

Regulation of Political Apparel in Polling Places: Why the Supreme Court's *Mansky* Opinion Did Not Go Far Enough

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I. Introduction

In *Minnesota Voters Alliance v. Mansky*, the Supreme Court struck down a Minnesota law prohibiting voters from wearing various political messages on buttons or clothing inside a polling place on Election Day.¹ In an opinion written by Chief Justice John Roberts, the Court held that Minnesota's sweeping ban on political expression violated the First Amendment. The vote was 7–2, with Justice Sonia Sotomayor, joined by Justice Stephen Breyer, dissenting.

The Minnesota law was breathtaking in its sweep, and, for that reason, easy pickings. Minnesota's law was “uncommonly silly”² and undoubtedly unconstitutional. The Supreme Court was absolutely right in striking it down. Yet the opinion in *Mansky* was markedly reserved, filled with hedging caveats and provisos.

Chief Justice Roberts has emerged as one of the Court's true First Amendment zealots. His opinions are often fired by eloquent passion for freedom of speech. In *United States v. Stevens*, for example, he wrote for the Court in striking down a ban on graphic depictions of animal cruelty, rejecting the position that First Amendment protection should extend only to “categories of speech that survive an ad hoc balancing of relative social costs and benefits.”³ Rather, he wrote, the “First Amendment itself reflects a judgment by the American people

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

² See *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) (“I think this is an uncommonly silly law.”).

³ *United States v. Stevens*, 559 U.S. 460, 470 (2010).

that the benefits of its restrictions on the Government outweigh the costs.”⁴ His opinion emphatically declared, “Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”⁵ Even more striking was his opinion in *Snyder v. Phelps*, upholding the mean-spirited and deeply offensive homophobic military funeral picketing by the Westboro Baptist Church, in which he concluded:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.⁶

None of this First Amendment fire was visible in *Mansky*, however. To the contrary, the chief justice went out of his way to leave open the possibility that less extreme restrictions on polling place apparel and accessories might be upheld.

While the outcome of the case was laudable, the hedging and trimming in the Court’s opinion may do much future mischief. First Amendment jurisprudence and the vibrancy of our democratic process would have been better served by a more robust condemnation of the paternalistic impulse of states to control what people wear when they cast a vote.

This article describes the *Mansky* holding, exposes the Court’s hints and innuendos suggesting that narrower voting apparel laws might be upheld, explores the roots of the Court’s reticence to condemn more broadly bans on what people wear to vote, and critiques the Court for not acting more aggressively to curb such laws.

II. The Court’s Holding

A. *The Minnesota Ban*

Minnesota’s law contained three prohibitions on expressive activity in and around polling places on Election Day. All three were part

⁴ *Id.*

⁵ *Id.*

⁶ *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011).

of a statute bearing the title “Election day prohibitions,” and a subsection entitled “Soliciting near polling places.”⁷

The first prohibition declared, “A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question.”⁸ This provision, prohibiting campaign workers and others from attempting to influence voters as they arrive to vote, was not challenged in *Mansky*. It was indistinguishable from a similar Tennessee law previously upheld by the Supreme Court in 1992, in *Burson v. Freeman*.⁹

The second prohibition declared, “A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election.”¹⁰ This sentence was not the focus of the litigation in *Mansky*, but it might have been. If a voter has a right to wear a button or T-shirt displaying messages such as “National Rifle Association” or “Black Lives Matter,” then surely there is a corresponding right by others to provide a button or T-shirt bearing those messages to a voter. The second prohibition was not formally challenged by the litigants in *Mansky*, however, nor did the Court remark on it. Its fate will await another day.

Minnesota’s third prohibition, the “political apparel” restriction, declared, “A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.”¹¹ Beneficently, the statute contained a carve-out reciting, “Nothing in this subdivision prohibits the distribution of ‘I VOTED’ stickers.” Only this third political apparel provision was challenged in *Mansky*.

Persons wearing such political contraband to the polling place on Election Day were law-violators, but not big-time criminals. Trafficking in or possessing illegal political buttons was not exactly like dealing cocaine. Election officials were instructed to first approach

⁷ Minn. Stat. § 211B.11(1) (Supp. 2017).

⁸ *Id.*

⁹ 504 U.S. 191 (1992).

¹⁰ Minn. Stat. § 211B.11(1) (Supp. 2017).

¹¹ *Id.*

the offending voter and ask the voter to conceal or remove the illegal message.¹² A voter who refuses to remove or conceal the offending message must still then be allowed to vote. The election official, however, is to make it “clear that the incident ‘will be recorded and referred to appropriate authorities.’” This is something akin to a middle schooler being admonished that an incident will go on his or her permanent record.

Though no one in Minnesota could go to jail for wearing a banned message, legal consequences could ensue. Violators were subjected to an administrative process before the Minnesota Office of Administrative Hearings, which had the power to issue a reprimand or impose a civil penalty.¹³ A Minnesota county attorney with nothing better to do could also charge the violator with a petty misdemeanor, carrying up to a \$300 fine.

For the challengers who brought the litigation in *Mansky*, it surely was not so much the penalty as the principle that supplied the rub. The challengers were led by the Minnesota Voters Alliance, a non-profit seeking better government through election reforms, its executive director, Andrew Cilek, and Susan Jeffers, an election judge. Among the messages the challengers sought to wear to the polling place were buttons saying “Please I.D. Me” and a “Tea Party Patriots” shirt. Andrew Cilek appeared to draw the greatest hassle from election officials. In addition to wearing a “Please I.D. Me” button, he had the temerity to wear a T-shirt with the words “Don’t Tread on Me” and a “Tea Party Patriots” logo. Cilek was twice turned away from the polls altogether (something which was not supposed to happen). When Cilek was finally allowed to vote, an election official recorded the incident.¹⁴

B. The Reach of the Minnesota Ban

In First Amendment challenges to government restriction on expression, the parties often begin with a threshold spar over exactly what is and what is not prohibited by the restriction. Governments will typically try to make the restriction appear narrow, and no big deal. Minnesota tried this, seeking to save itself in *Mansky* by limiting

¹² *Mansky*, 138 S. Ct. at 1883.

¹³ Minn. Stat. §§ 211B.32, 211B.35(2) (2014).

¹⁴ *Mansky*, 138 S. Ct. at 1884.

the meaning of its political apparel ban. The effort backfired. The more talking Minnesota did, the more trouble it made for itself.

The Minnesota secretary of state distributed a guideline policy, providing that the apparel ban included, but was not limited to:

- Any item including the name of a political party in Minnesota, such as the Republican, [Democratic–Farmer–Labor], Independence, Green or Libertarian parties;
- Any item including the name of a candidate at any election;
- Any item in support of or opposition to a ballot question at any election;
- Issue oriented material designed to influence or impact voting (including specifically the “Please I.D. Me” buttons);
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).¹⁵

The first three examples were clear enough, as the Court saw them. They banned the names of political parties, the names of candidates, and messaging expressing support or opposition to a ballot question.¹⁶ Whether or not these prohibitions violated the First Amendment, at least the substantive reach of the prohibitions was easy to understand. (As later explained, the Court strongly hinted that had the Minnesota law been limited to these examples, it would not have been struck down.)

As to the other two examples, Minnesota had some explaining to do, and the more it explained, the worse things got. Both the statute and the guidelines used the word “political” in a manner that the Court described as “unmoored.”¹⁷ The dictionary definition of “political” is expansive, encompassing “anything ‘of or relating to government, a government, or the conduct of government affairs.’”¹⁸ As the Court lamented, under this definition the mere wearing of a button that said “Vote!” could qualify.¹⁹

While Minnesota tried to confine the meaning of “political” to electoral choices facing the voter on Election Day, the Court did not

¹⁵ *Id.* at 1884.

¹⁶ *Id.* at 1889.

¹⁷ *Id.* at 1888.

¹⁸ *Id.* (quoting Webster’s Third New International Dictionary 1755 (2002)).

¹⁹ *Id.* at 1888.

buy the state's effort. Minnesota argued that the ban only reached "words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place."²⁰ The Court pointed out, however, that the statutory language banned "campaign material," and then, over and above that, also banned "political" material. And at oral argument, the counsel for Minnesota conceded that the law expanded "the scope of what is prohibited from campaign speech to additional political speech."²¹ This was a candid concession, but not one that helped the state's cause.

The fourth of the five guidelines provided by the state, explaining that the law banned "[I]ssue oriented materials designed to influence or impact voting," proved particularly problematic. The word "issue" appeared to encompass any subject "on which a political candidate or party has taken a stance."²² The reason that "Please I.D. Me" buttons were not allowed, even though *no ballot questions dealt with voter identification*, for example, was that Republican candidates for governor and secretary of state *had* taken positions on voter-identification laws. Minnesota conceded at oral argument that a button stating "#MeToo" would be banned if a candidate for office had brought up issues relating to sexual harassment and assault. The Court suggested that even the message "Support Our Troops" could be banned if a candidate or party had engaged on issues of military funding or aid to veterans.²³

Moving from bad to worse, the final exemplar offered by Minnesota, banning messages "promoting a group with recognizable political views," drove the chief justice to the heights of apoplectic sarcasm. Noting that any number of groups might take positions on issues of public concern, from the American Civil Liberties Union, the AARP, the World Wildlife Fund, to Ben & Jerry's, the potential sweep of this aspect of the ban clearly pushed the Court over the edge. (The chief justice did not mention the Cato Institute—but that was mere oversight.)

Conjuring the political stir over the policy of the Boy Scouts to exclude members based on sexual orientation, the Court suggested

²⁰ *Id.* at 1888–89 (quoting Brief for Respondents at 13).

²¹ *Id.* at 1889 (quoting Transcript of Oral Arg. at 50).

²² *Id.* at 1889.

²³ *Id.* at 1890.

that a Scout leader stopping to vote on his way to a troop meeting might have been asked to cover his uniform.²⁴ The most unkindest cut of all.

C. The Forum Status of Polling Places

The Court began its substantive First Amendment analysis by assessing the public forum status of a polling place, beginning with an overview primer on public-forum law. “Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”²⁵ Identical standards “apply in designated public forums—spaces that have ‘not traditionally been regarded as a public forum’ but which the government has ‘intentionally opened up for that purpose.’”²⁶ In “a nonpublic forum, on the other hand—a space that ‘is not by tradition or designation a forum for public communication’—the government has much more flexibility to craft rules limiting speech.”²⁷ “The government may reserve such a forum ‘for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.’”²⁸

The Court proceeded to hold that a polling place is a nonpublic forum. “It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting.”²⁹ The First Amendment standards governing speech regulation in a nonpublic forum are quite lax. Provided the government does not engage in viewpoint discrimination, restrictions on expression in a nonpublic forum need only be “reasonable in light of the purpose served by

²⁴ *Id.*

²⁵ *Id.* at 1885.

²⁶ *Id.* (internal citation omitted).

²⁷ *Id.* (quoting *Perry Educ. Assn. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 46 (1983)).

²⁸ *Id.*

²⁹ *Id.* at 1886.

the forum.”³⁰ The Minnesota law was neutral as to viewpoint—it would bar both a “Trump” button and a “Clinton” button, or both an “All Lives Matter” and a “Black Lives Matter” T-shirt. This meant the law need only be reasonable in relation to the purpose of the forum, a test that in most cases is not easy to flunk. But Minnesota flunked it.

D. Striking Down the Ban as Unreasonable

The Court struck down the Minnesota ban, insisting that the state must “draw a reasonable line” and must be able to “articulate some sensible basis for distinguishing what may come in from what must stay out.”³¹

Given the manifold sweep and mushy subjectivity of the Minnesota ban, the better question is not why the Court struck the law down as why the vote was only 7–2 and not unanimous. Since the mere engagement by a political candidate or a political party on an issue was enough to push that issue out-of-bounds for voting-place apparel, Minnesota’s law required election officials to keep tabs on what candidates and parties stood for in order to keep tabs on what messages could be worn. This alone was enough to do in the rule. “A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable.”³²

The picking and choosing necessary to determine who or what was in or out when it came to other organizations and messages was equally unsavory. The Court’s opinion mocking these choices was close to parody. “All Lives Matter” was *probably* out, “The National Rifle Association” was *definitely* out, but a “Rainbow Flag” was in *unless* a candidate’s campaign position or a ballot issue somehow dealt with gay rights.³³ Or consider my personal favorite: a shirt simply displaying the text of the Second Amendment would be banned, but a shirt displaying the text of the First Amendment would not.³⁴ Go figure.

³⁰ *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985))

³¹ *Id.* at 1888.

³² *Id.* at 1889.

³³ *Id.* at 1891.

³⁴ *Id.*

With all these infirmities, it is easy enough to see why the Court wisely sought to put the law out of its misery. As noted, it was easy pickings, and hard to see it any other way.

This might seem uncharitable to Justices Sotomayor and Breyer, who perhaps *did* see it another way. But not really. Even Justice Sotomayor's opinion did not attempt to defend the Minnesota ban on the merits as constitutionally permissible, *assuming* the Minnesota ban actually meant what the chief justice's opinion for the Court said it meant. The dissent merely argued that the Court should have certified the definition of the law to the Minnesota Supreme Court, to give that court the chance to render a narrowing construction consistent with First Amendment standards, thereby obviating "the hypothetical line-drawing problems" that she believed animated the decision of the majority.³⁵

III. *Mansky's Limits*

Justice Sotomayor's dissenting lament that Minnesota should have been given a chance to save itself carries significant clues and cues. Her point presupposes that Minnesota *could* save itself—that a more narrowly crafted ban would not have been struck down as unconstitutional, even under the principles articulated by the *Mansky* majority. There are numerous indications in the majority opinion suggesting that she is correct. As I state in my closing critique, I am not enamored of this assessment on its merits, but as prediction, it is probably sound.

Recall that in the majority opinion, the principal fault line was the divide between what I will label political "campaign" speech and "political issue" or "political organization" speech. Minnesota kept trying to narrow the interpretation of its own law to mere campaign speech, such as speech backing a particular candidate or an issue directly in play on a pending ballot, while the Court kept insisting that, on the record before it, the law was not so limited.

³⁵ *Id.* at 1893 (Sotomayor, J., dissenting) ("I agree with the Court that casting a vote is a weighty civic act and that States may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, including by prohibit[ing] certain apparel [in polling places] because of the message it conveys. . . . I disagree, however, with the Court's decision to declare Minnesota's political apparel ban unconstitutional on its face because, in its view, the ban is not capable of reasoned application . . . when the Court has not first afforded the Minnesota state courts a reasonable opportunity to pass upon and construe the statute.") (cleaned up).

Did this signal that if Minnesota's attempt at narrowing had been credible, the result would have been different? Would the Court approve a law prohibiting speech within the confines of a polling place urging the election or rejection of a candidate or specific ballot measure? The most revealing tea leaves may be gathered from the very end of the opinion, where the Court wrote, "That is not to say that Minnesota has set upon an impossible task."³⁶

I take this as code reminiscent of the lyric from the group Solid Base: "This is how you do it." Upon suggesting the task of limiting political apparel was not impossible, the Court immediately cited laws from two of Minnesota's sister states, California and Texas. The laws of both focused on naming the names of candidates and naming specific ballot measures before the voters, laws the Court described as "proscribing displays (including apparel) in more lucid terms."³⁷

"Lucid," like probably constitutional. The Court immediately invoked the stock disclaimer, cautioning that it was not purporting to decide issues not before it: "We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here." As in, "Dude, can you take a hint?"

I can take one, and if I were a betting man—oh, I am!—I would bet that as matters currently stand, the California and Texas laws, and others of their ilk, are short odds to prevail in any constitutional challenge.

Yes, I'm a betting man—and I tend to pull for underdogs. In the next two sections, I first opine on why I think the Court was so cautious. I follow with an argument attempting to improve my odds—explaining why the Court should be open to establishing heartier

³⁶ *Id.* at 1891.

³⁷ *Id.* (citing, Cal. Elec. Code Ann. § 319.5 (West Cum. Supp. 2018) (prohibiting "the visible display . . . of information that advocates for or against any candidate or measure," including the "display of a candidate's name, likeness, or logo," the "display of a ballot measure's number, title, subject, or logo," and "[b]uttons, hats," or "shirts" containing such information); Tex. Elec. Code Ann. § 61.010(a) (West 2010) (prohibiting the wearing of "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election.").

First Amendment principles striking down *all* restrictions on the wearing of merely passive voter apparel inside a polling place, provided that voters keep quietly to themselves while standing in line.

IV. Overreacting to History

The Court in *Mansky* was overly influenced by the sorry realities of American voting practices in the 19th century. Fortunately, widespread reform measures were enacted to address the abuses that were rampant in those times. One set of those reforms, designed to keep political activists at bay from voters within a 100-foot buffer of the polling place, was approved in 1992 in *Burson*. The Court relied on perfectly fine history, and *Burson* upheld a perfectly fine law. But neither the abuses of the distant past nor the rationales of *Burson* should be enough to justify blanket bans on political voting apparel. Reforms of the sort approved in *Burson* solved the problem. Political-apparel bans, in contrast, are overkill, attacking a problem that does not exist, at great sacrifice to core free-speech values.

The Court's historical account was elegantly and efficiently told. In a nutshell, in the olden days, casting a vote was a venture into a carnival-like, no-holds-barred, coercive, corrupt, and largely lawless space. Think the bar scenes in *Star Wars* or *Westworld*. Creep me and freak me out. Voters did not come to a polling place in which governmentally approved ballots were available, but rather showed up with privately prepared ballots, often "party tickets," preselecting their choices.³⁸ No secret ballots yet existed, and voters approaching the "voting window" ran through a gauntlet of political seduction, jeers, and cheers. "Crowds would gather to heckle and harass voters who appeared to be supporting the other side."³⁹

These shenanigans, deeply antithetical to democratic values, led to reforms adopting the secret, or "Australian" ballot, and state enactments calculated to place at bay the bizarre bazaar of hawkers, hustlers, and heavies that formed the gauntlet separating the voter from the voting booth. "Between 1888 and 1896, nearly every State adopted the secret ballot."⁴⁰ But providing for a secret ballot was not enough to improve the system. Something had to be done to shelter voters

³⁸ *Id.* at 1882–83.

³⁹ *Id.*

⁴⁰ *Id.* at 1883.

from the gauntlet of harassment and pressure they were forced to endure while entering the polling place. To that end, “States enacted ‘viewpoint-neutral restrictions on election-day speech’ in the immediate vicinity of the polls.”⁴¹ By 1900, 34 of 45 states had such restrictions, and today, “all 50 States and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day.”⁴²

This sordid history drove the Supreme Court’s decision in *Burson*, which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. The four justices in the plurality in *Burson* treated the spaces immediately outside polling places as public forums. Yet they ruled that, even applying the strict scrutiny standard applicable to the content-based regulation of speech in public forums, the Tennessee law was justified by the compelling state interests in curbing Election Day abuses. Justice Antonin Scalia supplied the fifth vote, in a concurring opinion that argued that the spaces outside polling places were not public forums. Employing the more pliant “reasonableness” standard applicable to regulations in nonpublic forums, Justice Scalia also voted to sustain the Tennessee law.⁴³

As the Court in *Mansky* summarized *Burson*, the *Burson* “analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past.”⁴⁴ It was against this sleazy historical backdrop that *Burson* upheld Tennessee’s 100-foot buffer zone. The Court in *Mansky* explained, *Burson* was “supported by overwhelming consensus among the States and ‘common sense,’ that a campaign-free zone outside the polls was ‘necessary’ to secure the advantages of the secret ballot and protect the right to vote.”⁴⁵ The plurality in *Burson* reasoned, “[t]he State of Tennessee has decided that [the] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible.”⁴⁶

Burson focused on the gauntlet outside polling places. *Mansky* focused on the space inside the polling place doors. The Court in *Mansky* held that the interior of the polling place was a nonpublic forum.

⁴¹ *Id.* (quoting *Burson*, 504 U.S. at 214–15 (Scalia, J., concurring in judgment)).

⁴² *Id.* at 1883.

⁴³ *Burson*, 504 U.S. at 214–16 (Scalia, J., concurring in judgment).

⁴⁴ *Mansky*, 138 S. Ct. at 1886 (citing *Burson*, 504 U.S. at 200–04 (plurality opinion)).

⁴⁵ *Id.* (citing *Burson*, 504 U.S. at 200, 206–08, 211 (plurality opinion)).

⁴⁶ *Burson*, 504 U.S. at 210.

That holding in itself was not especially problematic. It would have been a stretch to treat the inside of a polling place as a traditional or designated public forum.

Where the Court went wrong, however, was in imbuing the inside of the polling place with almost mystical qualities. The Court treated the interior of the polling place as a *reflective space*, not a *debating space*. The critical passage in Chief Justice Roberts's *Mansky* opinion thus stated:

In any event, we see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." . . . Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.⁴⁷

While the Court in *Mansky* struck down Minnesota's law, the passage above reflected the Court's general sympathy for what Minnesota sought to achieve. The Court's quarrel was not with the end the state sought to achieve, but its means in attempting to achieve it. The Court was careful to advise that its ruling ought not be read to imply the unconstitutionality of all restrictions on messaging inside a polling place and hinted that highly partisan messages directed to the election or defeat of a particular candidate could survive First Amendment challenge. "Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering," the Court observed.⁴⁸ "While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application."⁴⁹

V. Critique—Why the Court Did Not Go Far Enough

A. The Rule Should Be: All Passive Speech Allowed, but Quiet in the Room

I believe the Court's hints that it would approve more narrowly confined restrictions on what voters may wear to polling places is

⁴⁷ *Mansky*, 138 S. Ct. at 1887 (internal citation omitted).

⁴⁸ *Id.* at 1892.

⁴⁹ *Id.*

ominous and ill-considered. If and when the Court actually takes up a case posing those issues, I hope the Court gives the issue fresh consideration and does not consider itself bound by its dicta in *Mansky*. Specifically, my hope is that the Court will reconsider the propriety of this unfortunate remark: “Thus, in light of the special purpose of the polling place itself, 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.”⁵⁰

The constitutional rule that the Court *should* adopt in future cases is quite simple: Voters should be permitted to wear any buttons or clothing they please, expressing any political position whatsoever inside a polling place on Election Day. The First Amendment should be construed to entitle a voter to wear buttons or apparel within a polling place urging the election or defeat of any candidate or the approval or rejection of any ballot measure. The *only* license governments should have to control expressive activity within the polling place is to demand political silence while inside the polling place. Governments may reasonably insist that, once inside the 100-foot perimeter approved in *Burson* and inside the actual polling place facility addressed in *Mansky*, voters must refrain from *actively* speaking on political issues or addressing others in an attempt to persuade or proselytize. The mere *passive* wearing of political messages on a voter’s person, however, should be deemed protected by the First Amendment and immunized from punishment.

In stating that voters should be able to wear passively any political message they please inside the polling place, I really mean any message that would be protected if worn in a public forum. Speech that might subject a person to some legal liability in the general marketplace, such as incitement, a true threat, obscenity, defamation, a violation of intellectual property rights, and so on, is not constitutionally protected in any context, inside or outside a polling place. But as long as the message would be protected by the First Amendment in a public forum—on the sidewalks and streets as the voter approaches the polling place—the voter should be allowed to wear the message inside the polling place while politely maintaining political quiet in the room.

Even if the inside of a polling place is a nonpublic forum, the regulation of passive, nondisruptive self-expression by voters is

⁵⁰ *Id.* at 1888.

unreasonable in relation to the function and purpose of the voting place. Two interrelated rationales support this claim.

B. Political Speech Worn on the Person Is of the Highest Constitutional Value

The wearing of political messages *on the person of the voter on Election Day* should be understood to occupy a place at the very pinnacle of the expression protected by the First Amendment. No speech matters more than speech advocating candidates or causes on Election Day. No expression of that speech is more personal, intimate, fulfilling, and meaningful *to the speaker* than speech expressed on the *speaker's person*.

Modern First Amendment doctrine extends robust protection to a wide range of speech that is not “political.”⁵¹ Even so, political speech is always treated as being at the very core of the First Amendment’s purpose and protection.⁵² “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”⁵³ Countless “cases have often noted the close connection between our Nation’s commitment to self-government and the rights protected by the First Amendment.”⁵⁴

⁵¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

⁵² As the Supreme Court recognized in a case I argued there, political speech is “at the core of what the First Amendment is designed to protect.” *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion).

⁵³ *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (cleaned up).

⁵⁴ *Knox v. SEIU, Local 1000*, 567 U.S. 298, 308-09 (2012) (citing *Brown v. Hartlage*, 456 U.S. 45, 52 (1982)) (“At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.”); *Buckley v. Valeo*, 424 U.S. 1, 93, n. 127 (1976) (per curiam) (“[T]he central purpose of the Speech and Press Clauses was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.”); *Cox v. Louisiana*, 379 U.S. 536, 552 (1965); (“Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy.”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Patterson v. Colorado ex rel. Att’y Gen. of Colo.*, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting).

The importance of a political message *to the speaker* is especially heightened when the speaker is personally identified with the message. Such unification of speech and speaker is the quintessential embodiment of the American right to speak one's mind just because it *is* one's mind. The value is both personal and collective. As Justice Louis Brandeis wrote, "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."⁵⁵ That is why a political sign posted on one's own home window,⁵⁶ or expression on one's own car,⁵⁷ has special First Amendment respect. The Supreme Court's decision in *Ladue v. Gilleo*,⁵⁸ striking down a ban on residential political signs, invoked Aristotle to make this essential point:

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade.⁵⁹

If special veneration for political speech identified with the speaker is deserved for a sign posted at a residence, surely it is deserving of even more reverence when expressed on the physical person of the speaker.

There is a heavy-handed orthodoxy being imposed by a requirement that a voter cover up the voter's messages upon entering the polling place. The government ought not force voters to accept and internalize that somehow their continued passive self-expression on

⁵⁵ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

⁵⁶ *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

⁵⁷ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (upholding the right of a New Hampshire citizen to block out the motto "Live Free or Die" on his license plate, because the state could not force citizens to "use their private property as a 'mobile billboard' for the State's ideological message.").

⁵⁸ 512 U.S. at 59.

⁵⁹ *Id.* at 56 (citing Aristotle 2, *Rhetoric*, Book 1, ch. 2, in 8 *Great Books of the Western World*, Encyclopedia Britannica 595 (M. Adler ed., 2d ed. 1990) ("We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided.")).

political matters is dirty or undignified once they walk inside the polling place. The government has no right to treat the voting place as if the voter is walking into some kind of civic church. Perhaps some voters feel that they should remove their buttons on entering the polling place, out of some sense of respect for the polling place's deliberative dignity. That is just fine—but surely not *all* voters feel that way, and the government ought not paternalistically impose its sensibilities on all who come to vote absent some palpable demonstration that such expression causes genuine harm.

C. Passive Speech Poses No Reasonable Threat to the "Weighty Civic Act" of Voting

This leads to the second rationale for declaring restrictions on voter apparel unconstitutional. The harms the government seeks to prevent are chimerical. The risk that mere passive political expression visible to other voters as they stand in line to cast ballots will induce fraud, coercion, disorder, or chaos is fanciful, unrealistic, and paternalistic.

In the open spaces of society, the default rule is that speech is not censored merely because it may offend some viewers. The classic First Amendment principle is that the viewer should simply avert his or her eyes. "In most circumstances, 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.'"⁶⁰ To the contrary, "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."⁶¹ The authority of government, "consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."⁶² Quietly standing in line with persons expressing contrary political views is not suffering an invasion of privacy in an "essentially intolerable manner."

During campaign seasons, voters are constantly exposed to political messages with which they disagree. That exposure escalates as an election approaches, reaching its crescendo on final approach to

⁶⁰ Snyder, 562 U.S. at 459 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 (1975)).

⁶¹ *Erznoznik*, 422 U.S. at 210–11 (internal citation omitted).

⁶² *Cohen v. California*, 403 U.S. 15, 21 (1971).

Election Day. “Many are those who must endure speech they do not like, but that is a necessary cost of freedom.”⁶³ Voters are adults. They can handle it. Modern First Amendment law is grounded in a deep skepticism of government paternalism.⁶⁴ Voters ought not be treated as precious fragile snowflakes. “The First Amendment confirms the freedom to think for ourselves.”⁶⁵

Against the backdrop of the saturation of political messages common in society in the lead-up to an election, the notion that somehow a final glimpse of a “Trump” or “Clinton” button inside the voting place worn by a fellow voter, or spotting someone wearing a National Rifle Association or Black Lives Matter T-shirt, will somehow cause such fear and trembling as to disrupt the integrity of the civic act of voting, is entirely unreasonable. The paranoid speculation that last-minute exposure to the passive political messaging of others might persuade or dissuade a voter in the exercise of a ballot choice is hardly a cogent justification for censorship. “[T]he fear that speech might persuade provides no lawful basis for quieting it.”⁶⁶

Quietude inside the polling place, and the ultimate privacy of the voting booth itself, are enough to ensure that voters have ample opportunity for pressure-free deliberation and reflection in casting their ballots. Restrictions beyond that should be treated as unreasonable under the First Amendment.

The Court in *Mansky* took note of this distinction between passive, nondisruptive expression and active engagement, noting that in other contexts the Supreme Court had occasionally discussed the nondisruptive nature of passive expression. The Court thus conceded that “our decisions have noted the ‘nondisruptive’ nature of expressive apparel in more mundane settings.”⁶⁷ The Court cited as examples its decision involving the wearing of T-Shirts or buttons in airports,⁶⁸ and more famously, its landmark decision upholding

⁶³ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011).

⁶⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (“There is, of course, an alternative to this highly paternalistic approach.”).

⁶⁵ *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

⁶⁶ *Sorrell*, 564 U.S. at 576.

⁶⁷ *Mansky*, 138 S. Ct. at 1887.

⁶⁸ *Bd. of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (characterizing as nondisruptive “the wearing of a T-shirt or button that contains a political message” in an airport).

the right of a middle-school child, Mary Beth Tinker, to wear a black armband to school to protest the Vietnam War.⁶⁹ The Court distinguished those “more mundane settings,” however, from the polling place on Election Day, a place that the Court appeared to imbue with a sort of civic sacredness, as if the voter in walking into the polling place was entering a temple of democracy:

But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.⁷⁰

The passage above may indicate that the Court has already made up its mind on this matter, and that the argument I am advancing here has already lost. I hope that is not the case, and that the Court will be open to reconsideration.

The notion that the *act of voting* should be private and reflective is perfectly sound. And as a technical matter, the notion that the physical interior of a polling place is a nonpublic forum, and not a public forum like the outside streets and sidewalks, is sound as well. But the idea that the space inside the polling place *before* the voter gets inside the voting booth must be sanitized and cleansed of all passive political messages worn on the person of the voter simply goes too far. Voters waiting in line are not captive audiences in any meaningful sense. The Supreme Court has warned against expansion of “captive audience” principles.⁷¹ To treat waiting in line with other voters who are wearing political messages contrary to one’s own as the sort of coercive invasion of privacy sufficient to trigger authentic captive audience concerns is entirely implausible.

⁶⁹ *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 508 (1969) (students wearing black armbands to protest the Vietnam War engaged in “silent, passive expression of opinion, unaccompanied by any disorder or disturbance”).

⁷⁰ *Mansky*, 138 S. Ct. at 1888.

⁷¹ *Snyder*, 562 U.S. at 459 (“As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech.”).

Near the close of the opinion in *Mansky*, the Court observed that “Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering.” But the quiet wearing of buttons and T-shirts bearing political messages inside the polling place cannot be fairly characterized as “the *clamor and din* of electioneering.”⁷² As long as there is quiet and order as people stand in line, there is no clamor, there is no din.

The Court characterized casting a vote as a “weighty civic act,” a characterization also endorsed in Justice Sotomayor’s dissent.⁷³ The casting of a vote is indeed a weighty civic act. But the weight of the act is fully protected by ensconcing the voter in the privacy and quiet of the voting booth. Any voter knows full well that as he or she casts a vote for one candidate or cause, a voter in an adjacent booth may be casting a vote exactly the opposite. Standing in line with those fellow citizens, their views made quietly and passively visible, will be no shock to any voter who has paid any attention to political contests in the days and weeks leading to the election, or in the walk or drive to the polling place. The notion that standing in the quiet *public* company of fellow citizens passively expressing differing views just prior to entering the polling booth somehow diminishes the solemnity or deliberative dignity of the *private* exercise of the final “weighty civic act” of voting inside the booth defies common sense. The First Amendment stands against aggrandizing paternalistic regulations indulging in assumptions that voters are so hair-trigger hypersensitive that they need shelter from such passive political messaging.

VI. Conclusion

There are plenty of laws on the books to preserve order or to prevent voter intimidation or fraud. The First Amendment poses no bar to their enforcement. But American voters are not so squeamish, frail, or fragile as to be intimidated or defrauded by a fellow voter’s T-shirt or button. Nor are they so hot-tempered that they will be reflexively

⁷² *Mansky*, 138 S. Ct. at 1892.

⁷³ *Id.* at 1887; *id.* at 1893 (Sotomayor, J., dissenting) (“I agree with the Court that ‘[c]asting a vote is a weighty civic act’ and that ‘State[s] may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth,’ including by ‘prohibit[ing] certain apparel [in polling places] because of the message it conveys.’”).

driven to fisticuffs or undignified outbursts at the mere sight of the very opposing views to which they have been unrelentingly exposed in the weeks and hours and minutes leading up to their vote. Yes, voting is a weighty civic act that should be exercised in an atmosphere of decorum and dignity. Yet there is nothing inherently undignified in the expression of a political message. In America, we call that democracy.⁷⁴

⁷⁴ See Rodney Smolla, Symposium: Nothing Undignified about Political Messaging—In America, We Call that Democracy,” SCOTUSblog, Jan. 23, 2018, <http://www.scotusblog.com/2018/01/symposium-nothing-undignified-political-messaging-america-call-democracy>.

