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# Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much

by James J. Woodruff II\*

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publi[c] Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or contr[ol] the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

This sacred Privilege is so essential to free Governments, that the Security of Property, and the Freedom of Speech always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own.<sup>1</sup>

## I. INTRODUCTION

You are a student at the Massachusetts Institute of Technology showing up at the polling place to cast your ballot on election day in another historic presidential election. You are excited and cannot wait

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\* Associate Professor of Lawyering Process, Florida Coastal School of Law. Texas A&M University (B.S., 1998); South Texas College of Law (J.D., 2001). Editor in Chief, CURRENTS: INT'L TRADE L.J. (2000-2001). Member, State Bars of Florida and Texas.

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The title of this Article is based on the famous line by Shakespeare, "The lady doth protest too much methinks." WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 3, sc. 2.

1. Benjamin Franklin, Letter to the Editor, *Letter from Silence Dogood No. VIII*, NEW-ENGLAND COURANT (Boston) No. 49, Mon., July 2 to Mon., July 9, 1722, at A1 (front page) (quoting JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 96 (London, John Trenchard, Thomas Gordon & J. Peele prtg. 1720)), available at [www.masshist.org/data-base/viewer.php?item\\_id=645&mode=large&img\\_step=1](http://www.masshist.org/data-base/viewer.php?item_id=645&mode=large&img_step=1).

to exercise your right to vote. You just know that your candidate is the right person for the job and the opposition's candidate is the reason for all the country's problems.

As you get closer to the table where the poll worker is checking people in to vote, you see a young woman get turned away because she is wearing a button for a presidential candidate's campaign.<sup>2</sup> Then, the next person in line is turned away for wearing a button asking the poll worker to "Please I.D. Me."<sup>3</sup> It is an odd slogan, and not one you would relate to any specific politician. Only one person is left in front of you in line. She wears a yellow shirt with a coiled rattlesnake on it and the words "Don't Tread on Me."<sup>4</sup> A history nut, you think (as you recall the Gadsden Flag from your high-school history class). You overhear the poll worker tell her that she needs to go to the restroom to turn the shirt inside out before she will be allowed to vote.

Now it is your turn to show the poll worker your voter registration card and sign in to vote. You are suddenly told that you cannot vote because of your sweatshirt. You are confused. You cannot believe it. You ask, "What is wrong with my sweatshirt?" The poll worker responds, "It's a Mitt Romney Campaign sweatshirt. You must remove it before you will be allowed to vote." Now you are really confused—your sweatshirt says M.I.T., as in the Massachusetts Institute of Technology.<sup>5</sup>

Scenarios as illustrated above occur in a number of states during every election cycle. On election day, electors and campaigns are faced with a myriad of restrictions on what they can say, wear, and display at the polls.<sup>6</sup> This is not something they are faced with every day, as elections occur in some places as infrequently as every other year—hardly frequent enough to allow the general public to become familiar with a jurisdic-

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2. Based on Kimberly J. Tucker's experience wearing a "John Kerry for President" button (Democratic Party candidate for President in 2004) while voting in Virginia during the 2004 presidential election. 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, 61 (2006).

3. Several grassroots organizations and individuals planned on wearing buttons that stated, "Please I.D. Me" to the polling place on Election Day. *Minn. Majority v. Mansky*, 2010 U.S. Dist. LEXIS 116240 (D. Minn. Nov. 1, 2010).

4. *Id.* At least one of the individuals involved in the *Minnesota Majority* case sought to wear such a shirt. *Id.*

5. *MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney*, HUFFINGTON POST (updated Nov. 6, 2012, 8:23 PM), [http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneering-explain-not-shilling-for-romney\\_n\\_2084332.html](http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneering-explain-not-shilling-for-romney_n_2084332.html).

6. See Tucker, *supra* note 2, at 62-66 (discussing election process regulations in a fifty-state survey and categorizing states based on the particular conduct restricted).

tion's election laws.<sup>7</sup> While some states have broad, sweeping restrictions affecting both electors and political campaigns, other states have much less severe restrictions or no restrictions at all.<sup>8</sup> The result of these restrictions is the limitation of political expression at the very place where such expression may have the most impact—the polling place. These restrictions bewilder the campaigns for less popular offices as they work to get their message out.<sup>9</sup>

This Article seeks to answer the following question: What are the actual limits the government can place on political speech at and around the polling place? In examining this question, this Article argues that some of the current limitations placed on polling-place activities are unconstitutional. Specifically, this Article focuses on the wearing of political slogans and images within the polling room and campaign-free zone and the placement of campaign signs within the campaign-free zone.<sup>10</sup> Part II will examine the interpretation of the First Amendment's Free Speech Clause<sup>11</sup> under both an originalist and policy-based philosophy when applied to passive electioneering. Part III will discuss whether the statutes prohibiting passive electioneering are constitutional.

## II. REGULATING POLITICAL EXPRESSION UNDER THE FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

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7. This becomes even more of an issue as the transient nature of our population may lead an individual to vote in a different jurisdiction during each election cycle. Adding to the confusion may be the lack of uniform enforcement of election laws by election officials, but that will be discussed later in this Article. *See infra* text accompanying notes 200-05; *see also* Tucker, *supra* note 2, at 82-84 (exemplifying arbitrary enforcement of voter expression restrictions in several states).

8. *See* Robert Brett Dunham, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 GEO. L.J. 2137, 2158-59 (1989) (discussing the importance of election-day campaigning to candidates seeking less visible offices).

9. *See infra* notes 142-43.

10. This is a term commonly called "passive electioneering." For the purposes of this Article, I will be limiting my analysis to non-vocal electioneering. Examples of this, which from time to time will be referred to as "electioneering paraphernalia," are campaign buttons, shirts, stickers, and any other type of messaging device a voter may wear. The range of messaging on the election paraphernalia will include logos, names, and slogans associated with political parties, campaigns, or initiatives. With regard to signs, our examination will be regarding signs that include names, logos, slogans, and any other type of reference that may be placed on a sign that would allow the viewer to associate the sign with a particular candidate, party, or initiative.

11. U.S. CONST. amend. I.

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>12</sup>

Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made.<sup>13</sup>

These two quotes put the issue before us into perspective and illustrate what strikes at the center of the passive electioneering controversy. The Constitution's express terms do not place any limitations on the freedom of speech, political or otherwise, which may lead some to believe there are no restrictions on speech. Such an interpretation is both unworkable and unrealistic.<sup>14</sup> Determining what restrictions are allowed becomes a murkier issue as one faces the current state of the constitutional-interpretation debate. This requires us to pose this question: What philosophy should be followed to examine our quandary? For decades, and possibly centuries, there has been a debate over how the Constitution should be interpreted.<sup>15</sup>

This Article provides both an originalist<sup>16</sup> and policy-based analysis.<sup>17</sup> From this we will see how these two philosophies will resolve the

12. *Id.*

13. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 21 (1971).

14. Common examples of such language that should and preferably could be regulated are defamatory statements, mutiny, and treason. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (stating that "the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.") (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). After all, it would make little sense to allow a First Amendment defense to overcome the damages done because of defamation. Such a result would not respect the property right of the defamed, but would reward the plundering action of the defamer. Defamation was a well-known tort to the founding generation. See, e.g., WILLIAM BLACKSTONE, 4 *COMMENTARIES ON THE LAWS OF ENGLAND* 150-53 (Univ. Chicago Press (reprint) 1769), available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_speechs4.html](http://press-pubs.uchicago.edu/founders/documents/amendI_speechs4.html).

15. Lorianne Updike Toler, J. Carl Cecere & Justice Don Willett, *Pre-"Originalism"*, 36 *HARV. J.L. & PUB. POLY* 277, 279 (2013) [hereinafter Toler] (discussing the history of constitutional interpretative philosophy through the examination of ninety-six United States Supreme Court cases of first impression).

16. While some could argue that using such a methodology is nothing more than trying to read the minds of those long dead, this is an oversimplification similar to the argument that the Constitution is no longer valid because it is over two hundred years old.

17. Toler, Cecere, and Willett have chosen to refer to this philosophy as "[n]on-[o]riginalist." Toler, *supra* note 15, at 296. Such a description does not adequately describe the philosophy followed by those not enticed by originalism. Based on the wealth of case

same question. First, we will examine an originalist's view regarding the regulation of speech at the polling place. This will be followed by a policy-based view of regulating speech at the polling place.

A. *An Originalist's View of Regulating Speech at the Polling Place*<sup>18</sup>

In 1905, the United States Supreme Court in *South Carolina v. United States*<sup>19</sup> stated, "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."<sup>20</sup> This built upon the Supreme Court's 1838 pronouncement that:

The solution of this [Constitutional question] must necessarily depend on the words of the [C]onstitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this Court has always resorted in construing the [C]onstitution.<sup>21</sup>

This was further discussed in Justice Clarence Thomas's concurrence in *McIntyre v. Ohio Elections Commission*<sup>22</sup> where he opined what is to be done when an issue of first impression arises.<sup>23</sup> In those situations, the Supreme Court is to look at "what history reveals was the contemporane-

law before us, it would appear that a better description of the non-originalists would be policy-based interpreters. It is, after all, the policy the judges seek to see put forward that governs the results and not, as they might see it, the stodgy language of a centuries-old document known as the Constitution.

18. In the interest of approaching a complicated genre of constitutional interpretation, I have restricted the forms of originalism that will be the basis of examination. It is my hope that by using the selections focusing on the Founders' intent (intentionalism) and the understanding of the general public in 1791 (original public meaning), we can derive as close as possible the true meaning of the Freedom of Expression Clause.

19. 199 U.S. 437 (1905).

20. *Id.* at 448.

21. *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838). This is not the earliest such mention of originalist philosophy. Justice Marshall stated, in a dissenting opinion in 1827:

To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; – is to repeat what has been already said more at large, and is all that can be necessary.

*Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

22. 514 U.S. 334 (1995).

23. *Id.* at 360 (Thomas, J., concurring in the judgment).

ous understanding of [the Establishment Clause's] guarantees."<sup>24</sup> The Supreme Court, among other sources, provides a strong foundation for the originalist philosophy.

Originalism as a constitutional-interpretive philosophy was applied to the First Amendment in Robert Bork's work *Neutral Principles and Some First Amendment Problems*.<sup>25</sup> In that work, he refined the originalist philosophy and provided a method that could be adopted and give some sense of predictability to the outcome of constitutional cases.<sup>26</sup> His approach picked up on a method that had been sporadically used throughout the history of the United States and has spawned many different, but similar, methodologies for determining what constitutional provisions mean.<sup>27</sup> Judge Bork, then Professor Bork, looked to the common understanding of the Constitution's terms at the time of ratification.<sup>28</sup> In his work he brought the constitutional interpretation back in line with the Fuller Court.<sup>29</sup>

A review of the historical record surrounding the ratification of the Free Speech Clause shows that nothing of significance was raised regarding the topic during the ratification process.<sup>30</sup> This lack of debate in the founding era became apparent when the issue of the original drafters and ratifiers' understanding of the First Amendment's Free Speech Clause arose in *McIntyre v. Ohio Elections Commission*.<sup>31</sup> In *McIntyre*, Justice Scalia and Justice Thomas both attempted and failed to find a definitive understanding of what the First Amendment's drafters and ratifiers would have understood freedom of speech to mean

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24. *Id.* at 359 (alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).

25. Bork, *supra* note 13, at 1.

26. *Id.* at 8.

27. *Id.* at 20. According to Toler, Cecere, and Willett's work *Pre-"Originalism,"* the basic schools of originalism are intentionalism and original public meaning. Toler, *supra* note 15, at 290-94. They broke intentionalism down into the philosophies of framers' intentionalism and ratifiers' intentionalism (or understanding). *Id.* at 290-91. Under framers' intentionalism, the focus is placed on the intent of the fifty-five members of the constitutional convention. *See id.* at 290-91. Ratifiers' intentionalism focuses on the intent of the state conventions that ratified the Constitution. *See id.* at 292.

Original public meaning is broken into at least three philosophies: original public understanding, semantic originalism, and original methods originalism. *Id.* at 293-95.

28. Bork, *supra* note 13, at 22.

29. *See* Jonathan R. Macey, *Public Choice, Public Opinion, and the Fuller Court*, 49 *VAND. L. REV.* 373, 378-84 (1996) (reviewing JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910* (1995)) (explaining the Fuller Court's deference to the Founders' intent when deciding constitutional issues).

30. Eugene Volokh, *Freedom of Speech and of the Press*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 311, 311-12 (Edwin Meese III et al., eds., 2005).

31. 514 U.S. 334 (1995).

from the limited records prepared of the debates at any of the groups' conventions.<sup>32</sup>

Regardless of the lack of convention records, there is still a way to come to an understanding of what the drafters and members of the ratifying conventions would have believed the Free Speech Clause to mean. We can appreciate what the political class (made up of the ratifiers, drafters, and voters) at the time of the First Amendment's ratification would have understood by reviewing the history of the polling place in the United States.

Americans have been exposed to various methods of voting since the country's colonial days. These methods have included voting *viva voce* (by word of mouth),<sup>33</sup> bean counts,<sup>34</sup> showing of hands,<sup>35</sup> and hand-written ballots.<sup>36</sup> Some of these methods were very public and, as one can imagine, led to an election-day experience that was quite different than most elections today.<sup>37</sup> To understand the use of voting methods is to understand the atmosphere at the polling place.

Originally, the colonies followed the English method of voting.<sup>38</sup> That is, elections were held *viva voce* or by a showing of hands,<sup>39</sup> and electors would meet at a designated location and express their vote by voice or by raising their hands.<sup>40</sup> Both methods initially required the presence of the elector, but eventually a proxy system developed.<sup>41</sup> John Sergeant Wise described the Virginia general election of 1855, held *viva voce*, as follows:

In due course came election day. Father being absent, the young cousin above referred to represented him at the polling-place, and took me with him. In those days, voting was done openly, or *viva voce*, as it was called, and not by ballot. The election judges, who were magistrates, sat upon a bench with their clerks before them. Where practicable, it was customary for the candidate to be present in person, and to

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32. *Id.* at 360-62, 373-74.

33. ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 3 (Univ. Chicago Libraries, private ed. 1917); J.A.C. CHANDLER & T.B. THAMES, COLONIAL VIRGINIA 276 (Times-Dispatch Co. 1917).

34. EVANS, *supra* note 33, at 1.

35. *Id.*

36. *Id.* at 2.

37. The exception is the caucusing often seen during primary elections.

38. EVANS, *supra* note 33, at 1.

39. *See id.*

40. *Id.*

41. *See id.* The proxy system allowed landholders to vote from their residences or by sending a proxy. CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 279 (New York, Columbia College 1893).



occupy a seat at the side of the judges. As the voter appeared, his name was called out in a loud voice. The judges inquired, "John Jones (or Bill Smith), for whom do you vote?"—for governor, or for whatever was the office to be filled. He replied by proclaiming the name of his favorite. Then the clerks enrolled the vote, and the judges announced it as enrolled. The representative of the candidate for whom he voted arose, bowed, and thanked him aloud; and his partisans often applauded.<sup>42</sup>

While *viva voce* was the English method of voting adopted by the original colonies, it did not remain the status quo for long.<sup>43</sup> Through experience and practice, most of the colonies adopted other means of conducting elections.<sup>44</sup> One of those methods that is employed to this day is the use of paper ballots.<sup>45</sup>

The original paper-ballot system took many different forms. The ballots were usually provided by the individual voter, party, candidate, or newspaper prior to the election.<sup>46</sup> These ballots would be made of different types of paper and could be found in a broad range of colors.<sup>47</sup> Electors were solicited for their vote at the polling place door, and the "correct" ballots were distributed.<sup>48</sup> Electors who did not want to vote for a party's complete ticket could tear off or cross out the candidates they did not wish to vote for while writing in those they wanted to add.<sup>49</sup> A candidate's only barrier to an election was his ability to print a ballot and get it in the hands of electors on election day.<sup>50</sup> As there were no qualification deadlines to run for most offices, a politician could face a new opponent all the way up until the close of the polls.<sup>51</sup>

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42. JOHN S. WISE, *THE END OF AN ERA* 55-56 (Boston & New York: The Riverside Press, Cambridge 1899) (emphasis omitted for style).

43. See BISHOP, *supra* note 41, at 127.

44. See *id.*

45. R. MICHAEL ALVAREZ & THAD E. HALL, *THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR* 221 (2010).

46. *Id.* at 220; see also *Burson v. Freeman*, 504 U.S. 191, 200-06 (1992); *George v. Mun. Election Comm'n*, 516 S.E.2d 206, 209 (S.C. 1999).

47. ALVAREZ & HALL, *supra* note 45, at 220.

48. See *id.*

49. *Get Out The Vote: Tickets & Ballots*, CORNELL UNIV. LIBRARY (Sept. 13, 2006), available at <http://rmc.library.cornell.edu/vote/tickets>.

50. See BISHOP, *supra* note 41, at 126-27 (discussing a lack of political-nomination procedures for candidates seeking office in colonial America).

51. See *id.* at 120.

*B. A Policy-Based View of Regulating Speech at the Polling Place*

The other commonly found method of constitutional interpretation is a policy-based philosophy.<sup>52</sup> Often referred to as a living Constitution approach or values-based decision making,<sup>53</sup> this philosophy looks at the issue before the court and determines what the best policy would be to resolve the issue.<sup>54</sup> This policy may be based on human experience, precedent, social science, history, current understanding of words as opposed to their meaning at the time of the underlying document's creation or adoption, or any other means of forming an opinion without regard to originalist philosophy.<sup>55</sup> Sometimes the policy used fits squarely into the language of the Constitution, and sometimes the Constitution's language is given little regard.<sup>56</sup>

There is a wealth of examples of this in Supreme Court opinions. Policy-based analysis is engaged in, to some extent, when developing the many commonly followed rules that determine whether one act violates some constitutional precept. For our purposes, the issue is to determine if regulating passive electioneering violates the First Amendment's Free Speech Clause.

The key to a policy-based analysis begins with the question of whether the regulation is targeting a specific viewpoint when regulating speech.<sup>57</sup> To begin our journey we start with the presumption that content-based speech regulations are invalid.<sup>58</sup> In *Turner Broadcasting System, Inc. v. FCC*,<sup>59</sup> the Court held that content-based speech restrictions must meet strict scrutiny to be constitutional.<sup>60</sup> The regulations must be both viewpoint-neutral and subject-matter neutral

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52. Bork, *supra* note 13, at 17. The reason why an examination of current scholarship on media, electronic or print, is being used to examine the issue rather than recent Supreme Court opinions is because the policy-based approach is rather fickle. *Id.* at 8. By taking from the currently existing material on the issue at hand we are better able to predict the outcomes a group of justices using policy-based reasoning may reach. This, of course, could change, and a policy-based result might look radically different a decade from now. By its very nature, the policy-based method is a rather undemocratic way of determining a case's outcome as it focuses more on the morals or values of a small, elite group of Supreme Court justices rather than on the morals or values of society at large. *Id.* at 5-6.

53. *Id.* at 17.

54. *Id.*

55. *Id.* at 22.

56. *Id.* at 22-23.

57. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

58. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

59. 512 U.S. 622 (1994).

60. *Id.* at 640-41.

to escape strict scrutiny.<sup>61</sup> When a regulation is examined under strict scrutiny, the government always has the burden of proof (regardless of its standing as a plaintiff or a defendant).<sup>62</sup> To pass muster under strict scrutiny, the regulation must be (1) justified by a compelling government interest;<sup>63</sup> (2) narrowly tailored to achieve the interest;<sup>64</sup> and (3) the least restrictive means for achieving that interest.<sup>65</sup>

If the policy-based examination of strict scrutiny is not difficult enough, the location where the speech is to be regulated further complicates the analysis. To determine whether the regulated speech can pass constitutional muster, the Supreme Court has created three forums that alter the freedom of expression analysis: traditional public, designated public, and non-public.<sup>66</sup> These judicially created forums have a major impact on the constitutionality of laws aimed at restricting expression.<sup>67</sup>

A traditional public forum is a place "which by long tradition or by government fiat [has] been devoted to assembly and debate."<sup>68</sup> A designated public forum is property made available by the government for the public to use as a forum for speech.<sup>69</sup> The state may restrict, in a content-based manner, any speech made in a traditional or designated public forum if it shows the restrictions are:

necessary to serve a compelling state interest and that [they are] narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>70</sup>

A non-public forum is a forum that the government has not designated as a public forum, nor was it a traditional public forum.<sup>71</sup> Speech restrictions must be "reasonable and viewpoint-neutral."<sup>72</sup> Speech in

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61. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

62. *Burson*, 504 U.S. at 198.

63. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986).

64. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

65. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

66. *Perry Educ. Ass'n*, 460 U.S. at 45-46.

67. *Id.*

68. *Id.* at 45.

69. *Id.* at 45-46; *Pleasant Grove City v. Summum*, 555 U.S. 460, 478 (2009).

70. *Perry Educ. Ass'n*, 460 U.S. at 45 (internal citations omitted).

71. *Id.* at 46.

72. *Summum*, 555 U.S. at 461.

limited public forums is also subject to regulation of time, place, and manner.<sup>73</sup>

Printed material, whether on shirts, buttons, or signs, is protected as free speech under the First Amendment.<sup>74</sup> This is well illustrated in the school cases heard by the Supreme Court. These cases also illustrate a combination of the earlier- described issues of content-based speech regulation and the effect location has on such speech.

**1. The School Cases.** The closest comparison to the polling place that we routinely encounter is the schoolyard.<sup>75</sup> The public routinely encounters speech restrictions when they are attending primary and secondary school.<sup>76</sup> These restrictions affect what clothes can be worn in addition to what signs may be displayed or language used.<sup>77</sup> While the polling place is only available to the public on a limited basis (we only hold elections every so often and allow voting for a limited period of days), there are some similarities that are useful in analyzing polling-place speech restrictions. For instance, we are not trying to educate voters at the polling place, whereas that is the key goal of schools. We do, nonetheless, have to deal with the same discipline issues at these two locations. Just as students using speech to act out can cause distraction in the classroom and thereby inhibit teaching, voters engaging in certain speech can likewise inhibit the process of getting voters in and out of the polling place. It is this discipline issue that is the strongest link between the two.

The Supreme Court has held that students are allowed to express opinions regarding controversial subjects at school.<sup>78</sup> This allowance, however, is not an absolute right.<sup>79</sup> A student's speech may be curtailed if it materially and substantially interferes with the school's educational mission by materially disrupting class-work, creating substantial disorder, or invading the rights of other students.<sup>80</sup> Examples of such behavior include: lewd or indecent speech,<sup>81</sup> speech

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73. *Perry Educ. Ass'n*, 460 U.S. at 46.

74. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

75. While government-enforced speech restrictions are routinely found on government military facilities, these places are not routinely found open to the public, as public schools are. *Greer v. Spock*, 424 U.S. 828, 838 (1976).

76. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

77. See, e.g., *id.* at 517 (Black, J., dissenting).

78. *Id.* at 511 (majority opinion).

79. *Id.* at 512-13.

80. *Id.* at 513-14.

81. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

advocating drug or alcohol use,<sup>82</sup> irresponsible sex,<sup>83</sup> or conduct not consistent with the shared values of society.<sup>84</sup> This authority to curtail student speech extends to school-related activities occurring outside of school hours or activities that are school-sponsored.<sup>85</sup>

The United States Supreme Court has encountered the issue of restrictions on student speech on several occasions during the past several decades. On each occasion the boundaries of student speech, or more precisely, the limitations on one's First Amendment right to free speech have been established. Among all the cases, the key to these restrictions is acknowledging that the challenges of maintaining order in an educational environment is important.

**2. Common Speech Restrictions on Political Speech in the Polling Room and Campaign-Free Zone.** Robert Dunham's work, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*,<sup>86</sup> classified the expression restrictions found in the polling room and campaign-free zone into two classifications: "political free zones" and "politically restricted zones."<sup>87</sup> I find these classifications are still accurate in describing the legal landscape of speech restrictions in the states' campaign-free zones.

Political-free zones are the most restrictive of the classifications.<sup>88</sup> These zones prohibit any type of political activity within them.<sup>89</sup> These restrictions usually prohibit anyone from remaining in a campaign-free zone except for voters and election officials.<sup>90</sup> Campaign signs and regalia are also banned from the zone.<sup>91</sup> Voters are required to remove any campaign regalia before entering the campaign-free zone.<sup>92</sup>

Such a political free zone is illustrated in North Dakota's law regulating the campaign-free zone and polling place.<sup>93</sup> Its law states:

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82. *Morse v. Frederick*, 551 U.S. 393, 409 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

83. *Kuhlmeier*, 484 U.S. at 272.

84. *Id.*

85. *Id.* at 273 (allowing schools to exercise control over the style and content of school-sponsored student newspapers).

86. Dunham, *supra* note 8.

87. *Id.* at 2143-44.

88. *Id.*

89. *Id.*

90. *Id.* at 2144.

91. *Id.* (quoting IOWA CODE ANN. § 49.107(1) (West Supp. 1988) (repealed)).

92. *Id.* at 2181 n.241.

93. N.D. CENT. CODE § 16.1-10-03 (2011).

No individual may buy, sell, give, or provide any political badge, button, or any insignia within a polling place or within one hundred feet [30.48 meters] from the entrance to the room containing the polling place while it is open for voting. No such political badge, button, or insignia may be worn within that same area while a polling place is open for voting.<sup>94</sup>

North Dakota's law creates an atmosphere that is completely sterilized of any political messaging. If unwary electors enter a political-free zone while wearing campaign messaging, they may be asked to remove the messaging or reverse their shirt before entering the zone.<sup>95</sup>

Politically restricted zones are less restrictive than political-free zones.<sup>96</sup> Florida's expression restrictions in the polling place and campaign-free zone present a good example of a politically restricted zone.<sup>97</sup> Florida's statute states as follows:

(4)(a) No person, political committee, committee of continuous existence, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, or early voting site. Before the opening of the polling place or early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries.

(b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" shall not be construed to prohibit exit polling.

(c) Each supervisor of elections shall inform the clerk of the area within which soliciting is unlawful, based on the particular characteristics of that polling place. The supervisor or the clerk may take any reasonable action necessary to ensure order at the polling places, including, but not limited to, having disruptive and unruly persons removed by law enforcement officers from the polling room or place or from the 100-foot zone surrounding the polling place.<sup>98</sup>

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94. *Id.* (bracketed material in original)

95. See generally Tucker, *supra* note 2 (describing a poll worker's response to the inquiry of what would be done if Professor Tucker had worn a campaign shirt).

96. Dunham, *supra* note 8, at 2144.

97. FLA. STAT. § 102.031(4) (2011).

98. *Id.*

As exemplified by Florida's statute, politically restricted zones allow for the presence of some campaign messaging. Unlike political free zones, in politically restricted zones voters are allowed to wear campaign, party, or initiative paraphernalia. The completely politically sterilized environment found in political-free zones is absent in politically restricted zones.<sup>99</sup>

To focus on how the polling place and its surrounding area is regulated, we shall break the area surrounding the voting machine into three different zones: the polling room, the campaign-free zone, and the area outside the campaign-free zone. Each of these zones will be discussed individually and the speech restrictions analyzed accordingly.

**a. The Polling Room.** The polling room may be located in a government or non-government owned building and is where voting actually takes place. Generally, when electors enter the polling room they receive their ballots, mark their ballots in a booth or other device to ensure secrecy regarding their vote, and place the marked ballot into the ballot box. The state may limit who may enter and remain in the polling room.<sup>100</sup>

The polling place has been described as a non-public forum.<sup>101</sup> This description has been supported by the belief that it has not "immemorably been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>102</sup> As seen in the previous part providing a brief history of the polling room in the United States, the polling room has long been a public forum. Even today during the primary season, the polling room is still used as a place for public assembly. Regardless, we shall excuse this oversight as we continue the journey through the policy-based philosophy.

It is in the polling room that passive electioneering encounters governmental speech restrictions. Several cases have arisen regarding statutes that prohibit the wearing of stickers, buttons, and other election paraphernalia in the polling room.<sup>103</sup>

The issue of passive electioneering by wearing a campaign sticker when voting was the topic of *Marlin v. District of Columbia Board of Elections & Ethics*.<sup>104</sup> In *Marlin*, the plaintiff filed suit in the United

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99. Dunham, *supra* note 8, at 2144.

100. *See, e.g.*, FLA. STAT. § 102.031(3)(a) (2011).

101. *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 718 (D.C. Cir. 2001).

102. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

103. *E.g., Marlin*, 236 F.3d. at 717-18; *Minn. Majority*, 2010 U.S. Dist. LEXIS 116240.

104. 236 F.3d 716, 717 (2001).

States District Court for the District of Columbia to challenge two of the District of Columbia's election regulations. One of the regulations banned political activity "in, on, or within a reasonable distance outside the building used as a polling or vote counting place."<sup>105</sup> The other defined "political activity" to include "any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting."<sup>106</sup>

When the plaintiff went to vote in the primary election, he wore a sticker endorsing a candidate for mayor. When the plaintiff attempted to turn in his completed ballot, a poll worker told him that he was not allowed to cast his vote while wearing the sticker. After a second poll worker accepted the plaintiff's ballot, the first poll worker told the plaintiff that "he would not be permitted to vote in the general election if he was wearing 'any sticker, button, emblem, or clothing that showed support for a candidate.'"<sup>107</sup> After the primary election but before the general election, the plaintiff filed his lawsuit challenging the district's election regulations that restricted his ability to wear campaign paraphernalia. The plaintiff did vote in the general election, but had to vote curbside since he was wearing political paraphernalia.<sup>108</sup>

The plaintiff appealed the district court's ruling that the ban on political activity was constitutional.<sup>109</sup> The United States Court of Appeals for the District of Columbia upheld the trial court's ruling.<sup>110</sup> Both courts found that the polling room was a non-public forum and "that the political activity ban [was] a reasonable view-point neutral regulation."<sup>111</sup>

In *Minnesota Majority v. Mansky*,<sup>112</sup> the plaintiffs planned on wearing "Northstar Tea Party tee-shirts or Election Integrity Watch buttons that state[d] 'Please I.D. Me.'"<sup>113</sup> The shirts bore different slogans, including "Don't Tread on Me" and "Fiscal Responsibility, Limited Government, Free Markets."<sup>114</sup> The buttons depicted an eye, "a telephone number, and a website address including the word 'integrity.'"<sup>115</sup>

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105. *Id.* at 718 (citing 3 D.C. MUN. REGS. § 708.4).

106. *Id.* (quoting 3 D.C. MUN. REGS. § 708.8).

107. *Id.* (quoting trial court record).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. 2010 U.S. Dist LEXIS 116240 (D. Minn. Nov. 1, 2010).

113. *Id.* at \*2.

114. *Id.* at \*2-3.

115. *Id.* at \*2.



The plaintiffs, made up of private citizens and institutional organizations, were proactive in their efforts and filed a lawsuit in the Federal District Court for the District of Minnesota, seeking a temporary restraining order and injunction in anticipation of their shirts and buttons being banned at the polling place.<sup>116</sup> All the institutional organizations were self-described “grass roots coalition[s].”<sup>117</sup>

At issue was the following statute:

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. 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. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.<sup>118</sup>

The statute created an interpretive issue because it restricted “political material” rather than “campaign material.”<sup>119</sup> By using the term “political” it would appear that the restrictions on what messages may be worn to a polling place are highly restrictive. This could include messages as mundane as a school’s name,<sup>120</sup> a patriotic message,<sup>121</sup> or even a specific color.<sup>122</sup>

On November 1, 2010, the court heard the plaintiffs’ motion for a temporary restraining order seeking to “enjoin[,] [the] [d]efendants from preventing the individual [p]laintiffs from entering the polling place and voting while wearing Tea Party apparel and the ‘Please I.D. Me’

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116. *Id.* at \*3-4. The complaint alleged three counts: “(1) that Minnesota Statute [§] 211B.11, subdivision 1, is a facially unconstitutional restriction on First Amendment rights; (2) that [§] 211B.11 as applied to prohibit wearing the tee-shirts and buttons violates [the] [p]laintiffs’ federal constitutional rights under the First Amendment; and (3) that [§] 211B.11 as applied to prohibit wearing the tee-shirts and buttons violates [the] [p]laintiffs’ state constitutional rights to free speech and association.” *Id.* at \*3.

117. *Id.* at \*2.

118. *Id.* at \*4 (quoting MINN. STAT. § 211B.11, subdiv. 1 (2008)).

119. *Id.* The court did notice this and used this distinction to broadly interpret what is covered under the statute. *Id.* at \*5.

120. For example, a shirt displaying the name of a religious school may be determined to be political in nature by certain individuals and not allowed into the polling place.

121. Messages such as common statements like “God Bless America,” “Live Free or Die,” or “Support Our Troops” could fall under the ban.

122. Since the 2000 presidential election, red has been associated with the Republican Party and blue with the Democratic Party. The wearing of such colors could be seen as a political statement at the polling place.

buttons.”<sup>123</sup> One of the defendants included an affidavit stating “that no one will be prohibited from voting, but individuals who wear the buttons or apparel will be (1) asked to remove or cover the apparel and (2) the names of individuals refusing to do so will be noted for possible referral to the Minnesota Office of Administrative Hearings (OAH).”<sup>124</sup>

In its order, the court engaged in a temporary restraining order analysis.<sup>125</sup> The court also noted that the timing of the motion did “not weigh in favor of granting injunctive relief.”<sup>126</sup>

The plaintiffs claimed they were being singled out by the state authorities.<sup>127</sup> The court described the evidence supporting the plaintiffs’ claim of being singled out as “mere speculation.”<sup>128</sup> No further description of the plaintiffs’ evidence was provided. Immediately following the “mere speculation” statement, the court stated:

that the buttons are designed to affect the actual voting process at the polls by intimating that voters are required to show identification before voting. This intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required. The buttons are also associated with a political movement to require voters to produce identification. The Tea Party apparel communicates support for the Tea Party movement which is associated with certain candidates and political views.<sup>129</sup>

The court did not describe what evidence was presented by the defendants to support the court’s findings regarding the alleged intimation to voters. From the order, it appears that the court was engaging in its own “mere speculation.” Ultimately, the court held that prohibiting the wearing of the buttons and shirts was reasonably related to a legitimate state interest: “maintain[ing] peace, order, and decorum’ at the polls.”<sup>130</sup> It also determined that the plaintiffs would not prevail

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123. *Minn. Majority*, 2010 U.S. Dist. LEXIS 116240, at \*4.

124. *Id.* at \*5.

125. *Id.* at \*5-6. The factors reviewed when determining whether to grant a temporary restraining order are: “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury . . . granting the injunction will inflict on the other party; (3) the probability of the movant succeeding on the merits; and (4) the public interest.” *Id.* at \*6 (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 689-90 (8th Cir. 2008)).

126. *Id.* at \*5.

127. *Id.* at \*9.

128. *Id.*

129. *Id.* at \*9-10.

130. *Id.* at \*10 (alteration in original) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

on the merits based on the Supreme Court's decision in *Burson v. Freeman*<sup>131</sup> and that the polling room was not a public forum.<sup>132</sup>

After the election, the plaintiffs filed an amended complaint.<sup>133</sup> In response, the defendants brought motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>134</sup> The matter was heard and the court granted the defendants' motions dismissing the plaintiffs' claims with prejudice.<sup>135</sup> The court provided a strong basis for its opinion by noting that the polling room is a non-public forum.<sup>136</sup> It succinctly summed up the standard by stating, "[r]estrictions on speech in nonpublic fora are allowed as long as they are viewpoint neutral and reasonable in light of the purposes served by the forum."<sup>137</sup> The court did not rely on *Burson* to support its conclusions (noting that *Burson* was focused on the area outside the polling room).<sup>138</sup> Accordingly, the plaintiffs' amended complaint was dismissed with prejudice.<sup>139</sup>

**b. The Campaign-Free Zone.** The area outside the polling room is also included in the campaign-free zone.<sup>140</sup> Forty-seven states and the District of Columbia have non-campaign zones extending from the

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131. 504 U.S. 191 (1992).

132. *Minn. Majority*, 2010 U.S. Dist. LEXIS 116240, at \*4, 5.

133. *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1117 (D. Minn. 2011). The amended complaint was comprised of four counts:

(1) that Minnesota Statutes [§] 211.B11, subdivision 1, is a facially unconstitutional restriction of First Amendment rights under the United States Constitution and parallel rights under the Minnesota constitution (Count IV); (2) that [§] 211B.11, as applied in the Election Day Policy adopted by Hennepin and Ramsey Counties and the [Minnesota] Secretary of State, violated [the] [p]laintiffs' First Amendment rights, their constitutionally protected right to vote, and parallel rights under the Minnesota constitution (Counts I and IV); (3) that the Election Day Policy violated [the] [p]laintiffs' due process rights under both the United States and Minnesota its constitutions (Count II); and (4) that the Election Day Policy deprived the [p]laintiffs of equal protection under both the United States and Minnesota constitutions (Count III).

*Id.* at 1119.

134. FED. R. CIV. P. 12(b)(6); *Minn. Majority*, 789 F. Supp. 2d at 1117. Federal Rule of Civil Procedure 12(b)(6) provides a defense of "failure to state a claim upon which relief can be granted" to defendants. FED. R. CIV. P. 12(b)(6). Such a motion must be filed before the defendant files its answer or such a defense is waived. FED. R. CIV. P. 12(b).

135. *Minn. Majority*, 789 F. Supp. 2d at 1133.

136. *Id.* at 1121.

137. *Id.*

138. *Id.*

139. *Id.* at 1133.

140. James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 279 (2011).

entrance of the polling place to a fixed distance.<sup>141</sup> Vermont, Oregon, and Washington are the only states that do not have campaign-free zones.<sup>142</sup>

Not surprisingly, the campaign-free zone has been the subject of some litigation over the years. The hallmark case on the constitutionality of the campaign-free zone is *Burson*.<sup>143</sup> In 1992 the Supreme Court rendered its opinion in *Burson*, where the State of Tennessee banned campaigning within one hundred feet of polling places.<sup>144</sup>

In *Burson*, the plaintiff filed a declaratory action attacking the constitutionality of the campaign-free zone under both the Tennessee

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141. ALA. CODE § 17-9-50 (2006) (30 feet); ALASKA STAT. § 15.15.170 (2010) (200 feet); ARIZ. REV. STAT. ANN. § 16-411 (2010) (75 feet); ARK. CODE ANN. § 7-1-103(a)(9) (2010) (100 feet); CAL. ELEC. CODE § 319.5 (West 2010) (100 feet); COLO. REV. STAT. § 1-13-714 (2010) (100 feet); CONN. GEN. STAT. § 9-236 (2010) (75 feet); DEL. CODE ANN. tit. 15, § 4933 (2010) (50 feet); D.C. CODE § 1-1001.10(b)(2)(a) (2010) (50 feet); FLA. STAT. § 102.031(3)(c) (2011) (100 feet); O.C.G.A. § 21-2-414(a) (2011) (150 feet); HAW. REV. STAT. § 11-132 (2010) (200 feet); IDAHO CODE ANN. § 18-2318 (2010) (100 feet); 10 ILL. COMP. STAT. 5/7-41(c) (2010) (100 feet); IND. CODE ANN. § 3-5-2-10 (50-foot chute); IOWA CODE § 39A.4 (2009) (300 feet); KAN. STAT. ANN. § 25-2413 (2011) (250 feet); KY. REV. STAT. ANN. § 117.235 (2010) (300 feet); LA. REV. STAT. ANN. § 18:1462 (2010) (600 feet); ME. REV. STAT. tit. 21A, § 682(2) (2010) (250 feet); MD. CODE ANN., ELEC. LAW § 16-206 (2010) (100 feet); MASS. GEN. LAWS ch. 54, § 65 (2010) (150 feet); MICH. COMP. LAWS § 168.744 (2010) (100 feet); MINN. STAT. § 204C.06 (2010) (100 feet); MISS. CODE ANN. § 23-15-895 (2010) (150 feet); MO. REV. STAT. § 115.637 (2010) (25 feet); MONT. CODE ANN. § 13-35-211(1) (2010) (100 feet); NEB. REV. STAT. ANN. § 32-1524(2) (2010) (200 feet); NEV. REV. STAT. ANN. § 293.361(1) (2009) (100 feet); N.H. REV. STAT. ANN. § 659:43 (2011) (a 10-foot corridor that extends to a distance at the discretion of the election moderator); N.J. STAT. ANN. § 19:34-15 (West 2010) (100 feet); N.M. STAT. ANN. § 1-20-16 (2011) (100 feet); N.Y. ELEC. LAW § 17-130 (Consol. 2010) (100 feet); N.C. GEN. STAT. § 163-166.4 (2010) (50 feet); N.D. CENT. CODE § 16.1-10-03 (100 feet); OHIO REV. CODE ANN. § 3501.30(4) (West 2010) (100 feet); OKLA. STAT. tit. 26, § 7-108 (2010) (300 feet); 25 PA. CONS. STAT. ANN. § 25-14-3060(d) (2011) (10 feet from polling place); R.I. GEN. LAWS § 17-19-49 (2010) (50 feet); S.C. CODE ANN. § 7-25-180 (2010) (200 feet); S.D. CODIFIED LAWS § 12-18-3 (2010) (100 feet); TENN. CODE ANN. § 2-7-111 (2010) (100 feet); TEX. ELEC. CODE ANN. § 61.003 (West 2011) (100 feet); UTAH CODE ANN. § 20A-3-501 (2010) (150 feet); VA. CODE ANN. § 24.2-604 (2011) (40 feet); W. VA. CODE § 3-9-6 (2010) (300 feet); WIS. STAT. § 12.03(2)(b) (2010) (100 feet); WYO. STAT. ANN. § 22-26-113 (2010) (100 yards).

142. Such a zone would be impossible to have in Oregon because the state only allows voting by mail. OREGON REVISED STAT. § 254.465 (2009). Washington has followed Oregon's lead, but maintains a polling place in one county. WASH. REV. CODE § 29A.40.150 (2011).

143. 504 U.S. 191.

144. *Burson*, 504 U.S. at 191, 193. There had been challenges to campaign-free zones before the *Burson* case. See generally Dunham, *supra* note 8, at 2137 (discussing the many state and federal cases that reviewed campaign-free zones prior to the Supreme Court's opinion in *Burson*).

constitution and the United States Constitution.<sup>145</sup> The plaintiff was politically active and claimed that the statute against electioneering near the polling room "limited her ability to communicate with voters."<sup>146</sup> The statute under attack read as follows:

Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.<sup>147</sup>

The Tennessee Supreme Court overruled the trial court and held that the statute was unconstitutional.<sup>148</sup>

A plurality of justices on the United States Supreme Court held that the campaign-free zone was a "facially content-based restriction on political speech in a public forum."<sup>149</sup> Because it was deemed a content-based restriction, a state must prove that the speech restriction was "necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."<sup>150</sup> Tennessee offered as a compelling interest that the voters should have the right to vote for the candidate of their choice and to ensure election integrity and reliability.<sup>151</sup> To ensure that Tennessee had a compelling interest in preventing voter intimidation and election fraud, the Court engaged in a review of election history in Tennessee.<sup>152</sup>

In Justice Kennedy's concurring opinion he "elaborat[ed] on the meaning of the term 'content based'" as used in the Court's First Amendment jurisprudence.<sup>153</sup> Justice Kennedy was in favor of the speech restrictions upheld by the majority as the restrictions were necessary to protect "another constitutional right": the right to vote.<sup>154</sup> He explained that to have a content based restriction on speech, the speech being restricted should fall within a "recognized category

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145. *Burson*, 504 U.S. at 194.

146. *Id.*

147. *Id.* at 193-94 (alterations in original) (quoting TENN. CODE ANN. § 2-7-111(b)).

148. *Id.* at 195.

149. *Id.* at 193, 198.

150. *Id.* at 198 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

151. *Id.* at 198-99.

152. *Id.* at 205-06.

153. *Id.* at 212 (Kennedy, J., concurring).

154. *Id.* at 213-14.

permitting suppression” and that protecting other constitutional rights was one of these recognized categories.<sup>155</sup>

Justice Scalia’s concurring opinion called into question the applicability of the public-forum doctrine to campaign-free zones.<sup>156</sup> He believed that the easier solution was to declare the campaign-free zone a non-public forum rather than to engage in an unnecessary analysis of an area that is not a “traditional public forum.”<sup>157</sup> He surmised that even though some campaign-free zones may include sidewalks and streets, these locations (based on the long history of the Tennessee statute) were not “quintessential public forums.”<sup>158</sup> He stated that “at least [thirty-four] of the [forty-five] [s]tates . . . had enacted such restrictions” as of 1900, and that the campaign-free zones had “traditionally *not* been devoted to assembly and debate.”<sup>159</sup> Justice Scalia based his opinion on the fact that not all “[s]treets and sidewalks” are public forums and that “the long usage of our people demonstrates that portions of streets and sidewalks adjacent to polling places are not public forums *at all times*.”<sup>160</sup> Not only were the facts and law in support of finding the campaign-free zone a non-public forum, Justice Scalia pointed out that as a matter of policy it was “less confusing to acknowledge that the environs of a polling place, on election day, are simply not a ‘traditional public forum’—which means that they are subject to speech restrictions that are reasonable and viewpoint neutral.”<sup>161</sup>

The plurality’s opinion was met with a dissent written by Justice Stevens and joined in by Justices O’Conner and Souter.<sup>162</sup> The dissenters argued that the Tennessee statute prohibited conduct and speech that was “classic political expression.”<sup>163</sup> They argued for the “long recognized” standing of the Supreme Court with regard to political expression by invoking *Buckley v. Valeo*’s<sup>164</sup> famous passage:

[D]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Consitution. The First Amendment affords the broadest protection to such political expression in order “to assure [the]

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155. *Id.* at 212, 213.

156. *Id.* at 216 (Scalia, J., concurring in the judgment).

157. *Id.* at 214.

158. *Id.*

159. *Id.* at 214-16.

160. *Id.* at 216.

161. *Id.* at 216 (quoting *Perry Educ. Ass’n*, 460 U.S. at 46).

162. *Id.* at 217 (Stevens, J., dissenting).

163. *Id.*

164. 424 U.S. 1 (1976).

unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>165</sup>

It is here that the dissenters agreed with the plurality that a state must pass the strict-scrutiny standard of review.<sup>166</sup> They also agreed that "protect[ing] orderly access to the polls" was a "compelling state interest."<sup>167</sup> These, of course, were the only parts of the plurality's opinion with which they agreed.

The dissenters took issue with the effect the statute had on "last-minute campaigning."<sup>168</sup> The dissenters also called into question Tennessee's need for a three hundred-foot campaign-free zone in twelve of the state's ninety-five counties.<sup>169</sup> What struck the dissenters as odd was the existence of variations in campaign-free zones nationwide.<sup>170</sup> While some zones were one hundred feet in circumference, other zones ranged from fifty feet to five hundred feet.<sup>171</sup>

Then the dissenters turned to the meat of the issue, the key problem, that Tennessee's "statute [did] not merely regulate conduct that might inhibit voting; it bar[red] the simple 'display of campaign posters, signs or other campaign materials."<sup>172</sup> But the restrictions did not stop there— "[b]umper stickers on parked cars and lapel buttons on pedestrians [were] taboo" as well.<sup>173</sup> The dissent even called the plurality's opinion that the "sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box 'absurd."<sup>174</sup>

According to the dissenting Justices, the evidence produced at trial supporting the campaign-free zone "was exceptionally thin."<sup>175</sup> They attacked the plurality's analysis as "confus[ing] history with necessity," stating that "necessity must be demonstrated."<sup>176</sup> Further, the dissenters brought into question whether the campaign-free zone was necessary when it was originally adopted.<sup>177</sup> They believed that alternative

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165. *Burson*, 504 U.S. at 217 (Stevens, J., dissenting) (last alteration in original) (quoting *Buckley*, 424 U.S. at 14).

166. *Id.*

167. *Id.* at 217-18.

168. *Id.* at 224.

169. *Id.* at 218.

170. *Id.*

171. *Id.*

172. *Id.* at 218-19 (alteration in original) (quoting TENN. CODE ANN. § 2-7-111(b)).

173. *Id.* at 219.

174. *Id.*

175. *Id.*

176. *Id.* at 220-21.

177. *Id.* at 220.

electoral reforms, other than making a large political-free zone, were available to deter the conduct sought to be curtailed by the zone.<sup>178</sup>

Attacks were also made on the tradition argument by holding the Court's past history with Tennessee's electoral traditions.<sup>179</sup> The Court pointed to the cases of *Dunn v. Blumstein*<sup>180</sup> and *Baker v. Carr*<sup>181</sup> as demonstrating the apparent problems with relying on Tennessee's electoral traditions.<sup>182</sup> *Dunn* involved a one-year residency requirement, and *Baker* involved legislative reapportionment.<sup>183</sup>

The dissenters also attacked the current necessity of campaign-free zones.<sup>184</sup> They noted that no findings were made regarding why such zones were necessary in the modern world of campaigns and elections.<sup>185</sup> In fact, the dissenters were greatly persuaded by a number of lower-court campaign-free-zone cases that had resulted in findings that the zones were no longer necessary.<sup>186</sup>

Justice Stevens along with his fellow dissenters took aim at the broad sweep of Tennessee's law.<sup>187</sup> They believed that the speech restrictions were indeed content-based,<sup>188</sup> focusing on the fact that the law allowed exit polling and silences only "campaign-related expression" while allowing expression on all other topics.<sup>189</sup> They pointed out that testimony introduced at trial showed that "several groups of candidates rely heavily on last-minute campaigning."<sup>190</sup> Those groups included "candidates for lower visibility offices, and 'grassroots' candidates."<sup>191</sup> Despite the plurality's recognition that the speech restrictions were content-based, dissenters argued that the plurality failed to establish that such restrictions were "related to any purported state interest."<sup>192</sup>

To make matters worse, the dissent pointed out that the plurality did not even inquire whether the restrictions were necessary.<sup>193</sup> The dissent concluded by stating that the state did "not have a legitimate

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178. *Id.*

179. *Id.* at 221-22.

180. 405 U.S. 330 (1972).

181. 369 U.S. 186 (1962).

182. *Burson*, 504 U.S. at 221-22 (Stevens, J., dissenting).

183. *Id.* at 221-22.

184. *Id.* at 222.

185. *Id.*

186. *Id.*

187. *Id.* at 223.

188. *Id.*

189. *Id.*

190. *Id.* at 224.

191. *Id.*

192. *Id.*

193. *Id.* at 225.



interest in insulating voters from election-day campaigning,<sup>194</sup> and opining that “[t]he hubbub of campaign workers outside a polling place may be a nuisance, but it is also the sound of a vibrant democracy.”<sup>195</sup>

Once a decision was reached in *Burson*, it became a factor in a number of election related cases. We have already seen its use in the *Minnesota Majority v. Mansky* case discussed in Part II.B.2.a. Additional cases have felt the effect of *Burson* in Ohio, Kentucky, Michigan, and New York.<sup>196</sup>

The issue of whether Kentucky’s restriction on electioneering was overbroad became an issue in *Anderson v. Spear*.<sup>197</sup> While the appellant challenged the statute on two grounds, we will focus on the attack on the definition of electioneering.<sup>198</sup> Specifically, it was argued that the definition was overbroad because it included political speech not advocating in favor of or against a public candidate.<sup>199</sup>

In *Anderson*, the appellant was running as a write-in candidate and wanted to hand out instructions “on how to cast a write-in vote.”<sup>200</sup> The Kentucky Board of Elections had informed him that engaging in such an act was “electioneering” under the electioneering restrictions. Kentucky’s definition of electioneering included “the displaying of signs,

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194. *Id.* at 227.

195. *Id.* at 228.

196. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004); *Am. Fed’n of State, Cnty & Mun. Emps. v. Land*, 583 F. Supp. 2d 840, 848-49 (E.D. Mich. 2008) (upholding Michigan’s ban on wearing campaign paraphernalia in the campaign-free zone by basing its decision on *Burson* and *United Food*); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364-65 (S.D.N.Y. 2007).

197. 356 F.3d 651, 656 (6th Cir. 2004).

198. *Id.* The other ground was that the legislature’s reasoning behind the 500-foot campaign-free zone had scant evidence supporting the premise that the electioneering restrictions were for the prevention of voter intimidation and corruption. *Id.* at 658. In fact, it appeared from the record that the support for the electioneering ban was voter convenience. *Id.* at 660. In overturning the campaign-free-zone statute, the court specifically found the following section of the record to be interesting:

You know, it was almost impossible to get in to vote. You had handfuls of cards that people came in, threw down in the floor, threw down in the polling booth, because they weren’t interested in those. And I remember, you know, the first election when we had the 500[-foot] ban, I had, you know, comment after comment from people, that this was the way elections should be, that, you know, they didn’t have to run the gauntlet, they didn’t have to take all these cards that they didn’t want to take, because they didn’t want to offend people by not taking their card. It really has changed the appearance of the polling places. You don’t have the crowds hanging around on election day.

*Id.*

199. *Id.*

200. *Id.* at 665.

the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but [did] not include exit polling.”<sup>201</sup> In response, Anderson argued that the term “electioneering,” so defined, was defined encompassed constitutionally protected speech.<sup>202</sup> Agreeing with the appellant, the court held that Kentucky’s campaign-free-zone statute was overbroad because “it prohibit[ed] more speech than [was] necessary to meet the [s]tate’s protected interest.”<sup>203</sup> To illustrate the court’s reasoning, the court provided an example of how unlimited the statute’s restrictions were in practice:

While Mr. Anderson’s particular speech—[for example], providing instructions on how to vote for write-in candidates—at first glance looks like a relatively narrow class of speech, his legal challenge to a definition of electioneering which includes issue advocacy raises constitutional concerns about a broad class of speech. The Kentucky State Board of Elections fails to explain why providing instructions on how to cast a write-in vote would constitute “electioneering” for the purposes of the statute. Thus, as best we can tell, the Kentucky law as interpreted by the Board of Elections would forbid an individual to remind voters to fill in the ovals completely on optical scan ballots. Given the Board’s decision, it would also appear that individuals would be prohibited from displaying signs or distributing leaflets which fall into core issue advocacy: that is, promoting issues rather than specific candidates. If “electioneering” includes Mr. Anderson’s instructing voters on how to cast a write-in vote, does it also include, for example, parents urging voters to “support our schools”? All issue-related speech is chilled by the Board’s interpretation of “electioneering.” However, the [s]tate has failed to provide evidence to support a finding either that a regulation so broad is necessary to prevent corruption and voter intimidation, or that the regulation does not significantly impinge on the rights protected by the First Amendment.<sup>204</sup>

The restriction of electioneering in private parking lots and public sidewalks was addressed in *United Food & Commercial Workers Local 1099 v. City of Sidney*.<sup>205</sup> In *United Food*, the appellants had sought to collect signatures for a referendum petition in Ohio.<sup>206</sup> The United States Court of Appeals for the Sixth Circuit reviewed the appellants’

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201. *Id.* (quoting KY. REV. STAT. ANN. § 117.235(3)).

202. *Id.* at 663.

203. *Id.* at 666.

204. *Id.* at 665.

205. 364 F.3d 738, 743 (6th Cir. 2004).

206. *Id.* at 742.

case and held that it was lawful to restrict speech on public parking lots and sidewalks if they fall within the campaign-free zone.<sup>207</sup> The court also noted that when the state opens up a school or other private or public forum for voting, such forums are opened solely for the holding of elections.<sup>208</sup> Opening up these areas for voting does not open these areas up for other forms of expression.<sup>209</sup>

### C. *The Area Outside the Campaign-Free Zone*

The classification of property and the accompanying free-speech rights return to their “regular” status once one steps outside the polling room and campaign-free zone.<sup>210</sup> This can cause confusion on Election Day as many polling sites are not located in government buildings or on government property. It is not out of the ordinary to have churches, union halls, and veterans’ associations serve as polling sites. When this occurs, citizens who are seeking to influence the electorate may run afoul of private-property rights.

This area was recently at issue in *Liberty Township Tea Party v. International Brotherhood of Electrical Workers, AFL-CIO, Local 648*.<sup>211</sup> In *Liberty Township*, the plaintiffs had set up a table “to solicit petitions to ‘Stop Obama Care’ and to end estate taxes.”<sup>212</sup> During past elections, one of the plaintiffs, Ms. Dirr, had actively campaigned outside the union hall location for various candidates and causes. The table was located outside the campaign-free zone and on the grass next to the handicap parking spot at the union hall. The exact location was disputed at trial, but all parties agree it was outside the campaign-free zone. From her table Ms. Dirr solicited people to sign her petitions. At some point a union official approached her and told her she needed to leave. Ms. Dirr’s recollection of the conversation, which differed from the union member’s, was that the election supervisor stated that she must take the union’s viewpoint into account.<sup>213</sup>

The Liberty Township Tea Party and Ms. Dirr filed a lawsuit in the United States District Court for the Southern District of Ohio. The plaintiffs sought injunctive and declaratory relief and damages from the defendants.<sup>214</sup> While the court denied the plaintiffs’ requests for relief,

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207. *Id.* at 751.

208. *Id.* at 750.

209. *Id.* at 749.

210. *Id.*

211. 2010 U.S. Dist. LEXIS 142839 (S.D. Ohio Oct. 20, 2010).

212. *Id.*

213. *Id.* at \*3-4.

214. *Id.* at \*1-2.

it did provide guidance to all the parties involved.<sup>215</sup> The court, citing *United Food*, stated that the “areas surrounding a polling place may become a designated public forum if there is evidence of expressive activity occurring on the property that goes beyond each voter casting his or her ballot.”<sup>216</sup>

The union that owned the property being used as a polling site had allowed the placement of political signs “on the grass immediately to the left and right of the driveways.”<sup>217</sup> The union had also permitted “individuals to engage in political discourse near the walkways or front parking lot leading to the polling location.”<sup>218</sup> The court found that the union, by allowing these activities to take place, had “opened up these portions of its property to expressive activity and ha[d] intertwined itself with a function exclusively reserved to the [s]tate, that is, the administration of elections.”<sup>219</sup> Specifically, that area had, because of the union’s actions, become open not to the wide range of free speech, but to political discourse.<sup>220</sup>

Those who suffer speech restrictions outside the campaign-free zone may have additional remedies for the unlawful restriction of their speech. In *United Food*, the appellants had filed a 42 U.S.C. § 1983<sup>221</sup> claim against the county sheriff’s department for its actions taken against them outside the campaign-free zone.<sup>222</sup> A sheriff’s deputy threatened to arrest the appellants if they continued to solicit petition signatures on the sidewalk outside the campaign-free zone at the Y.M.C.A.<sup>223</sup> The court of appeals overturned the trial court’s order dismissing the plaintiffs’ claim against the county sheriff’s department.<sup>224</sup>

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215. *Id.* at \*22. The denial of the plaintiffs’ motion for a temporary restraining order was based on the presence of conflicting testimony between Ms. Dirr and Mr. McGuffey. *Id.* at \*18-19. The court held that the “[p]laintiffs’ claims hinge[d] upon the credibility determination to be made by the finder of fact” and, therefore, the “[p]laintiffs have not shown a substantial likelihood of success on the merits of their First Amendment claim.” *Id.* at \*19.

216. *Id.* at \*12 (citing *United Food*, 364 F.3d at 749-50).

217. *Id.*

218. *Id.* at \*13.

219. *Id.*

220. *Id.*

221. 42 U.S.C. § 1983 (2006).

222. *United Food*, 364 F.3d at 745-46.

223. *Id.* at 741-42.

224. *Id.* at 753.

### III. TO RESTRICT OR NOT RESTRICT: THAT IS THE QUESTION<sup>225</sup>

States have been running elections for public office for well over two hundred years.<sup>226</sup> During that time there has been a diverse methodology for the operation and regulation of these activities.<sup>227</sup> In the majority of states, today's election sites look similar from state to state.<sup>228</sup> To determine whether passive electioneering should be banned at the polling site, as earlier stated, we are going to review the restrictions under both an originalist philosophy and policy-based philosophy.

#### A. *The Originalist Philosophy's Treatment of Restriction on Passive Electioneering at the Polling Site*

This topic presents us with a unique opportunity to engage in an originalist analysis regarding the First Amendment's Free Speech Clause. During the First Amendment's ratification process, there were polling places and politics that revolved around competing candidates and political parties.<sup>229</sup> We can easily determine what the general public would have believed the First Amendment's guarantee of free speech meant in the context of a polling place. Things, politically, were not so different then. Various forms of media then in existence advocated for candidates and provided the political commercials of the day.<sup>230</sup> Candidates and parties ran campaigns to win at the ballot box on election day.<sup>231</sup> There is no need to consider the restrictions of who may be an elector at that time period; the issue is the freedom to passively electioneer at the polling place and not the right to vote.<sup>232</sup>

225. Paraphrasing WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET PRINCE OF DENMARK*, act 3, sc. 1.

226. BISHOP, *supra* note 41, at 220.

227. See *supra* Part I.A.

228. Oregon operates only one polling place, and has moved its election process to a mail-in format. OR. REV. STAT. § 254.465. Voters no longer are allowed to exercise their franchise in the traditional manner, due to the replacement of the ballot box with the mailbox.

229. BISHOP, *supra* note 41, at 120.

230. Volokh, *supra* note 30, at 311-12.

231. BISHOP, *supra* note 41, at 120-21.

232. The ability to be an elector in the 1700s looked much different than today. Restrictions such as land or property ownership were standard practices at the time. William Blackstone defended the practice of property ownership as a prerequisite for elections in his *Commentaries on the Laws of England*:

The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to

It is in using this wealth of law and tradition that we will be able to formulate both a proper view of intentionalism and original public meaning.<sup>233</sup>

The drafters and ratifiers of the First Amendment contended with a myriad of election environments. As illustrated in Part II.A of this Article, they were familiar with quite a few differing methods of conducting elections, most of which were used within some of the members' living memories. Such voting methods included *viva voce*, showing of hands, bean or corn count, and by ballot.<sup>234</sup> We can even go further and review the polling-room procedures enacted at the time by state legislatures and municipal bodies.<sup>235</sup>

Georgia's Act of June 9, 1761, provided for "the manner and form of Electing Members to represent the Inhabitants of [Georgia] in the Commons House of Assembly."<sup>236</sup> The Act covered everything from the qualifications of electors to the process at the polling room.<sup>237</sup> The only expressly restricted speech is that of intimidation by the provost marshal.<sup>238</sup> The Act states:

[I]f the Provost Marshal . . . shall influence or endeavor to influence or persuade any Voter not to vote as he first designed shall forfeit for each and every such offen[se] the sum of fifty pounds Sterling to be to his Majesty for defraying the expen[se] of the sitting of the General

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dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Univ. Chi. Press photo., reprint 1979) (1765). Benjamin Franklin also commented on the practice. He described the logic behind the necessary ownership of property being a precondition to vote:

Today a man owns a jackass worth fifty dollars and he is entitled to vote; but before the next election the jackass dies. The man in the mean time has become more experienced, his knowledge of the principles of government, and his acquaintance with mankind, are more extensive, and he is therefore better qualified to make a proper selection of rulers—but the jackass is dead and the man cannot vote. Now gentlemen, pray inform me, in whom is the right of suffrage? In the man or in the jackass?

BENJAMIN FRANKLIN, THE CASKET, OR FLOWERS OF LITERATURE, WIT AND SENTIMENT 4 (Philadelphia, 1828); *quoted in* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 3 (2000).

233. Intentionalism and original public meaning are the two widely accepted schools of thought in the originalist movement.

234. EVANS, *supra* note 33, at 1.

235. BISHOP, *supra* note 41, at 226-35 (discussing the procedures for municipal elections in colonial America). *See also id.* at 269-88 (providing the state acts concerning elections).

236. *Id.* at 279.

237. *Id.* at 279-87.

238. *Id.* at 285.

Assembly and to be sued for and recovered in the General Court of this Province by Bill Plaintiff or Information.<sup>239</sup>

The Act, however, did include a provision for unforeseen circumstances, but those were to be handled after the completion of the election.<sup>240</sup> Such a provision could plausibly allow for the punishment of speech at the polling place, but such issues would have been handled on a case-by-case basis.

Taking into consideration the atmosphere at the polls during the late eighteenth century, it is unlikely that the wearing of political slogans would have been found offensive. In fact, the example of voting *viva voce* provided by John Sergeant Wise would make the idea of restricting campaign or electioneering speech at the polling room rather ludicrous. Wise provided the following example of how voting *viva voce* was conducted: "The judges inquired, 'John Jones (or Bill Smith), for whom do you vote?'—for governor, or for whatever was the office to be filled. He replied by proclaiming the name of his favorite."<sup>241</sup>

Based on the election laws and methods of the eighteenth century, it would appear that those who ratified the Free Speech Clause would have found the restriction of passive electioneering offensive. Having come to a resolution of the originalist philosophy on the matter of passive electioneering, we now turn to how the policy-based philosophy would resolve the issue.

### *B. A Review of Restricting Passive Electioneering at the Polling Site Based on a Policy-Based Philosophy*

The first question posed under the current policy-based philosophy asks whether the speech being restricted is facing restriction in a content-neutral manner.<sup>242</sup> Once that is established, then we can look to the location affected by the speech restriction to determine if the speech can actually be restricted.

Restricting speech advocating for or against a politician, political party, or ballot initiative is by its very nature the regulation of political speech.<sup>243</sup> The statutes against passive electioneering are rather specific in the speech they prohibit. For example, a shirt or button advertising a common everyday product, service, or pop-culture brand would not be determined offensive under these statutes. Thus, the

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239. *Id.* at 284.

240. *Id.* at 285.

241. WISE, *supra* note 42, at 55-56.

242. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

243. *Burson*, 504 U.S. at 196.

government is restricting speech in a content-specific manner when restricting passive electioneering at the polling site.

We are now presented with two different standards to test the speech restrictions against. Because the polling site is comprised of three zones, one of which has been declared a non-public forum, the treatment given to government-imposed speech restrictions varies. We shall begin by examining the standard imposed on speech restrictions within the campaign-free zone. The campaign-free zone extends from the door of the polling room to some distance determined by the particular state's legislature.<sup>244</sup>

As discussed earlier, the campaign-free zone has been classified as a traditional or designated public forum.<sup>245</sup> The government may restrict speech in such forums if "the restrictions are 'necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.'"<sup>246</sup> Because the government is engaged in content-specific speech restriction, the burden of proof rests on the government to show that the regulation is constitutional.<sup>247</sup>

First, the question must be asked whether the restriction of passive electioneering is "necessary to serve a compelling state interest."<sup>248</sup> In *Burson*, the Supreme Court found that the passive electioneering restrictions in the campaign-free zone were necessary to serve the state's interest in fighting fraud and intimidation at the polling place.<sup>249</sup> While this may suffice for elections in Tennessee, the state where *Burson* was brought, it does not hold true for all states. In *Burson*, the state was able to show examples of voter intimidation and fraud by campaign workers from the state's own history of elections supporting the need for such speech restrictions.<sup>250</sup> Absent such a widespread abuse of the election process as demonstrated in Tennessee, a state may lack the compelling state interest necessary to engage in infringement of its citizens' free-speech rights. Even Tennessee does not appear to have an election history adequate to demonstrate the need to restrict passive electioneering.

To support the speech restrictions, the state would have to prove that banning passive electioneering from the campaign-free zone would

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244. Dunham, *supra* note 8, at 2143.

245. *Burson*, 504 U.S. at 198.

246. Woodruff, *supra* note 140, at 278 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

247. *Burson*, 504 U.S. at 208.

248. *Perry Educ. Ass'n*, 460 U.S. at 45.

249. *Burson*, 504 U.S. at 198.

250. *Id.* at 206.



“maintain peace, order and decorum” at the polling place.<sup>251</sup> Clearly the state has a compelling interest in this instance.

But the analysis does not end there. The speech restrictions must also be narrowly tailored to meet the state’s necessity for the law.<sup>252</sup> How the banning of the wearing of political slogans and images would in any way ensure “peace, order and decorum” may be difficult to see.

One argument supporting the need for regulating the wearing of such political paraphernalia at the polls may be based on America’s current partisan divide. As partisan lines have hardened and the existence of centrists holding office has all but disappeared, the rhetoric in the political arena has become quite heated in recent years. Heated political rhetoric is nothing new to American politics, but access to information and the ability to push messaging to every American is what has changed the landscape. While only a minority of Americans watch the cable news, those individuals who do watch these stations are heavily invested in the outcome of certain elections. This current atmosphere could cause disruptions at the polling place. Banning the wearing of political paraphernalia in the polling room and at the polling place removes a stimulus that could lead to a situation that may cause voters delays at the polling place.

The limiting of active in-person campaigning by individuals supports the compelling interest of keeping order at the polling place, but the restriction of campaign messaging placed in that zone does not further the keeping of order. The mere placement of signs, stickers, or similar media on voters or in the campaign-free zone does not support order at the polls. While active human campaigners can engage in mischief, passive electioneering, by its very nature, cannot.

An additional issue presented itself during the 2012 election cycle that went against the idea that banning passive electioneering will bring peace, order, and decorum to the polling place. In 2012, there were complaints of lines at polling places in several states.<sup>253</sup> Those in line waited for up to several hours to cast their ballots.<sup>254</sup> Burdening election workers with the added task of policing what voters wear to the polling place slows down the voting process. Additionally, the attempt to enforce the passive-electioneering prohibition may lead to altercations and arguments, thereby slowing down the already slow voting process

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251. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

252. *Perry Educ. Ass’n*, 460 U.S. at 45.

253. See, e.g., Jeremy W. Peters, *Waiting Times at Ballot Boxes Draw Scrutiny*, N.Y. TIMES, Feb. 4, 2013, [http://www.nytimes.com/2013/02/05/US/politics/waiting-times-to-vote-at-polls-draw-scrutiny.html?\\_r=0](http://www.nytimes.com/2013/02/05/US/politics/waiting-times-to-vote-at-polls-draw-scrutiny.html?_r=0).

254. *Id.*

during a presidential-election cycle. Any disruption caused by the wearing of political paraphernalia can be handled by law enforcement, like any other situation that may arise at the polling place on election day.<sup>255</sup>

Campaign signs should also be allowed placement within the campaign-free zone. The signs, like the slogans on shirts or buttons, are inert. They cannot reach out and touch or impede the flow of people coming to the polling place. I suppose that as technology gets less expensive there may be signs used in the future that project video messages or even two-way communication with people passing by. However, such a world does not currently exist for today's campaigns and elections. And while it may exist at some point in the future, the standard of strict scrutiny does not look into the future for distant possibilities.

If allowed, the number of signs placed by a campaign within the campaign-free zone should be limited. One sign per candidate or campaign should be sufficient to allow for adequate political expression while not cluttering or causing disruptions in the campaign-free zone. Failure to place some restriction on the amount of signage in the campaign-free zone could lead to a wallpapering of campaign messaging up to the polling-room door. It may also lead to heated disputes as campaigners attempt to obscure the signs of competing campaigns within the zone. These limitations should meet constitutional scrutiny because reasonable restrictions can be made on the time, place, and manner of political expression.<sup>256</sup>

The issue of passive electioneering within the polling room becomes more difficult. Because the polling room is a non-public forum, it is governed by the reasonableness standard—the restrictions must be “reasonable and . . . not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>257</sup> As a means of examining the reasonableness of restrictions on passive electioneering at the polling place, we shall review some instances that occurred during the 2012 election cycle.

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255. Some states have laws that forbid the presence of law enforcement at the polling place. In such states, the response would likely be delayed. *See, e.g.*, CAL. ELEC. CODE. § 18544 (Dearing 2003). The reasoning for the laws restricting the presence of law enforcement seems to focus on the idea that law enforcement’s presence may deter certain voters.

256. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

257. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (citing *Perry Educ. Ass’n*, 460 U.S. at 45).

One example of passive electioneering is the placement of signs or messages within the polling room. During the 2012 presidential election cycle, a polling room in Philadelphia contained a mural on the wall next to the voting booths.<sup>258</sup> The mural was a large painting of President Barack Obama and was surrounded by a number of quotes attributed to him.<sup>259</sup> The major problem with this was that President Obama was on the ballot seeking re-election during that cycle. Such a presentation may make members of the party opposing the sitting president squeamish to vote, especially in a precinct where they may be a minority facing an overwhelming majority. Such displays at the polling place can be reminiscent of the treatment political minorities received in the Jim Crow era. To avoid intimidation, or the appearance of intimidation, such displays should not be present in the polling place.

The mural of President Obama in the polling place does raise an interesting question: In what circumstances may a polling place have a politician's image or sayings on display? The Democratic Party and Republican Party have both been in existence for well over 150 years.<sup>260</sup> During that time, they have each produced a number of historically popular politicians. Would the image of Abraham Lincoln, or quotes attributed to him, be objectionable? He was, after all, the first Republican elected to the presidency. What about Andrew Jackson, the first Democrat elected to the presidency? Possibly the passage of time has sterilized the political beliefs and affiliations of those so distant in time. Would the image or quotes of Robert Kennedy or Ronald Reagan create more controversy? In all fairness, it is probably best to avoid the use of any politicians that can be connected to the current political parties we know. After all, voter intimidation is based on a subjective standard, and erring on the side of caution should be the preferred standard in protecting voters' civil rights.<sup>261</sup>

Another factor to consider is enforcement. In short, this can be wildly inconsistent. It would be consistent to believe that if a restriction is reasonable, enforcement of that restriction would be uniform throughout the state. For example, Kimberly J. Tucker, in her article "*You Can't Wear That to Vote*": *The Constitutionality of State Laws Prohibiting the*

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258. *Philly Poll Workers Partially Cover Obama Mural After Court Order, Leaving Logo and Quote in View*, FOX NEWS, Nov. 6, 2012, <http://www.foxnews.com/politics/2012/11/06/judge-issuing-order-to-reinstate-booted-philadelphia-election-officials/>.

259. *Id.*

260. RICHARD ROSE, UNDERSTANDING POST-COMMUNIST TRANSFORMATION: A BOTTOM UP APPROACH 55 (2009).

261. Woodruff, *supra* note 140, at 266.

*Wearing of Political Message Buttons at Polling Places*,<sup>262</sup> provides an example of when anti-electioneering laws are enforced.<sup>263</sup> She describes her experience as follows:

As I stepped into the polling place to vote during the highly contested 2004 Presidential Election, a Virginia election official told me that I had to take off my “John Kerry for President” button in order to vote. My response to him was “that is not a law.” When the official protested, I said, “show me the law,” and she brought over a book of rules. Virginia law states that it is unlawful for “any . . . voter . . . in the room . . . to . . . exhibit any ballot, ticket, or other campaign material to any person.” I told the official that whether I must take off my button is a question of interpretation of the phrase “other campaign material.” My argument was that wearing a button to the poll is a silent expression of speech protected by the First Amendment of the Constitution of the United States. Furthermore, allowing an individual voter to wear a political message button to the polling place was not the type of illegal campaigning intended to be prohibited by the statute. The official then threatened to call the police. I informed her that this was not necessary and questioned if I had worn a John Kerry t-shirt, would I have to take it off. She responded that I would be required to go into the bathroom and turn the shirt around. She again threatened to call the police. Finally, I acquiesced to her demands, but stated my position that her actions were unconstitutional.<sup>264</sup>

Her experience shows an individual offended by being asked to remove a campaign button. She even argued with the poll worker about her perceived constitutional rights.<sup>265</sup> While such an argument with a poll worker is futile (constitutional arguments are best left for courts and not stressed-out poll workers), it illustrates the injury perceived by some voters confronted by these laws. Additionally, the poll workers receive the brunt of enforcement. These workers are likely short-term employees who are just trying to follow the rules that have been given to them.<sup>266</sup> Failure to do so may lead to them losing their jobs. Some poll workers rely upon these jobs to supplement family incomes.

My experience with enforcement of the polling place speech restriction laws has been much different than that of Professor Tucker. During the 2012 election cycle, I observed the election process in Nevada. Nevada has a law that forbids the wearing of election paraphernalia in the

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262. Tucker, *supra* note 2.

263. *Id.* at 61.

264. *Id.* (citations omitted) (quoting VA. CODE ANN. § 24.2-604(D)).

265. *Id.*

266. See Woodruff, *supra* note 140, at 263.

polling room.<sup>267</sup> During early voting, I watched as voters waited in lines for up to half an hour to exercise their franchise. During that time voters showed up wearing shirts emblazoned with their candidate's logo or image. These shirts provided messages of support. Additionally, various special-interest groups were represented in the line. Shirts stating the wearer's membership in a wide range of groups from organized labor to civil-rights organizations were present. It does not make sense to ban the wearing of a candidate's or a political party's logo or likeness, but to allow special-interest groups to advocate as walking billboards. None of the voters were asked to remove campaign paraphernalia before voting.

Additional examples of this inconsistency can be found during the 2008 election cycle. The plaintiffs in *Mansky* had also encountered inconsistent enforcement of the passive electioneering ban.<sup>268</sup> The court summarized their allegations in their amended complaint as follows:

One voter wearing a Tea Party T-Shirt was "interrupted" "during the voting process" and asked to remove or cover his Tea Party T-Shirt. He was warned that if he did not, he could be prosecuted. Some Hennepin County election judges allowed individuals, including Plaintiff Dorothy Fleming, to wear the "Please I.D. Me" buttons without asking them to cover or remove the buttons. In unidentified counties, unidentified voters were allowed to vote wearing buttons affiliated with the Sierra Club and Minnesota Common Cause. The Sierra Club endorses candidates and Minnesota Common Cause lobbies for legislation to reform the electoral process.<sup>269</sup>

The lack of uniform enforcement of a passive electioneering restriction argues against the reasonableness of the speech restrictions placed on certain types of passive electioneering within the polling room—specifically, the wearing of campaign or political paraphernalia by voters. Additionally, the inconsistency in enforcement adds to the confusion that disrupts the peace, order, and decorum at the polls.

Placing the burden of determining what constitutes campaign or political paraphernalia on the poll workers can cause confusion. One of the strangest occurrences during 2012 was the banning of Massachusetts Institute of Technology (M.I.T.) students from voting for wearing M.I.T. sweatshirts.<sup>270</sup> The students had appeared at the correct polling places

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267. NEV. REV. STAT. ANN. § 293.740 (2009).

268. *Minn. Majority*, 789 F. Supp. 2d at 1119.

269. *Id.*

270. *MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney*, *supra* note 5.

in Colorado and Florida.<sup>271</sup> The election officials in Colorado had determined that the shirts violated the state's anti-electioneering statute and denied the student the right to vote until the sweatshirt was removed.<sup>272</sup> The Florida case is perplexing; Florida does not have a ban on wearing campaign or political paraphernalia in the polling room.<sup>273</sup> In both cases, the poll workers thought the M.I.T. sweatshirts were electioneering for Mitt Romney, the Republican presidential candidate.

The limitations placed on political expression by some of the current statutes should be found unconstitutional for their over-breadth and unreasonableness. At the core of the Free Speech Clause is political speech. While some limitations are acceptable to keep order and decorum at the polling place, these restrictions can be narrowly tailored to achieve such an objective. Banning all political expression within a designated zone does not meet the goal of a narrowly tailored solution.

#### IV. CONCLUSION

While states may be able to manufacture the illusion of a compelling interest in restricting expressive activity at the polling site, such an illusion has no present factual basis when it comes to passive electioneering. The states currently exercising broad restrictions on political expression at the polling place's campaign-free zone have failed to meet the strict scrutiny necessary to support those restrictions. While in-person campaigning has been properly restricted as a means to maintain order at the polling location, the presence of campaign paraphernalia worn by voters should be allowed within the zone.

The simple presence of a campaign slogan on a shirt, button, or sticker does not interfere with the elector's presence at the polling place. The presence of such paraphernalia is transitory because voters are not allowed to loiter inside the polling room after they have completed the task of voting. Additionally, the limited placement of campaign signs within the campaign-free or restricted zone should also be allowed. The number of signs should be restricted to one per campaign to deter overzealous campaigns from "wallpapering" the campaign-free zone with pro-campaign messaging.

Additionally, the banning of political paraphernalia inside the polling room does not meet the respective constitutional standards. While the

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271. *Id.*

272. *Id.*

273. FLA. DEP'T OF STATE DIV. OF ELECTION, POLLING PLACE PROCEDURE MANUAL 6 (2012).

reasonableness standard does not require that the restrictions be the most reasonable, it still requires them to be reasonable.<sup>274</sup> It is evident from the ability of states, without such a ban on passive electioneering in the polling room, to maintain order and decorum that such restrictions are not necessary or reasonable. This is further supported by the ability to keep order in states where enforcement of the speech restrictions is inconsistent.

Both the originalist philosophy and the policy-based philosophy of constitutional interpretation support the overturning of the anti-passive electioneering statutes. The overturning of these statutes will reduce confusion at the polling place, and the burden of enforcing, or simply ignoring, the law will be removed from election officials. The result will be what was originally sought by the passage of these restrictions—peace, order, and decorum.

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274. See generally *Burson*, 504 U.S. at 209.