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Legal Sidebar

From Clamor to Calm: Restrictions on Speech at Polling Places

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The Supreme Court recently issued its decision in *Minnesota Voters Alliance v. Mansky*, ruling on the constitutionality of a Minnesota statute that banned all "political" apparel from polling places. The Court acknowledged that courts should generally "respect" state laws that attempt to afford "the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering," but ultimately held that the specific Minnesota provision challenged in that case violated the First Amendment—even after reviewing it under the relatively forgiving standard of "reasonableness." The Court's opinion may have significant implications for the government's ability to ban political speech in certain forums and, even more immediately, may cast doubt on other state laws regulating speech at polling places.

Background

The provision of the Minnesota statute challenged in this case provides that "a political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." Essentially, it prohibits voters from wearing any "political" apparel at polling places. Although the statute itself does not further define what types of apparel qualify as "political," state election officials issued guidelines providing examples of prohibited political items in the run-up to the November 2010 elections. The state gave election judges stationed at the polling places the "authority to decide what is 'political.'" These guidelines identified as "political" any items that included the names of specific political parties and candidates, but also included "issue oriented" materials, along with materials "promoting a group with recognizable political views (such as the Tea Party, MoveOn.Org, and so on)."

On the day of the November 2010 elections, members of the Minnesota Voters Alliance either wore or wanted to wear political apparel to their polling places. But pursuant to the statute prohibiting political insignia, some voters wearing Tea Party shirts and buttons that read "Please I.D. Me" were told by workers at their polling places to cover their shirts—or risk being prosecuted under that statute. Minnesota Voters Alliance filed suit, arguing that this statute violated the First Amendment.

The Court previously considered the issue of free speech at polling places in the 1992 case *Burson v. Freeman*. In *Burson*, the Court upheld a Tennessee statute prohibiting campaign materials outside of polling places. Four members of the Court recognized that this prohibition implicated "three central

concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech." Under First Amendment law, sidewalks and streets, like those outside polling places, are usually considered traditional "public forums" in which "the rights of the State to limit expressive activity are sharply circumscribed." Because the Tennessee law was "a facially content-based restriction on political speech in a public forum," a plurality of the Court concluded that it was subject to strict scrutiny, meaning that the state had to show that its law was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." In one of the few Supreme Court free speech decisions to uphold a law that was subject to strict scrutiny, the four Justices held that the state had met this burden.

Justice Scalia provided the fifth vote to uphold the Tennessee law, but he disagreed with the plurality's application of the law governing forums. In his concurring opinion, Justice Scalia argued that the area outside a polling place is not a traditional public forum because "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot." In his view, the Tennessee statute was not subject to strict scrutiny. Instead, he argued that the state could restrict speech at polling places so long as the restrictions were "reasonable and viewpoint neutral."

Decision in *Minnesota Voter's Alliance v. Mansky*

Minnesota Voter's Alliance consciously drew from *Burson* in recognizing the important state interest in regulating polling places. The Court began its opinion by reviewing the history of polling places in America, examining the conditions that spurred states to pass statutes restricting speech at polling places during elections. After accepting the parties' agreement that Minnesota's "political apparel ban applies only *within* the polling place," the Court concluded that the interiors of Minnesota polling places are best characterized as "nonpublic" forums. Thus, the Minnesota law was distinct from the Tennessee law at issue in *Burson,* which also applied to the area outside polling places, an area that the *Burson* plurality viewed as a traditional public forum. In a nonpublic forum, unlike a traditional public forum, the government can impose content-based restrictions on speech, so long as they are reasonable and not imposed solely because a public official opposes the speaker's view. Ultimately, however, the *Minnesota Voters Alliance* Court concluded that Minnesota's law failed even this more lenient test.

Writing for seven members of the court, Chief Justice Roberts first held that states may reasonably regulate the interior of the polling place in order for it to reflect the calm, deliberative nature of the act of voting, including by excluding "some forms of advocacy . . . from the polling place" and protecting the voter "from the clamor and din of electioneering." The Court stated that "Minnesota 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."

However, the Court held that Minnesota's ban on all "political" apparel was unreasonable and therefore unconstitutional. The majority opinion emphasized that the word political was undefined in the statute and could be read expansively, noting that it could cover "a button or T-shirt merely imploring others to 'Vote!'" And the guidelines interpreting that statute, issued by the state leading up to the 2010 elections, "raise[d] more questions than [they] answere[d]," in the view of the Court. The majority held that the law failed to provide "objective, workable standards" to guide the discretion of the election judges who implemented the statute, raising the specter of arbitrary enforcement. Citing an exchange from oral argument, the Court noted that, according to lawyers for the state, the law would apparently prohibit a shirt displaying the text of the Second Amendment, but would allow a shirt with the text of the First Amendment. The Court concluded that this "unmoored use of the term 'political,' . . . combined with haphazard interpretations the State has provided in official guidance and representations to this Court," required it to declare the statute unconstitutional.

Justice Sotomayor dissented in an opinion joined by Justice Breyer. She argued that the Court should have certified the case to the Minnesota Supreme Court, asking the state court to provide "a definitive interpretation" of the meaning of the disputed state statute. Certification of questions allows federal courts "faced with a novel state-law question to put the question directly to the State's highest court, . . . increasing the assurance of gaining an authoritative response." In Justice Sotomayor's view, it was "at least 'fairly possible'" in this case "that the state court could" construe the statute in way that would be "capable of reasoned application" and constitutional. She noted that the word "political" has been given constitutionally permissible meanings in other contexts. Chief Justice Roberts, however, rejected this contention, concluding that Minnesota had waited too long—seven years—to request certification and had not "offered sufficient reason to believe that certification would obviate the need to address the constitutional question."

Implications of the Court's Decision

All 50 states have some form of law that prohibits various types of electioneering at polling places, and the Court's decision could have significant implications for these laws. However, as the Court was careful to note, not all laws reach as broadly as this Minnesota provision. In a footnote, the Court suggested that states "may prohibit messages intended to mislead voters about voting requirements and procedures." States will likely argue that more narrow proscriptions on election-day speech within the polling place can survive the Court's opinion, and should instead be judged as constitutional under the precedent of *Burson* and the broader language in this opinion. For example, a state might try to distinguish a statute that prohibits specific electioneering activities like verbally expressing support for or opposition to particular candidates, or even one that more narrowly bars wearing any insignia "that is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election." Even other portions of the Minnesota statute itself remain standing after this decision—although they could always be subject to future legal challenges.

But the significance of this decision likely reaches beyond electioneering laws. The Court added to its "forum" jurisprudence by clarifying that a polling place, "set aside for the sole purpose of voting" and subject to strict rules governing its use, qualified as a "nonpublic forum." Other forums previously characterized by the Court as "nonpublic" include a sidewalk owned by the Postal Service, a school system for internal mail, and a public television debate between candidates for a congressional seat. However, unlike most cases evaluating speech restrictions in nonpublic forums, the Court here *struck down* the challenged law. In one prior case, the Supreme Court *upheld* a government ban on "political advertising" in the nonpublic forum of ad space on public transit. The Court's decision in *Minnesota Voters Alliance*, holding that the state law violated the First Amendment, was unusual in light of the permissiveness of the reasonableness standard that applies in nonpublic forums. Future litigation will determine whether this more rigorous application of the test for reasonableness will spill over into other nonpublic forums, or whether it will instead be limited to speech restrictions that aim to protect "the right to vote—a right at the heart of our democracy."

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