constitutional rights than adults[326]) and in airports.[327] Schools and airports also have substantial security concerns that do not currently exist at polling places. School shootings[328] and airliner hijackings[329] have necessitated the posting of guards and the installation of metal detectors in those institutions; suspicious communications and actions in these contexts have been curtailed due to relevant security concerns.[330] However, even the heckling that Chief Justice Roberts recounted from during the heyday of the non-secret ballot comes nowhere near security threats posed by school shooters in Columbine in 1999 or Sandy Hook in 2012; nor does it approach the security

[322] *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677–78 (1986).

[323] *See* Morse v. Frederick, 551 U.S. 393, 396–97 (2007); *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 674, 685.

[324] *See* Burson v. Freeman, 504 U.S. 191, 206–07 (1992) (plurality opinion).

[325] *See Tinker*, 393 U.S. at 514.

[326] *See Fraser*, 478 U.S. at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340–42 (1985)).

[327] *See* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987).

[328] *See* Peter Greene, *How the Columbine Shootings Changed Classroom Life*, FORBES (Apr. 18, 2019, 10:18 AM), https://www.forbes.com/sites/petergreene/2019/04/18/how-the-columbine-shootings-were-felt-in-classrooms/ [https://perma.cc/J9Q3-S9PL].

[329] *See* Bryan Gardiner, *Off with Your Shoes: A Brief History of Airport Security*, WIRED (June 14, 2013, 6:30 AM), https://www.wired.com/2013/06/fa_planehijackings/ [https://perma.cc/4FVQ-J4GL].

[330] *See* Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?*, 41 PEPP. L. REV. 1, 9, 18 (2013).

threat created by al Qaeda operatives at our nation's airports on September 11, 2001. In this sense, what is considered materially and substantially disruptive at schools and airports should include more activity than at polling places on Election Day, meaning that those wearing apparel to the polls should have at least as much First Amendment protection as students in public schools or travelers at the nation's airports.

What would constitute expression that is materially and substantially disruptive at a polling place on Election Day? Given the panic and disorder that could accompany the wearing of a Nazi uniform or a Klan robe (as described above), those types of attire could also be banned by this standard. Furthermore, there may be other types of apparel that one could wear in a boastful manner, especially if one lingers at a polling place after they have voted; such action would be a form of active campaigning, and that could be constitutionally prohibited.[331] As explained by the Court in *Minnesota Voters Alliance*, Rhode Island imposes a rule whereby voters may wear political apparel but must "immediately exit the polling location without unreasonable delay after voting."[332] Such a rule would ensure that one could not using one's apparel to materially and substantially disrupt the polling place by turning it into an active campaigning location.

Finally, this approach would also allow states to prohibit, in the nonpublic forum that is a polling place, a large variety of more assertive expression, including holding a large placard with election-related messages on it while in line to vote, repeatedly shouting while in line that others present should vote for a particular candidate, or handing out campaign literature to persons in line to vote. Indeed, these forms of expression would be materially and substantially disruptive of the voting process. However, the display of partisan logos, candidate names, organizational names, and similar words and insignia on apparel would be passive expressions that are not be materially and substantially disruptive.

Writing for the Court in *Minnesota Voters Alliance*, Chief Justice Roberts rejected this disruption standard as the proper one to apply to restrictions on expression at polling places on Election Day.[333]

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[331] *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion); *see also* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 n.2 (2018) (explaining that Rhode Island permits voters to wear political apparel but must "immediately exit the polling location without unreasonable delay").

[332] *Minn. Voters All.*, 138 S. Ct. at 1888 n.2.

[333] *See id.* at 1886.

According to the Chief Justice, the examples from *Tinker* and *Board of Airport Commissioners*, which Roberts characterized as "more mundane settings[,] . . . do not speak to the unique context of a polling place on Election Day."[334] As discussed above, though, Chief Justice Roberts's reason for this—that the "State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth"[335]—is misplaced, as it is hardly the role of the state to enforce a sense of partisan harmony, especially when doing so will restrict passive political expression. Furthermore, even if a polling place on Election Day is "unique,"[336] that does not imply that the Court should be more deferential to state interests than it is in a public school, an environment the Court has characterized as "special" in its own right,[337] or an airport, with its unique security concerns described above. Just as "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[338] it can hardly be argued that voters shed their constitutional rights to freedom of speech or expression at the polling place entrance.

Although there may be questions by election officials if one's apparel approaches the line of being either (1) intimidating or (2) materially and substantially disruptive, those lines are much clearer than any ban on "political" apparel at the polling place. Thus, in nonpartisan, viewpoint neutral fashion, these standards avoid problems associated with vagueness under the First Amendment. In any event, as the Court noted in *Minnesota Voters Alliance*, "[p]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[339] Finally, these standards draw lines to prohibit much less speech than Minnesota did, thus not violating the First Amendment for overbreadth reasons either. Therefore, both the intimidation standard and the materially and substantially disruptive standard more appropriately ensure that Election Day apparel restrictions do not run afoul of the First Amendment. In this sense, these two standards ensure that Election Day is not just a time for choosing; it—like every other day of the year—also remains a time for free speech.

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[334] *Id.* at 1887 (citing Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987)).

[335] *Minn. Voters All.*, 138 S. Ct. at 1888.

[336] *Id.* at 1887.

[337] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[338] *Id.*

[339] *Minn. Voters All.*, 138 S. Ct. at 1891 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).