

**“YOU CAN’T WEAR THAT TO VOTE”:
THE CONSTITUTIONALITY OF STATE LAWS PROHIBITING THE
WEARING OF POLITICAL MESSAGE BUTTONS AT POLLING PLACES**

KIMBERLY J. TUCKER

INTRODUCTION

As I stepped into the polling place to vote during the highly contested 2004 Presidential election day, a Virginia election official told me I had to take off my “John Kerry for President” button in order to vote. I responded “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.”¹ I told the official that whether I must take off my button is a question of interpretation of the phrase “other campaign material.”² I said 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. I also said that allowing an individual voter to wear a political message button to the polls was not the type of illegal campaigning intended to be prohibited by the statute. She threatened to call the police. I said this was not necessary and questioned whether, if I had worn a John Kerry t-shirt, I would have to take it off and vote in my bra. 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 to avoid going to jail, but I added that what she was asking was unconstitutional. I propose that requiring a voter to remove a political message button in order to vote should be considered to be unconstitutional. I will argue that state election laws prohibiting the wearing of campaign

¹ See VA. CODE ANN. § 24.2-604 (D).

² See *id.*

buttons to polling places on election day³ violate First Amendment guarantees of freedom of speech. I will argue that, using a strict scrutiny analysis, states cannot demonstrate a “compelling state interest” in prohibiting the wearing of political message buttons in the polling place. I will also argue that these laws are overbroad and that the statutory language in many states permits arbitrary enforcement. Political speech is the most important and highly protected form of speech and must be regulated carefully. A voter’s right to demonstrate a political preference on election day outweighs the state interest in prohibiting voter fraud and intimidation. Therefore, an individual voter should not be prohibited from wearing a political message button to polling places on election day.

I. Overview of state laws

A. 50 states and the District of Columbia regulate activities and in around polling places on election day

Every state and the District of Columbia regulate the election process.⁴ It is a state’s prerogative to regulate elections as long as the elections are conducted in a fair manner.⁵ The permissible and impermissible activities in and around polling places vary greatly from state to state.⁶ However, the goal of every state in regulating elections should be to prevent voter fraud and intimidation.⁷ Through plain statutory language, some state laws explicitly prohibit certain activities in and around polling places. Other

³ Ten states have regulations explicitly prohibiting the wearing of buttons to the polls – Delaware, Kansas, Minnesota, Montana, New Jersey, New York, South Carolina, Tennessee, Texas, and Vermont.

⁴ Because states have traditionally exercised authority over their own elections and because the Constitution contemplates that authority, courts have long recognized that not every state election dispute implicates federal constitutional rights. *See* *Burton v. Georgia*, 953 F.2d 1266, 1268 (11th Cir. 1992).

⁵ *See* U.S. CONST. art. I, § 4, cl.1. “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations” *See also*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (finding that state statutes regulating the electoral process have an impact on the fundamental constitutional rights to vote and to associate politically that are protected by the First and Fourteenth Amendments).

⁶ The Supreme Court has recognized that states have broad powers to determine the conditions under which the right of suffrage may be exercised. *See* *Lassiter v. Northampton Elections Bd.*, 360 U.S. 45, 50 (1959).

⁷ *See* *Anderson*, 460 U.S. 780 (finding that there must be a substantial regulation of elections if they are to be fair and honest).

states employ more generalized language and determine impermissible activities through interpretation and enforcement.

1. Laws in 10 states prohibit the “wearing” of a political message button

Ten States -- Delaware,⁸ Kansas,⁹ Minnesota,¹⁰ Montana,¹¹ New Jersey,¹² New York,¹³ South Carolina,¹⁴ Tennessee,¹⁵ Texas,¹⁶ and Vermont¹⁷-- prohibit a voter from

⁸ See DEL. CODE ANN. tit.15 § 4942 (2005) Electioneering in polling place; (a) No election officer, challenger or any other person within the polling place or within 50 feet of the entrance to the building in which the voting room is located shall electioneer during the conduct of the election. (d) "Electioneering" includes . . . the wearing of any button, banner or other object referring to issues, candidates or partisan topics . . . into the polling place or the area within 50 feet of the entrance to the building in which the voting room is located.

⁹ See KAN. STAT. ANN. § 25-2430(a) (2005) Electioneering is knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted. Electioneering includes wearing . . . labels, . . . stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election within any polling place on election day.

¹⁰ See MINN. STAT. § 211B.11(1) (2004) Soliciting prohibited. 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.

¹¹ See MONT. CODE ANN. § 13-35-211(2) (2005) A person may not buy, sell, give, wear, or display at or about the polls on an Election day any badge, button, or other insignia which is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election.

¹² See N.J. STAT. ANN. § 19:34-19 (2005) No person shall display, sell, give or provide any political badge, button or other insignia to be worn at or within one hundred feet of the polls or within the polling place or room, on . . . election day.

¹³ See N.Y. ELEC. LAW § 8-104 (2005) 1. While the polls are open. . . no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial.

¹⁴ See S.C. CODE ANN. § 7-25-180 (2004) (A) It is unlawful on an election day within two hundred feet of any entrance used by the voters to enter the polling place for a person to distribute any type of campaign literature or place any political posters. (B) A candidate may wear within two hundred feet of the polling place a label no larger than four and one-fourth inches by four and one-fourth inches that contains the candidate's name and the office he is seeking. If the candidate enters the polling place, he may not display any of this identification including, but not limited to, campaign stickers or buttons.

¹⁵ See TENN. CODE ANN. § 2-7-111(b) (2005) (1) Within the appropriate boundary as established in subsection (a) [100 feet from the entrances to the building in which the election is to be held], 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, political party, or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building in which a polling place is located. . . (3) Nothing in this section shall be construed to prohibit any person from wearing a button, cap, hat, pin, shirt, or other article of clothing outside the established boundary but on the property where the polling place is located.

¹⁶ See TEX. ELEC. CODE ANN. § 61.010(a) (2005) [A] person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election, in the polling place or within 100 feet of any outside door through which a voter may enter the building in which the polling place is located.

¹⁷ See VT. STAT. ANN. tit.17 § 2508(a) (2005) The presiding officer shall insure during polling hours that: (1) Within the building containing a polling place, no campaign literature, stickers, buttons, name

“wearing” to the polls the same type of political message button that I wore on Election day. State laws describe this type of political message/campaign button in language such as “badge, “lapel,” “button,” or “pin” (all hereinafter “button”). It is important to note that in Tennessee, the state that enacted a “campaign-free zone” law that was challenged in the Supreme Court,¹⁸ the statute explicitly notes that a person may wear campaign clothing only outside the legally appropriate polling place boundary.¹⁹ I want to argue that these laws (hereinafter referred to as “button laws”) restrict political speech in violation of First Amendment.

2. Laws in 40 states and the District of Columbia prohibit campaign activities in and around the polls in other ways

Each of the other forty states and the District of Columbia also regulate activities in and around its polling places on election day. These laws are designed to preclude voter intimidation and reduce the opportunity for fraud. A group of states make it unlawful to “display” or “exhibit” campaign material (sometimes enforced against voters wearing buttons, t-shirts or hats) in and around polls. Several states ban “electioneering” in polling places (the definitions of the activities that constitute electioneering vary from state to state). The majority of states prohibit a person from “posting” or “distributing” campaign literature and materials around the polling area. Several states simply regulate campaigning near polls through anti-loitering statutes. All these statutes intend to prevent active, disruptive campaigning as voters cast their ballots. A state may regulate active campaigning in polling places because states have a compelling interest in

stamps, information on write-in candidates or other political materials are displayed, placed, handed out or allowed to remain. . . .

¹⁸ See *Burson v. Freeman*, 504 U.S. 191 (1992).

¹⁹ See TENN. CODE ANN. § 2-7-111(b)(3) (2005) (“Nothing in this section shall be construed to prohibit any person from wearing a button, cap, hat, pin, shirt, or other article of clothing outside the established boundary but on the property where the polling place is located.”)

prohibiting voter fraud and intimidation.²⁰ Although these statutes do not appear to be unconstitutional by the plain language employed, these laws could impose impermissible content-based regulation through enforcement.

a. In 8 states a voter may not “display” or “exhibit” campaign materials

The Virginia law under which the election official objected to my button makes it unlawful for “any . . . voter” to “exhibit . . . campaign material” in the polling place.²¹ Similarly, seven other states have laws that make it unlawful to “display or exhibit” campaign materials in the polling place— Hawaii,²² Louisiana,²³ Maine,²⁴ Oklahoma,²⁵ Rhode Island,²⁶ South Dakota,²⁷ and Wyoming.²⁸ It is important to note that Maine prohibits the “display” of campaign materials, but expressly allows a voter to wear a “campaign button” to the polling place.²⁹

b. In 14 states and the District of Columbia a voter may not “distribute,” “circulate,” “post,” “advertise,” or “solicit”

²⁰ See *Burson v. Freeman*, 504 U.S. 191 (1992) (holding that Tennessee’s content-based restriction on political speech around polling places is permissible because the regulation serves a compelling interest in a “long-lived” tradition of state involvement with elections to prohibit voter intimidation and election fraud).

²¹ See VA. CODE ANN. § 24.2-604(D) (2005) It shall be unlawful for any authorized representative, voter, or any other person in the room to . . . (ii) give, tender, or exhibit any ballot, ticket, or other campaign material to any person.

²² See HAW. REV. STAT. § 11-132(d) (2004) Any voter who displays campaign material in the polling place shall remove or cover that material before entering the polling place.

²³ See LA. REV. ANN. 18:1462(A)(3) (2005) [I]t shall be unlawful for any person . . . (3) to display campaign cards, pictures, or other campaign literature of any kind or description whatsoever.

²⁴ See ME. REV. STAT. § 682 (2005) Certain activities are prohibited on election day. . . . 3. A person may not display advertising material. . . . A. [I]t does not prohibit a person who is at the polls solely for the purpose of voting from wearing a campaign button when the longest dimension of the button does not exceed 3 inches.

²⁵ See 26 OKL. STAT. tit. 26 § 7-108 (2004) No printed material other than that provided by the election board shall be publicly placed or exposed.

²⁶ See R.I. GEN. LAWS § 17-19-49 (2005) No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to the voters shall be distributed or displayed within the voting place

²⁷ See S.D. CODIFIED LAWS § 12-18-3 (2005) [N]o person may, in any polling place. . . display campaign posters, signs or other campaign materials

²⁸ See WYO. STAT. ANN. § 22-26-113 (2005) [Prohibited] Electioneering too close to a polling place on election day consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature

²⁹ See ME. REV. STAT. ANN. § 682 (2005).

campaign materials

Fourteen states -- Alaska,³⁰ Arkansas,³¹ Connecticut,³² Florida,³³ Georgia,³⁴ Idaho,³⁵ Maryland,³⁶ Massachusetts,³⁷ Michigan,³⁸ Mississippi,³⁹ New Hampshire,⁴⁰

³⁰ See ALASKA STAT. § 15.56.016(a) (2005) A person commits the crime of campaign misconduct in the third degree if during the hours the polls are open . . .the person is within 200 feet of an entrance to a polling place, and . . . (B) circulates cards, handbills, or marked ballots, or posts political signs or posters relating to a candidate at an election or election proposition or question.

³¹ See ARK.CODE ANN. § 7-1-103(a)(9) (2005) [N]o person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose or do any electioneering of any kind whatsoever in the building or within one hundred feet . . . on election day.

³² See CONN. GEN. STAT. § 9-236(a) (2004) On the day of . . .election, no person shall solicit in behalf of or in opposition to the candidacy of another or himself or in behalf of or in opposition to any question being submitted at the election or referendum, or loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet [of the polling place].

³³ See FLA. STAT. § 102.031(3)(c) (2005) No person, political committee, committee of continuous existence, or other group or organization may solicit voters within 50 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, on the day of any election.

³⁴ See GA. CODE ANN. § 21-2-414(a) (2005) No person shall solicit votes in any manner or by any means or method, nor shall any person distribute any campaign literature, newspaper, booklet, pamphlet, card, sign, or any other written or printed matter of any kind, nor shall any person conduct any exit poll or public opinion poll with voters on any primary or election day: (1) Within 150 feet of the outer edge of any building within which a polling place is established; (2) Within any polling place; or (3) Within 25 feet of any voter standing in line to vote at any polling place

³⁵ See IDAHO CODE § 18-2318(1) (2005) On the day of any primary, general or special election, no person may, within a polling place, or any building in which an election is being held, or on private property within one hundred (100) feet thereof, or on public property within three hundred (300) feet thereof: (a) Do any electioneering; (b) Circulate cards or handbills of any kind; (c) Solicit signatures to any kind of petition; or (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.

³⁶ See MD. EL. ANN. CODE § 16-206(a) (2005) A person may not . . . (10) canvass, electioneer, or post any campaign material in the polling place [Electioneering boundary. -- 100 feet from the entrance and exit of the building that are closest to that part of the building in which voting occurs].

³⁷ See MASS. GEN. LAWS ch. 54, § 65 (2005) [N]o other poster, card, handbill, placard, picture or circular intended to influence the action of the voter shall be posted, exhibited, circulated or distributed in the polling place, in the building where the polling place is located, on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place. . . Pastors, commonly called stickers, shall not be posted, circulated or distributed in the polling place, in the building where the polling place is located, on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place.

³⁸ See MICH COMP. LAWS § 168.744 (2005) (1) A person shall not place or distribute stickers . . . in the polling room or in a compartment connected to the polling room or within 100 feet from any entrance to the building in which the polling place is located. . . (3) On election day, a person shall not post, display, or distribute in a polling place, in any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located

³⁹ See MISS. CODE ANN. § 23-17-55 (2005) It is unlawful for any person to distribute or post material in support of or in opposition to a measure within one hundred fifty (150) feet of any entrance to a polling place where the election is held.

⁴⁰ See N.H. REV. STAT. ANN. § 659:43(I) (2004) No person who is a candidate for office or who is representing or working for a candidate shall distribute or post at a polling place any campaign material in

North Carolina,⁴¹ Utah,⁴² Washington⁴³ -- and the District of Columbia⁴⁴ make it illegal to “post,” “circulate,” “distribute,” “advertise,” or “solicit” political message paraphernalia in and around polling places. These laws were written to prohibit deliberate, active campaigning by candidates or for issues. However, these laws could be found to violate the First Amendment if election officials in these states were to interpret language such as “posting” or “advertising” to include a voter wearing a button.

c. 15 states prohibit “electioneering”

Fifteen states -- Arizona,⁴⁵ California,⁴⁶ Colorado,⁴⁷ Illinois,⁴⁸ Indiana,⁴⁹ Iowa,⁵⁰ Kentucky,⁵¹ Missouri,⁵² Nebraska,⁵³ Nevada,⁵⁴ New Mexico,⁵⁵ North Dakota,⁵⁶ Oregon,⁵⁷

the form of a poster, card, handbill, placard, picture, or circular which is intended to influence the action of the voter within the building where the election is being held.

⁴¹ See N.C. GEN. STAT. § 163-166.4 (2005) No person or group of persons shall hinder access, harass others, distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity in the voting place.

⁴² See UTAH CODE ANN. § 20A-3-5012(2)(a) (2005) A person may not, within a polling place or in any public area within 150 feet of the building where a polling place is located: (i) do any electioneering; (ii) circulate cards or handbills of any kind

⁴³ See WASH. REV. CODE § 29A.84.510(1) (2005) On the day of any primary or general or special election, no person may, within a polling place, or in any public area within three hundred feet of any entrance to such polling place: (a) Suggest or persuade or attempt to suggest or persuade any voter to vote for or against any candidate or ballot measure; (b) Circulate cards or handbills of any kind

⁴⁴ See D.C. CODE § 1-1001.10(b)(1)(2)(A) (2005) No person shall canvass, electioneer, circulate petitions, post any campaign material or engage in any activity that interferes with the orderly conduct of the election within a polling place or within a 50-foot distance from the entrance and exit of a polling place.

⁴⁵ See ARIZ. REV. STAT. § 16-411(H) (2004) [A]ny facility that is used as a polling place on election day shall allow electioneering and other political activity outside of the seventy-five foot limit . . . in public areas and parking lots used by voters.

⁴⁶ See CAL. ELECT. CODE ANN. § 18370 (2005) No person, on election day, or at any time that a voter may be casting a ballot, shall, within 100 feet of a polling place . . . (d) Do any electioneering.

⁴⁷ See COLO. REV. STAT. § 1-13-714 (2005) No person shall do any electioneering on the day of any election within any polling place or in any public street or room or in any public manner within one hundred feet of any building in which polling place is located

⁴⁸ See 10 ILL. COMP. STAT. § 5/7-41(c) (2005) No person shall do any electioneering or soliciting of votes on primary day within any polling place or within one hundred feet of any polling place

⁴⁹ See IND. CODE ANN. § 3-14-3-16(b) (2005) A person who knowingly does any electioneering: (1) on election day within: (A) the polls . . . commits a Class A misdemeanor.

⁵⁰ See IOWA CODE § 39A.4(1) (2004) A person commits the crime of election misconduct in the third degree if the person willfully commits any of the following acts: a. (1) Loitering, congregating, electioneering, posting signs, treating voters, or soliciting votes, during the receiving of the ballots, either on the premises of a polling place.

⁵¹ See KY. REV. STAT. ANN. § 117.235(3) (2004) No person shall, on the day of any election . . . do any electioneering at the polling place [or within 300 feet of the polling place].

Pennsylvania,⁵⁸ and Wisconsin⁵⁹ -- regulate campaign activity in and around polling places on election day by prohibiting “electioneering” in general. The definition of “electioneering” varies greatly from state to state.

d. Laws in 3 states apply anti-loitering statutes to election day activities

Three states -- Alabama,⁶⁰ Ohio,⁶¹ and West Virginia⁶²-- regulate campaign activity in and around polling places on election day through anti-loitering statutes.

Although these statutes are arguably overbroad, they do not explicitly infringe on a

⁵² See MO. REV. STAT. § 115.637 (2005) [Misdemeanors are] . . . (18) Exit polling, surveying, sampling, electioneering, distributing election literature, posting signs or placing vehicles bearing signs with respect to any candidate or question to be voted on at an election on election day inside the building in which a polling place is located or within twenty-five feet of the building's outer door closest to the polling place, or, on the part of any person.

⁵³ See NEB. REV. STAT. § 32-1524 (2005) No person shall do any electioneering, circulate petitions, or perform any action that involves solicitation on election day within any polling place, any building in which an election is being held, or two hundred feet of such polling place or building.

⁵⁴ See NEV. REV. STAT. § 293.361 (2004) During the time a polling place voting is open for voting, a person may not electioneer for or against any candidate, measure or political party in or within 100 feet from the entrance to the voting area.

⁵⁵ See N.M. STAT. ANN. § 3-8-77 (2005) A. Electioneering too close to the polling place consists of any form of campaigning on election day within one hundred feet of the building in which the polling place is located and includes but is not limited to the display of signs, bumper stickers or distribution of campaign literature. B. A person who commits electioneering too close to the polling place is guilty of a petty misdemeanor.

⁵⁶ See N.D. CENT. CODE, § 16.1-10-06 (2005) Electioneering on election day -- Penalty. Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, is guilty of an infraction.

⁵⁷ See OR. REV. STAT. § 260.695(2) (2003) No person, within any building in which a polling place is located . . . [or within 100 feet] shall do any electioneering, including circulating any cards or hand bills, or soliciting signatures to any petition. . . . The electioneering need not relate to the election being conducted.

⁵⁸ See 25 PENN. CON. STAT. ANN. § 3060(c) (2005) No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room

⁵⁹ See WIS. STAT. § 12.03(2) (2005) No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place. This subsection does not apply to the placement of any material on the bumper of a motor vehicle that is located on such property on election day.

⁶⁰ See ALA. CODE. § 17-7-18 (2005) Except as electors are admitted to vote . . . no person shall be permitted within 30 feet of the polling place.

⁶¹ See OHIO REV. CODE ANN. 3501.35 (2005) During an election . . .no person shall loiter or congregate within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place

⁶²See W. VA. CODE § 3-1-37(a) (2005) [N]o person, other than the election officers and voters going to the election room to vote and returning there from, may be or remain within three hundred feet of the outside entrance to the building housing the polling place

person's right to wear a political button to the polls. However, if these three states interpret “loitering” to include the wearing of a political button, the laws could be viewed similarly to the others discussed.

II. Prohibiting voters from wearing political message buttons at the polls may violate the First Amendment

A. Wearing a political message button is free speech

State statutes that prohibit a voter from wearing a political message button to the polls on election day should be considered unconstitutional because the First Amendment guarantees freedom of speech to every American, including voters.⁶³ Courts have interpreted this right of “freedom of speech” to include the freedom to wear political messages on one’s own body.⁶⁴ Therefore, the wearing of a political message button to the polls on election day is presumptively a form of free expression.⁶⁵

B. Content-based regulation of speech

Laws that prohibit a voter from wearing a political message button to the polls are content-based restrictions that should be closely scrutinized. Traditionally, political speech has been afforded the highest level of protection.⁶⁶ Furthermore, the right to vote

⁶³ The First Amendment to the Constitution of the United States guarantees that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. It is worth noting that the Supreme Courts has consistently held that the right to vote is a fundamental right, which the Constitution guarantees to all citizens. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191 (1992); *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶⁴ *See Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969) (holding that students who wore black arm bands to school in protest of the Vietnam War were expressing a political view through their clothing). *See also Cohen v. California*, 403 U.S. 15 (1971) (holding that the State did not have a compelling reason for criminally prosecuting a man who wore a jacket with expressing his opposition to the military draft through a four letter expletive (“__ the Draft”) to a courthouse).

⁶⁵ *See, e.g.*, Charles Fried, *Saying What the Law Is The Constitution in the Supreme Court*, 79 (Harvard University Press, 2004) (arguing that the First Amendment protects the “freedom of the mind” by limiting “the government’s power to interfere with my liberty to think as I choose, to express my thoughts to others, and to receive their expressions in turn”).

⁶⁶ *See Buckley*, 424 U.S. at 14 (“discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered

is considered to be one of the most important forms of free speech.⁶⁷ Therefore, state action that infringes upon an individual's ability to speak must pass a higher level of scrutiny when the regulation is content-based. Content-based laws are particularly dangerous because such laws reduce public discourse and inhibit the ability of individuals to express political views freely. When a law is found to be content-based and involves protected expression, the court applies a strict scrutiny test.⁶⁸ In most cases the strict scrutiny standard is difficult for the state to overcome and the law is found to be invalid.⁶⁹

1. Content-based Restrictions on Speech Impermissible

a. Schools

The Supreme Court has limited the restrictions on political speech in schools. In *Tinker v. Des Moines Independent Community School District*, three public high school students were suspended for wearing black armbands to protest the Vietnam War in violation of a school rule prohibiting the wearing of armbands.⁷⁰ The Court described the students' actions as symbolic conduct "closely akin to pure speech"⁷¹ which should be

interchange of ideas for the bringing about of political and social changes desired by the people."); see also *Burson*, 504 U.S. at 198 (the right to vote is a right at the heart of our democracy) .

⁶⁷ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding that the right to vote is regarded as a fundamental political right); see, e.g., *Burson*, 504 U.S. at 198 (describing the right to vote as "at the heart of our democracy"); see also, *id.* at 214 (Justice Kennedy concurring, describing "[v]oting" as "one of the most fundamental and cherished liberties in our democratic system of government").

⁶⁸ See *Carey v. Brown*, 447 U.S. 455, 461 (1980) (holding that a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny).

⁶⁹ See, e.g., *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991) (holding that national law to prevent a criminal from benefiting financially from his crime is a content-based regulation on speech that is not narrowly tailored to advance the asserted governmental interest); See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding that a State may restrict speech based on content in pursuit of a compelling interest); See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (exemption of labor picketing from ban on picketing near schools will be subjected to a strict scrutiny analysis); *But see, e.g., Burson*, 504 U.S. 191 (a plurality decision upholding a Tennessee election statute that prohibited the solicitation of votes and the dissemination of campaign materials within 100 feet of the polling place despite finding that the law involved "core political speech" and was a "content-based regulation."); See also, *Burson*, 504 U.S. at 226 (Justice Stevens dissenting, characterizing the Court's analysis as "neither exacting nor scrutiny" and condemning the law as unconstitutional content-based regulation).

⁷⁰ *Tinker*, 393 U.S. at 504.

⁷¹ *Id.* at 505.

accorded “comprehensive protection.”⁷² The Court found that display of the armbands was a “silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”⁷³ The Court examined whether the students’ expression of opinion constituted a substantial material disruption to school activities.⁷⁴ The Court found that there was “no evidence whatever of interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.”⁷⁵ The Court observed that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁷⁶

More recently in *Chandler v. McMinnville School District*,⁷⁷ two students who wore buttons that supported a teacher strike (the button said “Scabs” with a line drawn through it to represent “no scabs”)⁷⁸ challenged their suspensions for failing to remove the buttons.⁷⁹ The students argued that the school officials’ reasons for requesting the removal of the buttons violated their First Amendment rights to freedom of expression.⁸⁰ Employing the *Tinker* strict scrutiny test, the Ninth Circuit considered whether the protest buttons were properly prohibited because the school officials reasonably believed that wearing buttons would substantially disrupt, or materially interfere with, school activities.⁸¹ The court found that the buttons expressed the personal opinion of the students wearing them, and that the buttons were displayed in a manner commonly used

⁷² *Id.*

⁷³ *Id.* at 514.

⁷⁴ *Id.*

⁷⁵ *Id.* at 508.

⁷⁶ *Id.* at 506.

⁷⁷ 978 F.2d 524 (9th Cir. 1992).

⁷⁸ *Id.* at 525.

⁷⁹ *Id.*

⁸⁰ *Id.* at 526.

⁸¹ *Id.* at 529.

to convey silently an idea, message, or political opinion to the community.⁸² In addition, the buttons expressed a position on a local political issue and should be afforded a higher level of protection.⁸³ The court held that asking the students to remove the non-disruptive buttons violated their individual right of freedom of speech.⁸⁴ Because the students' right to speak outweighed the state's interest, the actions of the school officials were found to be unconstitutional.⁸⁵ Therefore, the court struck down the school rule as a violation of the First Amendment.⁸⁶

b. Polling Places

Campaign buttons are not the only campaign materials prohibited at the polls. Courts have also examined whether written materials, in general, are protected in polling rooms. In *Catham v. Garva*,⁸⁷ a voter challenged a Texas law banning the possession of written communications while marking a ballot at a polling place.⁸⁸ Imposing a strict scrutiny test, the court first evaluated the interests put forth by the state as justifications for the burden imposed by its election law.⁸⁹ The court then considered the strength of those interests and the extent to which those interests made it necessary to place a burden on the voter's rights.⁹⁰ The court found that the law imposed unnecessary restrictions on the rights of the voter to cast a meaningful vote and to associate politically through the vote.⁹¹ The court found that the State failed to demonstrate that banning written material in the polling room advanced the legitimate state interest of prohibiting voter intimidation

⁸² *Id.* at 530.

⁸³ *Id.*

⁸⁴ *Id.* at 531.

⁸⁵ *Id.* at 531.

⁸⁶ *Id.*

⁸⁷ 905 F. Supp. 389 (S.D. Tex.1995).

⁸⁸ *Id.* at 397.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 396

and fraud.⁹² Therefore, the court held the law to be an unconstitutional restriction.⁹³

The highest courts in some states have found that wearing a campaign button to the polling place is permissible under their state constitutions. For example, in *Picray v. Secretary of State*,⁹⁴ an Oregon voter appeared at a polling place wearing two political message buttons, which the workers told him he had to remove or he would not be allowed to vote.⁹⁵ He refused to remove the buttons and was arrested and charged with criminal trespass in the second degree in violation of an Oregon election law that prohibited the wearing of a political badge, button or other insignia to the polls.⁹⁶ The Oregon Supreme Court found that the statute violated the Oregon Constitution⁹⁷ because it focused on the content of expression, rather than on the effect of such expression.⁹⁸ Therefore, the court overturned the appellant's conviction and held that the state law banning political buttons was unconstitutional under the state constitution.⁹⁹

2. Content based Restrictions on Speech Permissible

Although content-based regulation of political speech in schools has been found to be impermissible, polling places are treated differently by the Supreme Court. Due to the long tradition of free and fair elections in this county, Americans accept and understand that some restriction on speech on election day is important. Courts and the American public generally agree that campaign activities can and should be regulated. In

⁹² *Id.* at 399.

⁹³ *Id.* at 400.

⁹⁴ 140 Or. App. 592 (1996).

⁹⁵ *Id.* at 593.

⁹⁶ *Id.* at 594.

⁹⁷ *Id.* at 597 (citing Or. Const. art. I, § 8 “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right”).

⁹⁸ *Id.* at 605.

⁹⁹ *Id.*

Burson v. Freeman,¹⁰⁰ the U. S. Supreme Court held that states may reasonably regulate the content of speech and the extent to which someone may engage in campaign activities in the area immediately surrounding a polling place. However, the Court has never explicitly determined whether a state may regulate the political materials worn by a voter in a polling place.

a. Plurality holding

In *Burson*, the treasurer of a city-council candidate’s campaign who had been involved in campaign activities for many years challenged a Tennessee “campaign-free zone” law that regulated speech around a polling place.¹⁰¹ The Tennessee statute prohibited within 100 feet of the entrance to a polling place “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.”¹⁰² In reversing the decision of the Supreme Court of Tennessee, the Court described the law as constitutional content-based regulation.¹⁰³ The plurality determined that the facially content-based restriction on political speech would be subjected to an “exacting scrutiny” test.¹⁰⁴ For the regulation to survive this strict scrutiny test, Tennessee was required to show that the restriction is “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹⁰⁵ The Court held that the state interest was compelling to protect voters from “confusion and undue influence” while casting a ballot¹⁰⁶ and to preserve “the integrity of the election process.”¹⁰⁷ The Court found that

¹⁰⁰ 504 U.S. 191 (1992).

¹⁰¹ *Id.* at 194.

¹⁰² *See id.* at 193 (citing TENN. CODE ANN. § 2-7-11(b) (1991)).

¹⁰³ *Id.* at 211.

¹⁰⁴ *Id.* at 198.

¹⁰⁵ *See id.* at 198 (citing *Perry Ed. Assn.*, 460 U.S. at 45).

¹⁰⁶ *Id.* at 199.

the state had a compelling interest in protecting the fundamental right to “cast a ballot in an election free from intimidation and fraud.”¹⁰⁸

Having found that Tennessee had a compelling interest, the *Burson* Court next considered whether the regulation was necessary.¹⁰⁹ After reviewing the tradition of the voting in the United States and the history of voter fraud, the plurality determined that “widespread and time tested consensus” demonstrated the necessity of a campaign-free zone law.¹¹⁰ Therefore, the plurality found that this is one of the “rare” cases where content-based restrictions on political speech pass “exacting scrutiny” test.¹¹¹

The Court admitted that this holding should not apply to all instances in which the First Amendment conflicts with a state’s election process¹¹² and that at some point governmental regulation of vote solicitation could become impermissible.¹¹³ The Court asserted that this decision should only apply when the challenged activity physically interferes with electors attempting to cast their ballots.¹¹⁴

b. Dissent

In a strong dissent, Justice Stevens argued that the campaign-free zone law was unconstitutional¹¹⁵ because it was a “sweeping suppression of core political speech”.¹¹⁶ He agreed with the plurality that a strict scrutiny analysis was appropriate, but he disagreed that Tennessee carried its burden to show a compelling state interest or that the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 199.

¹⁰⁹ *Id.* at 200.

¹¹⁰ *Id.* at 206.

¹¹¹ *Id.* at 211.

¹¹² *Id.* at 209.

¹¹³ *See id.* at 210 (citing *Mills v. Alabama*, 384 U.S. 214 (1966) in which the Court struck down a State law prohibiting political editorials on Election Day in the newspaper).

¹¹⁴ *Id.* at 209.

¹¹⁵ *Id.* at 217.

¹¹⁶ *Id.* at 222.

regulation was narrowly tailored.¹¹⁷ Justice Stevens believed that the state’s restriction on speech “goes too far.”¹¹⁸ The dissent attacked the plurality for confusing “history with necessity,”¹¹⁹ and for mistaking “the traditional for indispensable.”¹²⁰ The dissent rejected the notion that the only way to preserve secrecy in elections was by restricting campaign activities near the polls¹²¹ and that elections were no longer as corrupt as they were in the past.¹²² Justice Stevens found that Tennessee did not demonstrate that its restrictions on political speech were “no broader than necessary to protect orderly access to the polls”¹²³ and should therefore be found to be a violation of the First Amendment.¹²⁴

The laws prohibiting a voter from wearing a political message button should be found to be impermissible content-based regulation unlike the campaign-free zone law at issue in *Burson*. Wearing a button to the polls is more like wearing an armband (as in *Tinker*) or a button supporting a strike (as in *Chandler*). A political message button is a silent form of speech that should be found to be “non-disruptive” and therefore permissible just as the Court found the items in the school cases to be permissible expressions of speech by an individual. A campaign button is similar to a piece of written material such as the written piece of paper at issue in *Catham* because it is personal to the voter at the time and has little disruptive effect on others. Unlike the active campaigning at issue in *Burson*, wearing a campaign button is a passive form of expression that is non-disruptive. These button laws should be found to be a violation of

¹¹⁷ *Id.* at 217.

¹¹⁸ *Id.* at 219.

¹¹⁹ *Id.* at 220.

¹²⁰ *Id.*

¹²¹ *See id.* at 220 (the dissent notes that there are “obvious and simple means of preserving voter secrecy” such as “opaque doors or curtains on the voting booth”).

¹²² *Id.* at 221.

¹²³ *Id.* at 228.

¹²⁴ *Id.*

the First Amendment freedom of speech because the state cannot show that it has a compelling interest that outweighs a voter's rights. These laws are not narrowly tailored to the state's interest in preventing voter intimidation or election fraud. Wearing a button simply does not lead to voter intimidation. These laws suppress speech and should not be able to survive the strict scrutiny test. A court should therefore find that these laws are invalid just as the school rule was struck down in *Tinker*.

C. Forum Analysis

The laws regulating the wearing of buttons are not only content-based, but should also be considered impermissible regulation of speech in a public forum. An examination of the location and circumstances in which the speech takes place is another factor in the First Amendment analysis of whether a voter may wear a political message to the polls on election day. A state may be able to determine the kind of rules that are in place in certain situations and locations.¹²⁵ Use of the streets and public places is a privilege of every citizen that is "not absolute, but relative and must be exercised in subordination to the general comforts and convenience and in consonance with peace and good order."¹²⁶ Traditional public forums are defined as those places that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹²⁷ For purposes of First Amendment analysis, "traditional public forums" are defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and

¹²⁵ See *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (considerations of the special attributes of a forum is relevant in determining and testing the reasonableness of state action).

¹²⁶ See *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).

¹²⁷ See *id.* at 515.

debate.¹²⁸ Traditional public forums include locations such as parks, public streets, and sidewalks. A designated public forum is “a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”¹²⁹ These forums include fairgrounds, rallies, or other events designated for limited, special purposes.¹³⁰ A content-based law that restricts expression in either a traditional forum or designated forum will be upheld only if the state shows that it “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹³¹ However, restrictions on speech in nonpublic forums need only be “reasonable” and do not need to be “narrowly drawn to achieve [their] end.”¹³² Jurisprudence is not clear whether the interior of a polling place is a public or a non-public forum.

1. Public Forum

In *Burson v. Freeman*, the Supreme Court indicated that the area immediately outside a polling place is a public forum.¹³³ However, the Supreme Court did not determine whether the interior of a polling place is a public forum.¹³⁴ The plurality defined the area surrounding a polling place to be a “quintessential public forum.”¹³⁵ As such, the Court engaged in an “exacting scrutiny” test to determine whether the content-

¹²⁸ *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1988).

¹²⁹ *See Perry Education Assn.*, 460 U.S. at 45.

¹³⁰ *See, e.g., Heffron*, 452 U.S. at 655.

¹³¹ *See, e.g., Perry Education Assn.*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)); *see Forbes*, 523 U.S. at 677.

¹³² *See, e.g., id.* at 45.

¹³³ *Burson*, 504 U.S. at 196.

¹³⁴ *See Burson*, 504 U.S. at 219 (Justice Stevens, dissenting, found that the Tennessee had presented some evidence to suggest that restrictions on speech might be reasonable *inside* the polling place, but provided no clear justification for the ban on political expression *outside* the polling place).

¹³⁵ *Id.* at 198.

based restrictions on political speech would be constitutional.¹³⁶ The Court rejected the respondent Treasurer's argument that the 100 foot geographical regulation was not narrowly drawn to achieve the state's compelling interest in protecting the right to vote.¹³⁷ The Court noted that it is difficult to detect intimidation and fraud.¹³⁸ The Court failed to address respondent's argument that this regulation prohibits someone from driving near a polling place with a campaign bumper sticker.¹³⁹

In a concurrence, Justice Scalia described the area around polling places on election day as a nonpublic forum.¹⁴⁰ Although he believed the regulation to be content based, he described it as constitutional because it is a “reasonable viewpoint neutral regulation of a nonpublic forum”¹⁴¹

In a strong dissent, Justice Stevens reminded the court not to “confuse sanctity with silence.”¹⁴² He pointed out that in *Mills*, the Court rejected the State’s claim that election day actions on speech were justified to protect the public from confusing “last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters.”¹⁴³ In light of *Mills* and the fact that the campaign free zone was determined to be “traditional” by the plurality, Justice Stevens found that the state law could not pass the strict scrutiny standard and was invalid.¹⁴⁴

The Supreme Court has also upheld restrictions on speech that could be considered to be political when the state’s interest in protecting the health, safety, and

¹³⁶ *Id.* at 198.

¹³⁷ *Id.* at 208.

¹³⁸ *Id.* at 208.

¹³⁹ *Id.* at 208.

¹⁴⁰ *Id.* at 214.

¹⁴¹ *Id.*

¹⁴² *Id.* at 227.

¹⁴³ *Id.* (citing *State v. Mills*, 278 Ala. 188, 195-196, 176 So. 2d 884, 890 (1965) (holding that despite tradition, the State does not have a legitimate interest in insulating voters from election-day campaigning).

¹⁴⁴ *Id.* at 228.

welfare of the public outweighs the speaker's rights. In *Hill v. Colorado*,¹⁴⁵ anti-abortion activists challenged a Colorado state law that made it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with [that] person."¹⁴⁶ The Court determined that the law at issue regulated speech in a public forum;¹⁴⁷ therefore, the Court applied a strict scrutiny test.¹⁴⁸ The Court held that even though the speech was took place on public sidewalks, and were "quintessential" public forums for free speech,¹⁴⁹ the state had a compelling interest in protecting the health and safety of its citizens for which the statute was intended to serve.¹⁵⁰ The Court considered whether the protected First Amendment rights of the speaker to do leafleting, display signs, and make oral communications were abridged by the protections the statute provided for the unwilling listener.¹⁵¹ The dissenters argued that the Court departed from precedent by recognizing a "right to avoid unpopular speech in a public forum."¹⁵² However, the majority asserted that cases have repeatedly recognized the interests of unwilling listeners in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."¹⁵³ The Court noted that fact that the messages conveyed by those communications may be offensive did not deprive them of constitutional

¹⁴⁵ 530 U.S. 703 (2000).

¹⁴⁶ *Id.* at 703.

¹⁴⁷ *Id.* at 715.

¹⁴⁸ *Id.* at 730.

¹⁴⁹ *Id.* at 715.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 707.

¹⁵² *Id.* at 783.

¹⁵³ *Id.* at 715 (citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)).

protection.¹⁵⁴ The regulation was described as a “minor place restriction” on communications to unwilling listeners. The majority noted that there needs to be a delicate balancing when pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors -- in a variety of contexts.¹⁵⁵

In certain circumstances, courts have found that political speech may not be regulated in a public forum. For example, in *Irish Subcommittee v. Rhode Island Heritage Commission*,¹⁵⁶ the court struck down a state prohibition of the display or distribution of any political paraphernalia, including political buttons, pins, hats, and pamphlets, at a state festival.¹⁵⁷ The court held that the law was an impermissible content-based restriction on public forum speech.¹⁵⁸ The court rejected the argument that the festival or the booths, from which the plaintiffs distributed their political paraphernalia, lacked the status of a traditional public forum.¹⁵⁹ The court found that allowing the government to constrain a traditional public forum location and thereby create within it a nonpublic forum “destroy[s] the entire concept of a public forum.”¹⁶⁰

2. Nonpublic Forum

Courts have found that button-wearing can be restricted in non-public forums. For example, courts have routinely found that the wearing of political buttons in courtrooms¹⁶¹ and at workplaces¹⁶² can be restricted. Courts have also allowed

¹⁵⁴ *Id.* at 715.

¹⁵⁵ *Id.* at 718.

¹⁵⁶ 646 F. Supp. 347 (D. R.I. 1986).

¹⁵⁷ *See id.* at 352-53.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See Berner v. Delahanty*, 129 F.3d 20, 27 (1st Cir. 1997) (upholding a trial judge's order for an attorney to remove a political button expressing support for an upcoming ballot issue because, as an officer of the

restrictions on button-wearing in political gatherings designated as non-public forums. For example, in *Sistrunk v. City of Strongsville*, the Sixth Circuit upheld a restriction on a button-wearer's ability to attend a political rally.¹⁶³ There, the plaintiff attempted to attend a rally for a political candidate (President George H.W. Bush) sponsored by defendant political committee (the Republican National Committee) that was held on public property pursuant to a permit issued by the city.¹⁶⁴ The plaintiff wore a campaign button supporting the opponent (Governor Bill Clinton).¹⁶⁵ She was allowed to attend only after she removed the button.¹⁶⁶ In dismissing a button-wearer's claim, the court held that the First Amendment did not require the rally committee to include persons who expressed discordant views.¹⁶⁷ The court further noted that the plaintiff remained free to express herself elsewhere.¹⁶⁸

The Supreme Court has upheld restrictions on political speech in a nonpublic forum if the restrictions are "reasonable." In *Arkansas Educational Television Commission v. Forbes*,¹⁶⁹ an independent political candidate challenged action by a state-owned public television broadcaster that would exclude him from a candidate debate in violation of his First Amendment freedom to speak.¹⁷⁰ The Supreme Court found that a televised debate among candidates for political office that was sponsored by a public

court, the lawyer should not insert his political views of the controversy into a nonpublic forum where the purpose of the room is to be an absolutely fair and neutral environment).

¹⁶² See, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding state law restricting the political expression of state employees during working hours even though law included the wearing of political buttons and the displaying of bumper stickers because the regulation targeted political activity by classified civil servants in a neutral manner and only prohibited clearly partisan political activity).

¹⁶³ 99 F.3d 194 (6th Cir. 1996).

¹⁶⁴ *Id.* at 197.

¹⁶⁵ *Id.* at 200.

¹⁶⁶ *Id.* at 194.

¹⁶⁷ *Id.* at 200.

¹⁶⁸ *Id.* at 199.

¹⁶⁹ 523 U.S. 666 (1998).

¹⁷⁰ See *id.* at 670.

broadcaster was a “nonpublic forum” because the debate was not an open-microphone format.¹⁷¹ Instead, the broadcaster restricted eligibility for the debates to those candidates that had objective support from the public.¹⁷² The Court determined that the state action must only pass a reasonableness test because the restrictions on speech took place in a nonpublic forum.¹⁷³ The court found that the plaintiff was excluded because he lacked support and not because of his political views.¹⁷⁴ Therefore, the Court held that the State action was reasonable, viewpoint-neutral exercise of journalistic discretion.¹⁷⁵

A Circuit Court first examined the issue of whether the interior of a polling place is a nonpublic forum in *Marlin v. D.C. Bd. of Elections & Ethics*¹⁷⁶ Appellant voter claimed that the D.C. electoral board's enforcement of polling place regulations, which prohibited him from wearing a campaign sticker on his t-shirt within the polling place on election day, violated free speech protections under the First Amendment.¹⁷⁷ When the appellant attempted to turn-in his completed ballot during a primary election day, an election worker informed him that he could not “cast his ballot” while wearing a sticker in support of a mayoral candidate.¹⁷⁸ The voter eventually arranged to cast his ballot “curbside” (not in the polling room) while wearing the sticker on the day of the general election.¹⁷⁹ The D.C. Circuit Court held that the interior of the polling place was a non-public forum¹⁸⁰ and therefore, the law would be examined only for reasonableness.¹⁸¹

¹⁷¹ See *id.* at 676.

¹⁷² *Id.* at 676.

¹⁷³ *Id.* at 677-678.

¹⁷⁴ *Id.* at 677

¹⁷⁵ *Id.* at 676.

¹⁷⁶ 236 F.3d. 716 (2000).

¹⁷⁷ *Id.* at 717.

¹⁷⁸ *Id.* at 717.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 719.

¹⁸¹ *Id.*

The court found that D.C.'s enforcement of the election law constituted reasonable viewpoint neutral regulation of speech because such enforcement was a reasonable means of ensuring an orderly and peaceful voting environment, free from the threat of contention or intimidation.¹⁸² The court reasoned that the only expressive activity was each voter's elective choice, and that that choice was carried out privately by secret ballot in a restricted space.¹⁸³ The court believed that the polling place should not be used for general public discourse of "any sort."¹⁸⁴

3. Is a polling place a public or nonpublic forum?

I think a court would be misplacing its focus in attempting to define the precise area of space at a polling place or its surroundings that does or does not constitute a public forum.¹⁸⁵ The entire process of voting, from approaching the location to casting the vote, should be viewed as a public act taking place in a public forum. A voter wearing a button or particular piece of apparel (including a t-shirt, arm band, jersey or even a certain color) is simply providing a silent expression of a political belief or viewpoint. If it is determined that the interior of a polling place is a nonpublic forum as suggested by the *Marlin* court and by Justice Scalia's dissent in *Burson*, then these laws will only be examined for reasonableness and are likely to be upheld. If a strict scrutiny test is applied, they are likely to be declared invalid. The choice would determine the outcome. But public or private should not really be the issue in this situation. Voting is one of the most important times of a participatory democracy. The basic tenets of the

¹⁸² *Id.* at 720.

¹⁸³ *Id.* at 719.

¹⁸⁴ *Id.* at 719.

¹⁸⁵ See Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va.L.Rev., 1219, 1234 (1984) (arguing that the First Amendment protects people not places and that constitutional protection should depend not only labeling the speaker's physical location but on First Amendment values and government interest involved in the case).

First Amendment should allow passive political expression throughout the process of voting.

If the interior of a polling place were considered to be “nonpublic,” the button laws may survive the reasonableness test. In *Burson* the Supreme Court determined that a tradition of fraud at the polls allows states to have broad powers in election day campaigning, including the regulation of individual speech. Under a reasonableness test, a state may be able to show that a voter’s rights are not significantly burdened by having to remove a button or cover a t-shirt for the few minutes that he or she is casting a ballot.

If the polling place is considered to be a public forum like the festival in at issue in *Rhode Island Heritage Commission*, the button laws must pass the strict scrutiny test. The characteristics of a polling place, open to all, are unlike nonpublic forums such as a political rally as in *Sistrunk* or a candidate debate as in *Forbes*. The public forum strict scrutiny standard is the appropriate test for whether a law violates an individual’s right to speak. Unlike the laws at issue in *Burson* and *Hill*, these button laws do not involve active campaigning by an individual. The state’s interests do not outweigh the individual’s more significant interest in speaking freely.

Perhaps a state could demonstrate a compelling interest in the distribution or political materials in the polling room if it could show that this activity interferes with or threatens the security of other voters as they cast ballots. However, a state does not have a compelling interest in preventing voters from merely *wearing* campaign materials to the polling place because such silent speech does not have the harmful effects that active campaigning could have on a voter’s right to be free from interference. The state cannot show that a button law is similar to the law at issue in *Hill*, because there the state had a

compelling interest in protecting the health, safety, and welfare of the public by allowing access to medical treatment facilities. In that case, the state's interest outweighed minimal burdens on speech in a public forum. These buttons laws are different because the state statutes significantly burden an individual's right to speak in a silent, expressive manner that does not have an improper, significant or deleterious effect on other people casting their votes.

III. The 10 State laws that prohibit a voter from wearing a political message button to a polling place on election day do not pass the higher scrutiny standard

A. There is no valid "compelling" state interest in banning political message buttons; the laws are not "narrowly tailored" to asserted state interests

Ten states prohibit a voter from wearing a political message button to the polling place on election day. The states that explicitly ban campaign buttons in the language of its statute are the following: Delaware, Kansas, Minnesota, Montana, New Jersey, New York, South Carolina, Tennessee, Texas, and Vermont. Courts should examine these button laws through a strict scrutiny analysis because they are content-based restrictions of speech in a public forum. A state would have difficulty showing that this type of law passes muster as a compelling interest of the state or that it is narrowly tailored to that state interest. A state may try to show that it has an interest in prohibiting voter intimidation and election fraud--interests found to be compelling in *Burson*. However, wearing a button to the polls is not active campaigning like distributing campaign material or verbally encouraging voters to vote a certain way on an issue or for a certain candidate that was the type of active campaigning at issue in *Burson*. The current button laws are more like the school rule invalidated by the Court in *Tinker*. Just as the Court determined that children do not check their First Amendment rights at the schoolhouse

gate, voters do not check their First Amendment rights at the polling room door. Political message buttons are similar to black armbands because buttons are a nondisruptive, silent form of speech. The First Amendment was not written in order to silence nondisruptive speech. In *Catham*, the District Court even allowed a voter to take printed materials into the polling room. A political message button is a piece of printed material intended to be kept in the possession of voter. There is a significant difference between the action of wearing a political message button on the body of a person and distributing buttons or other material to voters.

As discussed above, the interior of a polling place should be considered a public forum within the meaning of the law. A polling place is not closed off like a political rally such as in *Sistrunk* or like the candidate debate in *Forbes*. Although the polling place may be considered to be a profound and reflective place, it is a place for the culmination of discourse and debate that is the act of voting. In my experience voting, it has been a verbally silent room too. Essentially debate is engaged in through the act of voting. I would argue that the very act of voting itself is an act of speaking publicly. Because speech is “at the heart of democracy,”¹⁸⁶ it is important to allow speech at the very time one engages in that democratic process.

The Supreme Court has found that “preserving the integrity of electoral process, preventing corruption,” and sustaining “the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government” are interests of the highest importance.¹⁸⁷ Included in the integrity of this process is the freedom to engage in debate about the issues that are important and who should represent us as citizens. Courts

¹⁸⁶ *Burson*, 504 U.S. at 198.

¹⁸⁷ *Buckley*, 424 U.S. 1.

should not place barriers of the ability of a voter to speak. Wearing a button is not electioneering, intimidation, or committing fraud. It is merely showing who the wearer individually and personally supports for political office. It is merely “showing your colors.” Some might argue that this action might have some influence on other voters, but this is not improper in a free society. Despite efforts by states to justify wide ranging prohibitions on electioneering,¹⁸⁸ voter fraud and intimidation are not the type of ills that occur when a voter is merely wearing a political message button. A button worn during the brief period that a voter is actually in the polling place should not be viewed as intimidating or coercing other voters.

A statute regulating political speech in a public forum is subject to strict scrutiny; it cannot survive constitutional muster unless the state demonstrates that it is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest.¹⁸⁹

B. The language of button laws are overbroad and lead to arbitrary enforcement

Internet websites and “blogs” contain firsthand accounts from voters across the country who were required to remove buttons before voting in the 2004 Presidential Election. A voter in Orangeburg, South Carolina was asked to remove his pro-President Bush button in the polling area.¹⁹⁰ The South Carolina Election Committee interprets the

¹⁸⁸ For example, Louisiana’s law includes a description of the historical reasons for enacting the law prohibiting activities at the polls. *See* LA. STAT. ANN. § 18:1462(A) (2005) “The Legislature of Louisiana recognizes that the right to vote is a right that is essential to the effective operation of a democratic government. Due to a past, longstanding history of election problems, such as multiple voting, votes being recorded for persons who did not vote, votes being recorded for deceased persons, voting by non-residents, vote buying, and voter intimidation, the legislature finds that the state has a compelling interest in securing a person’s right to vote in an environment which is free from intimidation, harassment, confusion, obstruction, and undue influence. The legislature, therefore, enacts this Subsection to provide for a six hundred foot campaign-free zone around polling places to provide to each voter such an environment in which to exercise his right to vote.”

¹⁸⁹ *Burson* at 191 (citing *Perry Educ. Assn.*, 460 U.S. 37).

¹⁹⁰ *See* Wireless Election Connection Moblog, “Remove the button, Please,” <http://wec.textamerica.com/?=1602741> (Posted November 2, 2004, Last visited November 10, 2005).

South Carolina election law prohibiting “distribution of campaign literature”¹⁹¹ as including the wearing of buttons and pins.¹⁹² Voters in Virginia had very different voting experiences as demonstrated by my personal experience being denied the right to wear a button by election officials in Fairfax County, Virginia.¹⁹³ Voters in Alexandria, Virginia were also told to remove buttons in polling places.¹⁹⁴ However, enforcement of the law in Virginia varies county to county. A voter in Albemarle County, Virginia noted that voters were allowed to wear buttons and T-shirts to the polls in that county.¹⁹⁵ The Albemarle County's electoral board considers wearing political paraphernalia “a matter of free speech”¹⁹⁶ despite the Virginia law prohibiting a voter from exhibiting campaign material.¹⁹⁷ An official from the Fluvanna County, Virginia Electoral Board noted that enforcing this Virginia law is “pretty low on the list of priorities on election day.”¹⁹⁸ However, election officials in some states believe that enforcing the button laws is a priority.¹⁹⁹ On the other hand, election officials in other states instruct poll workers not to comment on a voter’s attire.²⁰⁰

¹⁹¹ See S.C. CODE ANN. § 7-25-180 (2004).

¹⁹² See Wireless Election Connection Moblog, “Remove the button, Please,” <http://wec.textamerica.com/?=1602741> (Posted November 2, 2004, Last visited November 10, 2005). (Poll workers were told to enforce button law during 2004 Election Day).

¹⁹³ See *supra*, Introduction (including my personal story); see also Kimberly Tucker, “Election Dress Code: Leave Your Campaign Buttons At Home,” *Richmond Times-Dispatch*, November 6, 2005 (the op-ed related to this paper that appeared the Sunday before election day 2005 in which I argued that the Virginia law should be amended).

¹⁹⁴ See *id.*

¹⁹⁵ See George Loper, <http://george.loper.org/~george/archives/2004/Nov/975.html>

¹⁹⁶ See *id.*

¹⁹⁷ See VA. CODE ANN. § 24.2-604 (2005).

¹⁹⁸ See George Loper, <http://george.loper.org/~george/archives/2004/Nov/975.html> (county official further noted that the election board (political in nature) is in charge until the polls open, but that neutral precinct workers are in charge of polls on election day).

¹⁹⁹ See Saginaw County, M.I. Electoral Board, website questions and answers page, <http://www.saginawcounty.com/clerk/questions/#elections> (The Saginaw County, M.I. Electoral Board states that “anyone wearing pins . . . endorsing a candidate or ballot issue will be asked to remove that item upon entering the polling place.”)

²⁰⁰ See Alachua County Supervisor of Elections, Gainesville, FL, “Voter Bill of Rights,” <http://www.elections.co.alachua.fl.us> (last visited November 10, 2005) (“Voter’s Bill of Rights” established

Some voters know the law, such as Former First Lady Barbara Bush, who removed a button supporting her son's presidential campaign when she entered the polling place in Texas last November.²⁰¹ Other voters express surprise over the laws.

Furthermore, election officials have sometimes interpreted seemingly non-political paraphernalia to be campaign material. For example, last year Texas officials required voters to wear paper gowns over Dallas Cowboys apparel because a stadium-finance issue was on the ballot.²⁰² On the other hand, Denver Broncos fans were not required to remove their sports paraphernalia when a stadium tax issue was on the ballot in Colorado in 1998.²⁰³ These contrasting examples demonstrate widely differing views of permissible constraints on voter attire. Any limitations on voters' attire should be closely scrutinized to ensure that election laws, and their application, do not infringe on an individual's right of expression.

CONCLUSION

Where does it end? A significant difference exists between a voter wearing a campaign button to the polls and someone actively campaigning in a polling room. In this time of "Blue State" and "Red State" shorthand for Democratic and Republican leanings, could a voter wearing all blue/red to the polls be denied access to the polling place to vote and be required to change clothes before re-entering? Would it be

by Alachua County Supervisor of Elections, Gainesville, FL including section 9: "Poll workers are instructed not to comment on pins, buttons, T-shirts, etc. worn by a voter or to discuss the election").

²⁰¹ See Houston Independent Media, Voter comments on the 2004 Election, http://www.houston.indymedia.org/news/2004/10/33862_comment.php (last visited November 10, 2005) (Texas voter reported watching Mrs. Bush wearing a jeweled "W '04" campaign pin as she entered the voting center, but she took it off before going near the voting machines).

²⁰² See Toya Lynn Stewart, *Cowboys fans can't show colors at polls*, The Dallas Morning News (October 19, 2004).

²⁰³ See Associated Press, *Colorado official to county: Back off ban on Broncos apparel at polls*, available at <http://firstamendmentcenter.org/news.aspx?id=9444&SearchString=electioneering> (last visited November 10, 2005).

acceptable to wear a vintage Kennedy or Nixon button or one saying “I Like Ike”? Could a voter wear a “support our troops” t-shirt, an armband, a Nationals baseball cap?

The wearing of political message buttons provides a silent voice of personal conviction during one of the most important times for a democracy—the casting of votes. States, including Virginia, should amend their election laws to limit the effects of these restrictions on an individual’s constitutional right to speak. Next election day, I hope to cast my ballot wearing a button expressing my political preferences without comment from an election official. There should be no political dress code for polling places.