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Ballot Selfies: Balancing The Right To Speak Out On Political Issues And The Right To Vote Free From Improper Influence And Coercion

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BALLOT SELFIES: BALANCING THE RIGHT TO SPEAK OUT ON POLITICAL ISSUES AND THE RIGHT TO VOTE FREE FROM IMPROPER INFLUENCE AND COERCION

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Courts and legislatures face the difficult task of balancing individual First Amendment rights with other basic freedoms, a task that has become increasingly challenging with the advent of new technology. The emergence of the ballot selfie has caused a legal uproar due to the perception that it may compromise the sanctity of the electoral process and the secret ballot process by facilitating vote buying and coercion. Consequently, several states have enacted laws that prohibit most or all ballot selfies. However, many individuals have rightfully protested these laws as an unreasonable restraint on freedom of speech. This Note argues that although an absolute ban on ballot selfies infringes on voters' First Amendment rights, less-constrained and clearly-articulated guidelines aimed at combating real threats can appropriately regulate ballot selfies without infringing upon freedom of speech.

INTRODUCTION

In 2015, a New Hampshire district court struck down a state law[1] prohibiting ballot selfies.[2] The legislature justified the law as

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[1] N.H. REV. STAT. ANN. § 659:35 ("No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is

a restraint on vote buying and coercion, claiming that a "ballot selfie" could serve as a form of confirmation of a bought vote.[3] A "ballot selfie" is a self-taken photograph of a voter's ballot.[4] Ballot selfies are often posted on the Internet on various social media sites as a form of social activism.[5] While often done with good intentions, one risk of ballot selfies is that they will allow individuals to skew the voting process.[6] Individuals could purchase the votes of others and require a ballot selfie as proof that the person had voted the way they had been paid to vote.[7] Voters who do not understand the voting process or do not speak English as their native language are even more likely to be misled or intimidated to vote in ways others want them to.[8] While election fraud is a serious concern, laws prohibiting ballot selfies are in direct conflict with the First Amendment[9], and courts must balance

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about to vote or how he or she has voted"); Rideout v. Gardner, 123 F. Supp. 3d 218, 235 (D.N.H. 2015).

[2] "'Ballot selfies' are photos taken in the voting booth of ballots that may or may not include the voter's face." Heather Kelly, *Snapchat Fights Ban on 'Ballot Selfies'*, CNN MONEY (Apr. 22, 2016), http://money.cnn.com/2016/04/22/technology/snapchat-ballot-selfie/.

[3] *Rideout*, 123 F. Supp. 3d at 231, n. 7.

[4] *Definition of: Ballot Selfie*, PCMAG, https://www.pcmag.com/encyclopedia/term/68178/ballot-selfie (last visited Dec. 29, 2017); Kelly, *supra* note 2.

[5] David Mikkelson, *Ballot Selfies*, SNOPES, http://www.snopes.com/dont-selfie-your-ballot/ (last updated Nov. 8, 2016).

[6] *Id.*

[7] *Id. See* discussion *infra* Section IV.A. for a discussion on how someone could potentially buy votes. *See also* Frederic Charles Schaffer & Andreas Schedler, *What is Vote Buying?*, *in* ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING 17 (Frederic Charles Schaffer ed. 2007) ("Vote buying, in its literal sense, is a simple economic exchange. Candidates 'buy' and citizens 'sell' votes, as they buy and sell apples, shoes, or television sets. The act of vote buying by this view is a contract, or perhaps an auction, in which voters sell their votes to the highest bidder."); *Vote Buying Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/v/vote-buying/ (last visited Dec. 29, 2017) (noting that vote buying may also be defined as "[a]ny reward given to a person for voting in a particular way or for not voting [that] is a corrupt election practice.").

[8] Mikkelson, *supra* note 5.

[9] *See* U.S. CONST. amend. I (protecting an individual's freedom of speech among other rights).

the two competing interests.[10] The New Hampshire district court reasoned that no evidence had been presented of an imminent problem with photographs of completed ballots actually being used to perpetuate either voter coercion or vote buying.[11]

New Hampshire may have been the first state to prohibit ballot selfies but likely will not be the last.[12] Many states have laws prohibiting voters from showing marked ballots or the face of voting machines to others.[13] These laws predate New Hampshire's selfie ban but arose out of similar concerns.[14] Soon after the New Hampshire ban[15] was enacted, a similar law against ballot selfies was called into question in Indiana.[16] In that instance, the Southern District Court of Indiana held that the statute was a content-based restriction on speech that neither served a compelling state interest nor was narrowly tailored.[17]

As of June 2016, laws in approximately thirty-five states had made ballot selfies illegal and individuals who violate these laws may be subject to penalties including fines, invalidated ballots or jail time.[18] For example, the New Hampshire law imposed a fine of up to a thousand dollars for sharing ballot selfies.[19] However, a

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[10] *See generally* Rideout v. Gardner, 123 F. Supp. 3d 218 (D.N.H. 2015) (attempting to balance an individual's free speech rights while maintaining the integrity of the electoral process).

[11] *Id.* at 232–33.

[12] Joe Palazzolo, *Appeals Court Overturns Ban on Selfies in Voting Booths*, WALL ST. J., (Sept. 28, 2016), http://www.wsj.com/articles/appeals-court-overturns-ban-on-selfies-in-voting-booths-1475096927.

[13] *Id.*

[14] *Id.*

[15] *Rideout*, 123 F. Supp. at 236. On September 28, 2016, the First Circuit ruled on the issue and this case was affirmed. *See* Rideout v. Gardner, 838 F.3d 65, 67–68 (1st Cir. 2016).

[16] *See* Ind. Civil Liberties Found, Inc. v. Ind. Sec'y of State, No. 1:15-CV-01356, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015).

[17] *Id.* at *9.

[18] John Browning, Passman Jones PC, *Selfie-Absorbed: Ballot Selfies, the First Amendment and the Sharing Generation*, U.S. LAW WEEK (June 9, 2016), https://www.bloomberglaw.com/search/results/102189f99608fa131183ac86dba687d3/document/X1PTS2ES000000?.

[19] Erik Eckholm, *Selfies in Voting Booths Raise Legal Questions on Speech and Secrecy*, N.Y. TIMES (Aug. 24, 2015), https://www.nytimes.com/2015/08/25/us/selfies-in-voting-booths-raise-legal-questions-on-speech-and-secrecy.html?_

few states such as Maine, Oregon, Arizona, and Utah have "enacted laws that take the opposite approach and expressly allow ballot selfies."[20] Considering the reality that the majority of voters went to the 2016 presidential election with a smartphone in hand, the split in legislative authority with regard to resolving the issue has only complicated matters for voters.[21]

This Note will evaluate former and current state laws banning, limiting and permitting ballot selfies. Some scholars accurately find that many draconian ballot selfie laws cannot possibly withstand constitutional scrutiny.[22] Recognizing the validity of this argument, this Note argues that although an absolute ban on ballot selfies infringes voters' First Amendment rights, less constraining and more clearly articulated guidelines can appropriately regulate ballot selfies without infringing upon an individual's free speech rights.

Part I of this Note will provide an overview of the First Amendment. Part I will also scrutinize how the First Amendment has been interpreted and applied by courts in the context of free speech, and more specifically political free speech.[23] Part II will

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r=0 (discussing N.H. REV. STAT. ANN. § 659:35 (2017)).

[20] Browning, *supra* note 18.

[21] "[Ballot selfie] laws in several states are muddled, under review or confusing." Katie Rogers, *Can You Take a Voting Selfie? States Wage Legal Battles Days Before Election*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/us/politics/voting-selfie.html?mcubz=0. As states continue to prohibit sharing photos of ballots, ballot selfie law is in a "legal gray area" that has become increasingly "murkier." *Id.*

[22] *See, e.g.*, Daniel A. Horwitz, *A Picture's Worth a Thousand Words: Why Ballot Selfies Are Protected by the First Amendment*, 18 SMU SCI. & TECH. L. REV. 247, 249–50 (2015) (arguing ballot selfie laws are neither narrowly tailored nor furthering a compelling government interest).

[23] "The Supreme Court has interpreted 'speech' and 'press' broadly as covering not only talking, writing, and printing, but also broadcasting, using the Internet, and other forms of expression. The freedom of speech also applies to symbolic expression, such as displaying flags, burning flags, wearing armbands, burning crosses, and the like. The Supreme Court has held that restrictions on speech because of its *content*—that is, when the government targets the speaker's message—generally violate the First Amendment . . . [I]n the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s." Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NAT'L CONST. CTR., https://constitutioncenter.org/inter

examine the evolution of ballot selfies, what they are, and why people take them. Part III will compare the different state laws banning and allowing ballot selfies and will explicitly discuss and analyze the recent *Rideout* cases in New Hampshire.[24] Part IV will address the consequences of states allowing all types of ballot selfies including vote buying and threats to the sanctity of the election process. Part V will suggest more efficient and less infringing ways of ensuring the integrity of the voting process without violating individuals' First Amendment rights. This Note will close with a brief conclusion on the future of free speech in the electoral process and suggest alternative methods that can be utilized by voters to demonstrate their pride and civic engagement. This Note further argues that while these are viable suggestions that should be encouraged, they are not satisfactory solutions in and of themselves, so it is necessary to modify state statutes regarding political bribery to prevent coercion at the polls[25] without leading to the infringement of citizens' First Amendment rights.

I. THE FIRST AMENDMENT AND POLITICAL SPEECH: LAWS AND REGULATIONS

The First Amendment explicitly restricts Congress's powers by stating that it "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[26] However, interpretation of the First Amendment is the province of the courts, and they have long struggled with the challenges inherent to this power.[27] Political speech represents a

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active-constitution/amendments/amendment-i/the-freedom-of-speech-and-of-the-press-clause/interp/33 (last visited Dec. 29, 2017).

[24] *See id.*; Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016).

[25] *See* discussion *infra* Part V.

[26] U.S. CONST. amend. I.

[27] As recent as the Supreme Court's October 2016 term, the First Amendment continues to be "put to the test on multiple levels" as the Court was expected to hear several cases challenging the First Amendment. *See* David

particular struggle for courts in this area. In an attempt to distinguish between protected and unprotected speech,[28] the Supreme Court has previously faced First Amendment challenges in contexts which include, but are not limited to, imminent danger,[29] educational institutions,[30] and obscenity.[31]

The Supreme Court has historically upheld many First Amendment protections.[32] In *Hess v. Indiana*, the Supreme Court

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Kravets, *US Supreme Court Loaded with First Amendment Cases*, ARSTECHNICA (Jan. 10, 2017), https://arstechnica.com/tech-policy/2017/01/from-speech-to-recycled-tires-the-supreme-courts-1st-amendment-cases/.

[28] The Supreme Court has recognized several categories of speech that are not protected by the First Amendment. Among these categories are "obscenity, child pornography, and speech that constitutes so-called 'fighting words' or 'true threats' . . . All other types of speech are protected by the First Amendment. In general, the government may not prohibit the citizen[s] from engaging in speech. However, that does not mean that speech may not be subjected to regulation." The government, however, may still place burdens on protected speech. KATHLEEN ANN RUANE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, CONG. RES. SERV. 1 (Sept. 8, 2014), https://fas.org/sgp/crs/misc/95-815.pdf.

[29] *See* Hess v. Indiana, 414 U.S. 105 (1973).

[30] *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

[31] *See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

[32] *See* United States v. Stevens, 559 U.S. 460 (2010) (holding a federal statute that criminalized the commercial creation, sale, or possession of depictions of animal cruelty was unconstitutionally overbroad); Virginia v. Black, 538 U.S. 343 (2003) (holding Virginia's cross burning statute was unconstitutional because of its chilling effect); *Hess*, 414 U.S. at 109 (reversing the defendant's conviction for disorderly conduct because "there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder . . . "); Cohen v. California, 403 U.S. 15 (1971) (reversing defendant's conviction for disorderly conduct because the statement printed on his jacket did not fall within an unprotected category of speech); *Tinker*, 393 U.S. 503 (holding that a school district's decision to punish students for wearing black armbands in protest of the Vietnam War violated the First Amendment because the students' speech neither interfered with the school's work or the rights of other students); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

held that the words, "[w]e'll take the fucking street later [or again]," spoken by the defendant while facing a crowd at an anti-war demonstration, were protected speech and did not fall under the umbrella of fighting words[33] that would be subject to punishment.[34] Similarly, the Court in *Tinker v. Des Moines School District* upheld students' right to wear black armbands to school to protest the Vietnam War, finding that restriction of a student's First Amendment rights is not warranted unless evidence shows that regulation is necessary to avoid substantial interference with school discipline or the rights of others.[35]

In contrast, the Supreme Court in *Roth v. United States*[36] declined to safeguard the mailing of obscene and indecent materials, defining obscenity as "material which deals with sex in a manner appealing to prurient interest,"[37] and ultimately upheld a statute regulating the sale and advertising of obscene materials.[38] In *Miller v. California*,[39] the Court reaffirmed the holding in *Roth*

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[33] *Hess*, 414 U.S. at 107–09. Fighting words have historically been categorized as a subset of words that would likely make the individual to whom they are addressed commit an act of violence and have therefore traditionally been labeled as a form of unprotected speech. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) ("The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within th[is] purview . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.").

[34] *Hess*, 414 U.S. at 107–08.

[35] *Tinker*, 393 U.S. at 509.

[36] Roth ran a business in New York that published and sold various photographs, magazines and books. He was charged with the mailing of obscene materials in violation of the federal obscenity statute and convicted by a jury sitting in the Southern District of New York. *Roth*, 354 U.S. at 480.

[37] *Id.* at 487. Prurient interest is "a term that is used for a morbid interest in sex, nudity and obscene or pornographic matters." *Prurient Interest*, BLACK'S LAW DICTIONARY (2d ed. 1910).

[38] *Roth*, 354 U.S. at 492–93.

[39] This was another 'obscenity-pornography' case reviewed by the Court where the Appellant sent unsolicited advertising brochures to a restaurant. The brochures advertised four books with the titles "'Intercourse,' 'Man-Woman,' 'Sex Orgies Illustrated,' and 'An Illustrated History of Pornography,' and a film entitled 'Marital Intercourse.'" The brochures contained both printed descriptive

that obscene material is not protected speech under the First Amendment and established a three-part framework for determining what constitutes obscenity.[40] The Miller test takes into consideration: "(a) whether 'the average person applying contemporary community standards' would find that the work taken as a whole applies to prurient standards; (b) whether the work depicts or describes in a patently offensive way sexual conduct specifically described by state law; and (c) whether the work taken as a whole lacks serious, literary, political or scientific value."[41] These decisions represent only a small fraction of the First Amendment issues the Supreme Court has grappled with throughout the years.

Courts have continuously attempted to determine the outer limits of the freedoms protected under the First Amendment, which have proven to be arduous.[42] These interpretations have evolved throughout history, and the process of interpreting First Amendment jurisprudence steadily continues today.[43] The First Amendment states that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[44] Although the First Amendment refers to freedom of "speech," much speech remains completely untouched by the First Amendment.[45] Legal doctrine and free speech theory seek to elucidate what speech is protected and falls within the First Amendment's boundaries today.[46]

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material as well as explicit drawings of men and women engaging in sexual activity. Miller v. California, 413 U.S. 15, 18–19 (1973).

[40] *Id.* at 36–37.

[41] *Id.* at 24 (citation omitted). "Contemporary community standards" are established locally, rather than nationally. *Id.* at 33–34.

[42] *American Government-First Amendment Rights*, USHISTORY, http://www.ushistory.org/gov/10b.asp (last visited Dec. 29, 2017).

[43] *Id.*

[44] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65 (1983) (quoting Police Department v. Mosley, 408 U.S. 92, 95 (1972)).

[45] *See generally* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981 (2016) (discussing the diminishing distinction between content-based and content-neutral regulations).

[46] *See generally id.* (discussing the overarching policies behind free speech theory).

Restrictions emanating from the First Amendment "were first recognized in *Gitlow v. New York*, where the Court 'assumed' that freedom of speech and freedom of the press were among the 'liberties'[47] protected by the Due Process Clause[48] of the Fourteenth Amendment."[49] This was the first time the Supreme Court applied the First Amendment against the states by incorporating it under the Fourteenth Amendment.[50] In *Gitlow*, petitioner Benjamin Gitlow was convicted for publishing a communist manifesto calling for strikes and revolution.[51] At the time, New York's Criminal Anarchy Statute punished individuals who either taught or advertised the overthrow of the government by force.[52] Justice Sanford held that the state legislature acted

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[47] Gitlow v. New York, 268 U.S. 652, 666 (1925); JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 517 (4th ed. 2012).

[48] *Gitlow*, 268 U.S. at 666; ATTANASIO & GOLDSTEIN, *supra* note 47, at 517. The Due Process Clause of the Fourteenth Amendment prohibits the government from depriving a person of their right to liberty or property without due process. It serves three distinct functions in modern constitutional doctrine. U.S. CONST. amend. XIV, § 1. "First, it incorporates [against the States] specific protections defined in the Bill of Rights . . . Second, it contains a substantive component, sometimes referred to as 'substantive due process' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.' Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process[.]" Daniels v. Williams, 474 U.S 327, 336 (1986) (Stevens, J., concurring).

[49] U.S. CONST. amend. XIV, § 1; ATTANASIO & GOLDSTEIN, *supra* note 47, at 517.

[50] ATTANASIO & GOLDSTEIN, *supra* note 47, at 521 (citing *Gitlow*, 268 U.S. at 666).

[51] *See Gitlow*, 268 U.S. at 654, 656–59.

[52] ATTANASIO & GOLDSTEIN, *supra* note 47, at 521. Sections 160 and 161 of the statute, the material provisions that were at issue in *Gitlow* read: "'§ 160. *Criminal Anarchy Defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by [assassination] of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony. § 161. *Advocacy of Criminal Anarchy.* Any person who: 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or, 2. Prints, publishes, edits,

rationally in determining that the statute advanced the state's interest in self-preservation and was within its police power.[53] Justice Holmes, joined by Justice Brandeis, dissented with the majority's view that the manifesto was not merely a theory but incitement.[54] The dissenting justices firmly believed that Gitlow's actions were no more than a mere theory and were therefore protected under the First Amendment.[55] They advocated that erroneously categorizing speech as a "clear and present danger" does not inexorably transform it into a "clear and present danger."[56] Holmes' dissent, stated in relevant part:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.[57]

Decided in 1925, *Gitlow* paved the way for First Amendment jurisprudence. Among other issues, the *Gitlow* justices addressed two vital points: first, the justices addressed situations in which a person may be arrested simply for something they say[58], and

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issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means[.]'" *Gitlow*, 268 U.S. at 654–55.

[53] ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND 10 (2006) ("The 'police power' is the right and obligation of the states to legislate for the health, safety, welfare and morality for persons present in the states"); *see Gitlow*, 268 U.S. at 670; ATTANASIO & GOLDSTEIN, *supra* note 47, at 522.

[54] *See Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting).

[55] *See id.* at 673 (Holmes, J., dissenting).

[56] *See id.* at 672–73 (Holmes, J., dissenting).

[57] *Id.* at 673 (Holmes, J., dissenting).

[58] *See id.* at 664–65 ("The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of

second, the Court reviewed whether there is a difference in arresting someone for their words as opposed to actions that are the equivalent of words.[59]

In 1969, the Court moved closer to the First Amendment ideals we know and follow today in *Brandenburg v. Ohio*.[60] In *Brandenburg*, the appellant, a Ku Klux Klan leader, delivered a speech encouraging Klan members to take vengeful action against the government.[61] Brandenburg was convicted under Ohio's criminal syndicalism statute, which prohibited the teaching or advocacy of methods of "industrial or political reform."[62] The Court held that the statute violated the First Amendment and could not be sustained, moving away from the *Gitlow* standard permitting punishment of mere advocacy of overthrow.[63] In doing so, the Court indicated that a statute seeking to regulate advocacy of governmental overthrow must draw a distinction between "mere abstract teaching" and "imminent lawless action" intended and likely to incite such action.[64]

A. Symbolic Speech: Distinguishing Between Content Regulation and Manner Regulation

Symbolic speech[65] is another form of speech that courts have struggled with interpreting and continue to shape today.[66] A

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government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means.").

[59] *See Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

[60] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (moving away from the standards used in *Gitlow*).

[61] *Id.* at 444–46.

[62] *Id*. at 444–45.

[63] *Id*. at 448–49.

[64] *Id*. at 447–48.

[65] Symbolic speech is non-verbal conduct that expresses an idea or opinion. This includes sit-ins, demonstrations, waving of flags and banners and wearing protest pins or other expressive clothing. When looking at cases concerning symbolic speech, courts will ask "whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it." *What is Symbolic Speech? When is it Protected?*, STREET LAW, INC., http://landmarkcases.org/en/Page/680/What_Is_Symbolic_Speech__

thorough analysis of First Amendment jurisprudence within the context of symbolic speech necessarily includes discussion of three important decisions: *United States v. O'Brien,*[67] *Texas v. Johnson*[68] and *Reed v. Town of Gilbert*.[69]

1. *United States v. O'Brien*

U.S. v. O'Brien set the stage for extended discussions on symbolic speech. In 1966, David Paul O'Brien, along with three companions, burned their Selective Service registration certificate in front of a South Boston Courthouse.[70] A large crowd witnessed O'Brien and the three men burn their draft cards, and members of the crowd attacked them.[71] O'Brien was indicted and tried in a Massachusetts district court where he was subsequently convicted.[72] The indictment charged that he "willfully and knowingly did mutilate, destroy, and change by burning his Registration Certificate" in violation of Section 462(b)(3) of the Universal Military Training and Service Act of 1948 ("UMTSA").[73] The UMTSA made it a crime for a person to "forge, alter, knowingly destroy, knowingly mutilate, or in any manner change any such [federally issued military certification]."[74]

The Court's analysis in *O'Brien* began with an examination of conduct labeled as speech.[75] It noted that conduct cannot be "labeled as 'speech' whenever the person engaging in the conduct intends . . . to express an idea."[76] The Court also noted that even if O'Brien's conduct did constitute speech and implicate the First

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When_Is_It_Protected (last visited Dec. 29, 2017) (citing LEE ARBETMAN, STREET LAW: A COURSE IN PRACTICAL LAW 1 (8th ed. 2010)).

[66] *See generally* Texas v. Johnson, 491 U.S. 397 (1989); United States v. O'Brien, 391 U.S. 367 (1968).

[67] *See O'Brien*, 391 U.S. 367.

[68] *See Johnson*, 491 U.S. 397.

[69] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

[70] *O'Brien*, 391 U.S. at 369.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 370.

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

[75] *See id.* at 376.

[76] *Id.*

Amendment, "it does not necessarily follow" that the act of burning a registration card would be protected speech under the First Amendment.[77] The Court pointed out that it had previously held "when 'speech' and 'nonspeech' elements are combined in the same course of conduct [there is] a sufficiently important governmental interest in regulating the nonspeech element . . . ."[78]

The Court referenced an array of descriptive terms previously employed by the Court to depict the quality and extent of the government interest that must be present in order to justify government regulation: "compelling;[79] substantial;[80] subordinating;[81] paramount;[82] cogent;[83] [and] strong.[84]"[85] The Court, in reinstating O'Brien's conviction for knowingly burning his draft card, made clear that a government regulation is sufficiently justified if (1) it is within the constitutional power of the government which promulgated the rule; (2) the regulation furthers a substantial (not compelling) government interest; (3) the government regulation is unrelated to the suppression of free speech (in other words, it must be content neutral); and (4) the incidental restriction on speech that comes about from enforcing the expressive part must be absolutely minimized.[86] In utilizing this four-step analysis, the Court held that the government's substantial interest in assuring the continued availability of issued Selective Service certificates was enough of a sufficient government interest to justify O'Brien's conviction.[87]

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[77] *Id.*

[78] *Id.*

[79] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963).

[80] *Button*, 371 U.S. at 444; NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958).

[81] Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

[82] *See Sherbert*, 374 U.S. at 406 (1963); Thomas v. Collins, 323 U.S. 516, 530 (1945).

[83] *Bates*, 361 U.S. at 524.

[84] *Sherbert*, 374 U.S. at 408.

[85] United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

[86] *Id.* at 377.

[87] *Id.* at 382.

2. *Texas v. Johnson*

In 1989, the Supreme Court further clarified the applicability of the *O'Brien* test in *Texas v. Johnson*.[88] At the 1984 Republican National Convention in Dallas, Texas, Gregory Lee Johnson participated in a political demonstration by burning the American flag outside of Dallas City Hall.[89] Johnson was convicted of desecrating a flag in violation of Section 42.09(a)(3) of the Texas Penal Code.[90] Here, the Supreme Court was tasked with interpreting and applying *O'Brien*.[91] It limited the applicability of the *O'Brien* test and its "relatively lenient standard" to cases in which "'the governmental interest is unrelated to the suppression of free expression.'"[92] Texas stated that the state's interests were rooted in "preventing breaches of the peace" as well as "preserving the flag as a symbol of nationhood and national unity."[93]

The Court stated that because these concerns related to the suppression of expression contained in flag burning, the less-lenient *O'Brien* standard for non-communicative conduct did not apply and there had to be a time, place, and manner exception to the specified conduct.[94] Stated differently, a statute must be content-neutral both on its face and in the manner in which it is enforced by the government; it must be narrowly tailored; and it must provide some exception, such as a time, place, and manner in which the conduct can be expressed.[95] The Court held that the state's interest in "preventing breaches of the peace" and

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[88] Texas v. Johnson, 491 U.S. 397, 407 (1989) (citing *O'Brien*, 391 U.S. at 367–77).

[89] *Id.* at 399.

[90] *Johnson*, 491 U.S. at 399 n. 1 (At the time, § 42.09 of the Texas Penal Code read: "(a) A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag. (b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action. (c) An offense under this section is a Class A misdemeanor.").

[91] *See Johnson*, 491 U.S. at 407.

[92] *Id.* (quoting *O'Brien*, 391 U.S. at 377).

[93] *Id.*

[94] *Id.* at 407.

[95] *See id.*

"preserving the flag as a symbol of nationhood" did not justify the criminal conviction, and Johnson's conviction was therefore inconsistent with the First Amendment.[96]

Through *O'Brien*, *Johnson* and cases to follow, the Supreme Court has developed a framework for resolving conflicts where free speech rights and governmental interests clash.[97] First, speech restrictions are sorted by whether they are content-based or content-neutral.[98] Second, if the reviewing court determines that the restrictions are content-based, they will be subject to strict scrutiny.[99]

3. *Reed v. Town of Gilbert*

In 2015, in *Reed v. Town of Gilbert*, the Supreme Court expanded the definition of content-based restrictions and the kinds of statutes subject to the exacting strict scrutiny analysis.[100] In *Reed*, the Supreme Court invalidated a local Arizona town ordinance that restricted the public display of various signs.[101] This was due to the fact that the ordinance contained numerous content-based exceptions which discriminated against a small church group whose temporary signs announcing services did not qualify as one of the exceptions.[102] Since the Arizona ordinance was inherently content-based, it was subject to a strict scrutiny review by the Court.[103] The Court in *Reed* stated that strict scrutiny "requires the Government to prove [1] that the restriction furthers a compelling interest and [2] is narrowly tailored to achieve that interest."[104] Content-neutral restrictions, on the other hand, are only subject to the lesser standard of intermediate scrutiny which means "the

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[96] *Id.* at 420.

[97] Rideout v. Gardner, 123 F. Supp. 3d 218, 228 (D.N.H. 2015).

[98] *See id.*

[99] *See id.* (citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015)).

[100] *See generally Reed*, 135 S. Ct. at 2230 (finding that a speech regulation targeting specific subject matter is content-based regardless of whether it favors a specific viewpoint).

[101] *See Reed*, 135 S. Ct. at 2231–32.

[102] *Id.* at 2224–26, 2232.

[103] *Id.* at 2231.

[104] *Id.* (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)).

government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are . . . narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[105]

Taken together, these cases set clearer parameters on governmental restrictions of political speech. Evidently, ballot selfies qualify as political speech and deserve the same protection.[106] Similarly to *O'Brien*, New Hampshire's prohibition on the distribution and sharing of ballot selfies on social media platforms implicates both speech and nonspeech elements.[107] Posting the photo can be categorized as nonspeech whereas any caption or commentary regarding why the individual voted the way he or she did more closely resembles actual speech.[108] Therefore, we are left with the Court's decisions in *O'Brien*, *Johnson* and *Reed* to foster our analysis and interpretation of the First Amendment protections voters are afforded across the United States.[109]

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[105] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 293 (1984)).

[106] Rideout v. Gardner, 123 F. Supp. 3d 218, 234–36 (D.N.H. 2015). *Secrecy of the Ballot and Ballot Selfies*, NAT'L CONF. ON ST. LEGISLATURES (Feb. 23, 2017), http://www.ncsl.org/research/elections-and-campaigns/secrecy-of-the-ballot-and-ballot-selfies.aspx ("Because the ballot selfie was held to be political speech, it therefore commands the same constitutional protection required of other First Amendment rights.").

[107] Emily Wagman, *But First, (Don't) Let Me Take a Selfie: New Hampshire's Ban on Ballot Selfies and First Amendment Scrutiny*, 25 WM. & MARY BILL RTS. J. 343, 360–61 (2016) (citing United States v. O'Brien, 391 U.S. 367 (1968)).

[108] *Id.*

[109] *See Reed*, 135 S. Ct. 2218; Texas v. Johnson, 491 U.S. 397 (1989); *O'Brien*, 391 U.S. 367. It is extremely difficult, however, to fathom how the offensive and outrageous speech targeted at the family of a deceased soldier on the day of his funeral is protected by the First Amendment but taking a photograph of one's own ballot is not. In *Snyder v. Phelps*, the congregation of the Westboro Baptist Church picketed a soldier's funeral who was killed in Iraq. Snyder v. Phelps, 562 U.S. 443, 460–61 (2011). The picketers displayed signs prior to the commencement of the funeral that read "'Thank God for Dead Soldiers,' 'Fags Doom Nations,' 'America is Doomed,' 'Priests Rape Boys,' and 'You're Going to Hell[.]" *Id.* at 448. Justice Alito was the sole dissenter in the

II. THE BALLOT SELFIE

Ballot selfie jurisprudence, like Supreme Court First Amendment jurisprudence, is open to interpretation. For example, although the term "selfie" implies a picture of one's own face, that may not necessarily be true.[110] The term is in many ways a misnomer. The ballot selfie is a picture of a voter's marked ballot, which is often shared over the internet through social media platforms.[111] However, while the photographs of one's ballot need not show the voter or their face, they oftentimes do.[112]

A. Purpose and Significance

Many individuals "like to take pictures of their ballot because they're excited about voting and participating in the [electoral] process."[113] As the Supreme Court has stated, "[t]he use of illustrations or pictures . . . serves important communicative functions: it attracts the attention of the audience to the [speaker's] message, and it may also serve to impart information directly."[114] Ken Falk, Legal Director of the ACLU of Indiana, has explained

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case and described the picketers' action as a "vicious verbal assault[.]" *Id.* at 463 (Alito, J., dissenting). Nonetheless, the Supreme Court held that no matter how outlandish and unorthodox the picketers' speech taunting a grieving family by claiming that soldiers were dying as punishment for America's tolerance of homosexuality was, it was still protected by the First Amendment. *See id.* at 461.

[110] Kelly, *supra* note 2.

[111] Robert Barnes, *Is a Ballot-booth Selfie Free Speech, or a Threat to the Sanctity of the Secret Vote?*, WASH. POST (Aug. 23, 2015), https://www.washingtonpost.com/politics/courts_law/is-a-ballot-booth-selfie-free-speech-or-a-threat-to-the-sanctity-of-the-secret-vote/2015/08/23/89623272-4809-11e5-8ab4-c73967a143d3_story.html.

[112] Rideout v. Gardner, 838 F.3d 65, 67 (1st Cir. 2016).

[113] Zach Pluhacek, *No Ballot 'Selfies' in Nebraska, Secretary of State Says*, LINCOLN JOURNAL STAR (Sept. 4, 2015), http://journalstar.com/news/state-and-regional/nebraska/no-ballot-selfies-in-nebraska-secretary-of-state-says/article_a6a74c18-5f98-5794-b852-e1d21de53b4b.html?mobile_touch=true.

[114] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 647 (1985) (addressing newspaper advertisements for legal representation of defendants in drunk driving cases that promised a full legal fee refund in the event of conviction).

that "[t]aking a picture of one's ballot and sharing it with family and friends is an expression of pride and enthusiasm about voting."[115] Similarly, Assemblyman Marc Levine of San Rafael, California believes that ballot selfies "are a positive sign of civic engagement and should be encouraged."[116]

Arguably, the ballot selfie was a long time coming: "People post selfies with their strawberry daiquiris and their calico kittens, with strangers and friends, with and without clothes. So it was inevitable, perhaps, that some might take photographs inside the voting booth to show off their completed ballots."[117] However, states have nonetheless proceeded to ban ballot selfies, not without opposition from voters.[118] Ballot selfies and social media remain an important part of the democratic process in today's society in which voters, particularly young voters, are discussing their candidate selections.[119]

B. Social Media and Voting

As of 2012, 22 percent of registered voters have shared how they voted with the world through social media such as Facebook and Twitter.[120] Social media platforms have not only become a forum for voters to express support for a particular candidate, but also a venue for people to actively try to persuade their friends to vote.[121] For example, in the 2012 presidential election, many registered voters, regardless of party affiliation, "were encouraged

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[115] *ACLU of Indiana Challenges State Law Prohibiting Ballot "Selfies"*, AM. CIVIL LIBERTIES UNION (Aug. 27, 2015), https://www.aclu.org/news/aclu-indiana-challenges-state-law-prohibiting-ballot-selfies.

[116] Jack Morse, *That 'Ballot Selfie' You Just Posted? Yeah, That's Illegal.*, SFIST (Nov. 3, 2015, 1:05 PM), http://sfist.com/2015/11/03/that_ballot_selfie_you_just_posted.php.

[117] Eckholm, *supra* note 19.

[118] *See* discussion *infra* Section III.B (discussing challenges brought by three voters in New Hampshire for violation of their free speech rights).

[119] Lee Rainie, *Social Media and Voting*, PEW RES. CTR. (Nov. 6, 2012), http://www.pewinternet.org/2012/11/06/social-media-and-voting/.

[120] *Id.*

[121] *Id.*

by their friends [and family] to vote for [candidates through various social media platforms]."[122]

Also in 2012, a survey conducted by Pew Research Center's Internet & American Life Project concluded that of the registered voters[123] who heard from family and friends on how to vote via posts on Social Networking Sites (SNS)/Twitter, 25 percent urged voting for incumbent President Barack Obama, and 25 percent of voters urged voting for Republican presidential candidate Mitt Romney.[124] Though appearing facially even, demographics played a role in the type of channel from which individuals received this information.[125] For example, "female registered voters were more likely to hear from family and friends via social media postings[,]" as opposed to other outlets of communication.[126] Additionally, about 29 percent of registered voters under the age of fifty have announced through social media platforms how they voted or planned on voting; that number was approximately 17 percent for registered voters over the age of fifty.[127] These numbers are likely to grow as social media becomes more prevalent and as the next generation comes of voting age.[128]

Many people feel that there is no better way to show their pride in democracy than through a voting booth photograph.[129] This is "the moment political talk turns to political action, [a moment] younger voters are especially eager to record and share with friends."[130] Ballot selfies have been and continue to be shared among an array of social media platforms such as Facebook,

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[122] *Id.*

[123] The Pew study identified those voters who share how they voted via social media as the "'social vote' cohort" which reflects a sizable 74 percent of registered voters. *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *See* Heather Satterfield, *How Social Media Affects Politics*, SYSOMOS (Oct. 5, 2016), https://sysomos.com/2016/10/05/social-media-affects-politics/.

[129] Daniel Victor, *Selfies in Voting Booth? Snapchat Fights for the Right*, N.Y. TIMES (Apr. 26, 2016), http://www.nytimes.com/2016/04/27/us/politics/voting-booth-snapchat-selfies.html?_r=1.

[130] *Id.*

Twitter, and Snapchat.[131] The New Hampshire lawsuit concerning the right to take and share ballot selfies was brought and supported by traditional free speech advocates such as the American Civil Liberties Union ("ACLU")[132] and Freedom of the Press.[133] The suit was also supported by start-ups and established social media companies such as Snapchat.[134]

Snapchat is a messaging app in which shared photos and videos automatically disappear within a few seconds of the recipient viewing them.[135] It argued that political coverage generated by its users is a significant source of content on the service, especially in its "Live Stories."[136] In presenting itself "as a news-gathering operation," Snapchat maintains that "restricting its ability to gather

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[131] *See* discussion *supra* Section II.C.

[132] The ACLU, established in 1920, is a national, non-partisan organization that works to defend and preserve the fundamental rights of individuals. The ACLU now has over two million members and supporters and continues to work in courts and legislatures to secure the individual rights guaranteed by the Constitution for everyone in the country. For additional information on the organization, see *About the ACLU*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/about-aclu (last visited Dec. 29, 2017).

[133] Anna Orso, *Pennsylvania: Don't Post Ballot Selfies Until After You Leave Your Polling Place*, BILLYPENN (Oct. 17, 2016), http://billypenn.com/2016/10/17/pennsylvania-dont-post-ballot-selfies-until-after-you-leave-your-polling-place/.

[134] *Id.*

[135] Elyse Betters, *What's the Point of Snapchat and How Does it Work?*, POCKET-LINT (Dec. 26, 2015), http://www.pocket-lint.com/news/131313-what-s-the-point-of-snapchat-and-how-does-it-work.

[136] Brief Amicus Curiae of Snapchat, Inc. in Support of Appellees and Affirmance at 23–24, Rideout v. Gardner, 838 F.3d 65 (1st Cir. Apr. 22, 2016) (No. 15-2021) [hereinafter Brief Amicus Curiae of Snapchat, Inc.]. Snapchat Live Stories are a combination of "snaps" that are "submitted mostly by users and [then] assembled by Snapchat staff." The amalgamation can be described as a fusion between the Instagram app and Vine. Live Stories cover a broad scope of themes from topical, educational or purely entertaining. Some stories include traveling, concert and festival stories, and commemorative anniversary events. Snapchat's Live Stories "can be funny or thought-provoking or just kind of pointless." Nonetheless, with 10–20 million daily viewers, they have arguably become Snapchat's most important feature. P. Claire Dodson, *Why Snapchat's Live Stories Are the Most Powerful New Social Media*, FASTCOMPANY (Oct. 21, 2015), https://www.fastcompany.com/3052322/why-snapchats-live-stories-are-the-most-powerful-new-social-media.

user-generated content infringes on its watchdog function."[137] Ballot selfies capture "the very essence of th[e] [political] process as it happens—the pulled lever, the filled-in bubble, the punched-out chad—and thus dramatizes the power that one person has to influence our government.'"[138] With social media being a prominent part of our culture for over a decade, it is easy to understand why voters are inclined to broadcast their voting intentions on social media platforms despite laws to the contrary.[139]

C. Recent Infractions and Societal Responses

On October 24, 2016, actor and singer Justin Timberlake voted in Memphis, Tennessee and shared a photo of his ballot on Instagram[140] with his millions of followers.[141] Timberlake wanted to encourage others to "ROCK THE VOTE"[142] and make their

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[137] Victor, *supra* note 129.

[138] Brief Amicus Curiae of Snapchat, Inc., *supra* note 136, at 6.

[139] Kimberlee Morrison, *The Growth of Social Media: From Passing Trend to International Obsession [Infographic]*, ADWEEK (Jan. 27, 2014), http://www.adweek.com/digital/the-growth-of-social-media-from-trend-to-obsession-infographic/ (discussing the growth and prominence of social media: "While many have come and gone, the growth of social media indicates that more people are catching on and using social networks to connect and communicate.").

[140] "Instagram is a social networking app made for sharing photos and videos from a smartphone. Similar to Facebook or Twitter, everyone who creates an account has a profile and a news feed. When you post a photo or video on Instagram, it will be displayed on your profile. Other users who follow you will see your posts in their own feed. Likewise, you'll see posts from other users who you choose to follow." Elise Moreau, *What Is Instagram, Anyway?*, LIFEWIRE (Mar. 28, 2016), https://www.lifewire.com/what-is-instagram-3486316.

[141] Mark Joseph Stern, *Don't Worry! The Law Justin Timberlake Broke Is Unconstitutional.*, SLATE (Oct. 16, 2016), http://www.slate.com/blogs/future_tense/2016/10/26/justin_timberlake_ballot_selfie_the_tennessee_law_is_unconstitutional.html.

[142] Rock the Vote is one of the largest nonpartisan organizations in the United States that has been registering millions of new voters since 1990. It represents the historic intersection between culture and politics and in 1999, it made politics accessible to all by creating an online voter registration tool. "For more than 25 years, Rock the Vote has revolutionized the way we use pop

voices heard in the upcoming election.[143] He did not anticipate the political and legal uproar his picture would cause. News outlets were flooded with stories when the news broke.[144] "[Timberlake] had the best of intentions" wrote a reporter for USA Today.[145] Timberlake claimed he was promoting early voting and accompanied his ballot selfie with the following caption: "Hey! You! Yeah, YOU! I just flew from LA to Memphis to #rockthevote!!! No excuses, my good people! There could be early voting in your town too. If not, November 8th! Choose to have a voice! If you don't, then we can't HEAR YOU! Get out and VOTE!"[146]

Timberlake's good intentions had no bearing on the legal repercussions of his post.[147] The crime Timberlake is said to have committed is a misdemeanor in Tennessee, which could carry a penalty of up to thirty days in jail and a fifty-dollar fine.[148] Under Tennessee law,[149] voters are prohibited from taking photos or videos while in the polling place, but may use electronic devices

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culture, music, art and technology to inspire political activity. The organization has pioneered ways to make voting easier for young adults by simplifying and demystifiying voter registrations and elections." For additional information on the organization, see ROCK THE VOTE, https://www.rockthevote.com (last visited Dec. 29, 2017).

[143] Stern, *supra* note 141.

[144] *See e.g.*, Jody Callahan, *Lawmaker Wants to Make Tenn. Safe for Ballot Selfies*, USA TODAY (Nov. 3, 2016), http://www.usatoday.com/story/news/politics/onpolitics/2016/11/03/ballot-selfies-law-tennessee/93272538/; Andrea Mandell, *Justin Timberlake's Voting Selfie May Have Broken the Law*, USA TODAY (Oct. 26, 2016), http://www.usatoday.com/story/life/people/2016/10/25/justin-timberlakes-voting-selfie-may-have-broken-law/92728472/; Stern, *supra* note 141; *Justin Timberlake's Ballot Selfie Raises Some Important Questions*, FORTUNE (Oct. 26, 2016), http://fortune.com/2016/10/26/justin-timberlake-ballot-selfie-laws/.

[145] Mandell, *supra* note 144.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] TENN. CODE ANN. § 2-7-142(b) (2016) ("Any voter using a mobile electronic or communication device . . . shall be prohibited from using the device for telephone conversations, recording, or taking photographs or videos while inside the polling place.").

for informational purposes while voting.[150] Initially, the Shelby County District Attorney's Office declared that Timberlake's actions were under investigation for a possible violation of state election law, but later rescinded the statement, stating that their limited resources would not be utilized in investigating the matter.[151] After the ballot selfie received widespread attention, "Timberlake took it down [, making it unavailable to] his 37.1 million Instagram followers."[152] The media was largely sympathetic to Timberlake, with one reporter going as far to say that "selfies are a nearly universal way of sharing exuberance over life's bright moments" and banning them is "unnecessary, unconstitutional and, dare we say, un-American."[153]

Another high-profile individual who couldn't resist sharing a ballot selfie on election day was none other than the current President's son.[154] Eric Trump took to Twitter[155] to share a photo of his completed ballot, followed by a caption stating, "It is an incredible honor to vote for my father! He will do such a great job for the U.S.A!"[156] Unlike Timberlake's photograph, however,

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[150] *Id.*

[151] Mandell, *supra* note 144.

[152] Callahan, *supra* note 144.

[153] News Sentinel Editorial Board, *Justin Timberlake Exposes Lame Ban on Ballot Selfies*, CITIZEN-TIMES (Oct. 26, 2016), http://www.citizen-times.com/story/opinion/editorials/2016/10/26/justin-timberlake-exposes-lame-ban-ballot-selfies/92777080/.

[154] *See* Michael Addady, *Eric Trump Just Violated This New York Voting Law*, FORTUNE (Nov. 8, 2016), http://fortune.com/2016/11/08/eric-trump-twitter-ballot/.

[155] "Twitter and 'tweeting' is about broadcasting daily short burst messages to the world, with the hope that your messages are useful and interesting to someone. In other words, *microblogging*. Conversely, Twitter is also about discovering interesting people online and following their burst messages for as long as they are interesting . . . You join with a free account and Twitter name. Then you send broadcasts daily, or even hourly. Go to the 'What's Happening' box, type 140 characters or less, and click 'Tweet' . . . To receive Twitter feeds, you simply find someone interesting (celebrities included), and 'follow' them to subscribe to their tweet microblogs. Once a person becomes uninteresting to you, you simply 'unfollow' them." Paul Gil, *What is Twitter & How Does it Work?*, LIFEWIRE (July 28, 2017), https://www.lifewire.com/what-exactly-is-twitter-2483331 (last updated Nov. 8, 2017).

[156] Addady, *supra* note 154.

Trump's did not include his name or his picture, but nonetheless violated state law.[157] New York Election Law prohibits a voter from "[s]how[ing] his ballot after it is prepared for voting, to any person so as to reveal the contents[.]"[158] Judge P. Kevin Castel, a federal judge in the Southern District of New York, refused to overturn the New York ban on ballot selfies[159] and indicated that people who wish to share their voting decision can do so through "other powerful means."[160] Judge Castel wrote that changing the law so close to the election would cause too much confusion[161] and cautioned that "[a] last-minute, judicially-imposed change in the protocol at 5,300 polling places would be a recipe for delays and a disorderly election[.]"[162] But not changing the law is sure to have caused just as much confusion, as millions of Americans stepped into voting booths around the country not knowing what constituted proper conduct with regard to ballot selfies. Judge Castel's reluctance to overturn the ban was part of a wider trend of widespread confusion and inconsistent jurisprudence in this area of the law.

III. A SPLIT IN LEGISLATIVE AUTHORITY: THE DIFFERING APPROACHES TOWARD BALLOT SELFIES

The right to take ballot selfies remains under a cloud of controversy as states around the country continue to debate the issue.[163] One argument is that a picture is an act of speech and, given the country's heavy use of social media, a picture is one of the most attention-grabbing acts of speech possible.[164] As such, a state should not prevent people from showing their pride in who

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[157] Dan Evon, *Eric Trump Tweets (Illegal) Ballot Selfie*, SNOPES (Nov. 8, 2016), http://www.snopes.com/eric-trump-tweets-illegal-ballot-selfie/.

[158] N.Y. ELEC. LAW § 17–130 (10) (McKinney 2017).

[159] Silberberg v. Bd. of Elections of N.Y., 216 F. Supp. 3d 411, 415 (S.D.N.Y. 2016).

[160] *Id.* at 422.

[161] *Id.* at 421.

[162] *Id.* at 415.

[163] *See* discussion *infra* Sections III.A–B.

[164] Richard L. Hasen & Elie Mystal, *Are Voting Booth Selfies Fun or Dangerous?*, N.Y. TIMES (Nov. 4, 2016), http://www.nytimes.com/roomfordebate/2016/11/04/are-voting-booth-selfies-fun-or-dangerous.

they voted for via a picture, as this would constitute a blatant violation of the First Amendment.[165] The opposing argument is that the need for ballot secrecy overrides the need for ballot selfies,[166] and while laws barring photography of ballots may seem draconian, they are necessary to uphold the integrity of elections.[167] States have yet to reach a consensus, and it is questionable whether they will anytime in the near future.[168] Nevertheless, states should consider resolving these questions sooner rather than later to dispel the widespread confusion concerning the legality of taking and sharing ballot selfies.

A. States Banning Ballot Selfies

In the landmark 2010 case *Citizens United v. Federal Election Commission*, the Supreme Court stated:

> The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.[169]

However, states continue to clamp down on ballot selfies, arguing that they promote vote buying and undue influence.[170] States fear that "people being paid in vote buying schemes would be required to show proof that they voted in accordance with their agreement [and] one way to do this was to snap a picture in the

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[165] *See id.*; Rideout v. Gardner, 123 F. Supp. 3d 218, 229 (D.N.H. 2015).

[166] *See* Hasen & Mystal, *supra* note 164.

[167] *Id*.

[168] *See* discussion *infra* Sections II.A–B (discussing the inconsistencies in legislative choices among the states).

[169] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) (Kennedy, J., dissenting).

[170] *See* Parker Molloy, *18 States Ban Ballot Selfies, and the Reason Actually Makes Some Sense.*, UPWORTHY (Oct. 26, 2016), http://www.upworthy.com/18-states-ban-ballot-selfies-and-the-reason-actually-makes-some-sense.

booth."[171] One such state is West Virginia, where the relevant law states that "[n]o person may enter a voting booth with any recording or electronic device in order to record or interfere with the voting process."[172] The statute therefore suggests that a voter may take a selfie only after they leave or are outside of the polling place and does not regulate such photographs once a voter leaves and is outside the polling station.[173]

States have also justified restrictions on ballot selfies by claiming that the restrictions protect voter privacy, the integrity of the vote, and the electoral process as a whole.[174] Alabama, for example, prohibits voters from taking photographs in polling places,[175] but as of November 2, 2016, nobody had yet been prosecuted for violating the law.[176] Considering the prevalence of voter expression on social media (e.g., the Pew study infra), it is unlikely that no ballot selfies were taken in Alabama during the 2016 presidential election. It is more likely that ballot selfies were taken, but were neither discovered nor prosecuted. Another state, Arizona, has proscribed the taking of photos within seventy-five feet of a polling station, but does permit citizens to take a photo of a ballot that was mailed to them.[177] Consequently, this would mean that despite prohibitions on ballot selfies in many states like Alabama and Arizona, these regulations are either unenforced or ineffective even if they were enforced.

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[171] *Id.*

[172] AJ Willingham, *Don't Even THINK About Taking a Selfie When You Vote in These States*, CNN POLITICS (Nov. 2, 2016, 2:16), http://www.cnn.com/2016/11/02/politics/voting-selfie-laws-trnd/ (referencing W. VA. CODE § 3-4A-23 (2017)).

[173] *See id.*

[174] Debbie Encalada & Sean Stout, *Here's a List of States That Allow Ballot Selfies*, COMPLEX (Oct. 24, 2016), http://www.complex.com/life/2016/10/where-voting-ballot-selfies-are-legal-and-illegal.

[175] *See* ALA. CODE § 17-6-34 (2017) ("Every voter in Alabama shall have the right to vote a secret ballot, and that ballot shall be kept secret and inviolate."); Willingham, *supra* note 172.

[176] Willingham, *supra* note 172.

[177] *See* ARIZ. REV. STAT. ANN. § 16-515 (A)–(G) (2015) ("a person shall not be allowed to remain inside the seventy-five foot limit while the polls are open, except for the purpose of voting . . . [and] may not take photographs or videos while within the seventy-five foot limit.").

If the goal of regulating ballot selfies is the prevention of coercion and vote buying,[178] imposing a restriction on conduct only within a certain distance of a polling booth, as in Arizona, is an arbitrary move, as it fails to consider the potential vote buying that could occur via the mail in absentee ballots. Other states, such as Iowa, have drawn a distinction between taking photos in a voting booth that interfere with other voters or "the orderly operation of the polling place" and displaying photos of ballots for unrelated purposes, specifically disallowing the former but allowing the latter.[179] Similarly, Colorado has drawn a distinction between disclosing your ballot "in furtherance of [an] election violation" proscribed in other sections of the statute and showing your ballot on a completely disparate basis, again specifically disallowing the former but allowing the latter.[180] Maryland takes ballot selfie laws a step further and forbids the use of any "electronic communication devices."[181] While these laws vary from state to state, the argument for upholding bans on ballot selfies is the same—"voting has long been a private act in the United States" in an effort to preserve the sanctity of the electoral process "and should remain that way."[182]

B. States Allowing Ballot Selfies

As early as 2011, five states—Maine, Oregon, Utah, Arizona, and California—had carved out exceptions to permit voters to

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[178] Encalada & Stout, *supra* note 174.

[179] *See* IOWA CODE §49.88 (2017) ("The use of photographic devices and the display of voted ballots is prohibited if such use or display is for purposes prohibited under chapter 39A, interferes with other voters, or interferes with the orderly operation of the polling place.").

[180] *See* COLO. REV. STAT. ANN. §1-13-712 (2017).

[181] MD. CODE REGS. 33.07.04.02(A) (2017**).** While broadening the ban from taking photographs of ballots to the general use of electronic devices in the voting booth may further ensure the integrity of the electoral process, it indefinitely could hinder voter education because people often use applications to tell them about candidates or where their polling location is.

[182] *MAP: Ballot Selfies Are Banned in These 18 States, Allowed in 19*, FOX NEWS (Oct. 24, 2016), http://insider.foxnews.com/2016/10/24/map-ballot-selfies-are-banned-these-18-states-allowed-19.

share photos of their ballots.[183] Since then, several other states have followed their footsteps,[184] and today, a total of twenty-three states have made it legal to snap a photograph and share it with the world through social media platforms.[185] As recently as 2016, Hawaii passed a law[186] allowing voters to share photos of their own marked ballots,[187] and in Oregon, where voting is done through mail-in ballots, voters are now entitled to photograph their ballots if they wish.[188] Given this shift toward an increased acceptance of ballot selfies, other states should follow this trend and continue in this direction in upcoming elections.

Another state that now allows ballot selfies, after much controversy, is New Hampshire. New Hampshire originally intended to outlaw ballot selfies through a now-overturned statute.[189] That statute, Section 659.35, as amended, reads:

> No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted except as provided in RSA 659:20. This prohibition shall include taking a digital image or photograph of his or her marked ballot and

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[183] Palazzolo, *supra* note 12.

[184] As of early 2017, ballot selfies have been made legal in Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, North Dakota, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington State and Wyoming. *17 States Where Ballot Selfies are Illegal*, WYFF GREENVILLE, http://www.wyff4.com/article/17-states-where-ballot-selfies-are-illegal/7577619 ; *see* Kristen Wyatt, *Bill Allowing Ballot 'Selfies' Approved by Colorado Senate*, U.S. NEWS & WORLD REPORT (March 2, 2017), https://www.usnews.com/news/best-states/colorado/articles/2017-03-02/ballot-selfie-bill-approved-in-colorado.

[185] *Id.*

[186] *See* HAW. REV. STAT. ANN. §11-121 (West 2016).

[187] *Id.* ("A voter shall not be prohibited from distributing or sharing an electronic or digital image of the voter's own marked ballot via social media or other means regardless of how the voter acquired the image . . . ").

[188] *Secrecy of the Ballot and Ballot Selfies*, *supra* note 106 (describing Oregon S.B. 515, which repealed a statute prohibiting showing marked ballots to other people); *see Voting in Oregon*, STATE OF OREGON, http://sos.oregon.gov/voting/Pages/voteinor.aspx (last visited Dec. 29, 2017).

[189] *See* Rideout v. Gardner, 835 F.3d 65 (1st Cir. 2016).

> distributing or sharing the image via social media or by any other means.[190]

The New Hampshire statute was challenged in *Rideout v. New Hampshire*. Among the opponents arguing the statute was a violation of their free speech rights were Leon Rideout, Brandon Ross, and Andrew Langlois.[191] "Leon Rideout, a state representative[,] posted his ballot to show he had voted for himself [as well as] other Republican candidates and [to encourage] others to do the same."[192] Brandon Ross, a statehouse candidate, "took a photo of his ballot to memorialize his [ ] candidacy and posted it [ ] with the message 'Come at me, bro' [ ] after learning the attorney general's office was [seeking] to prosecute [individuals] for violating the [controversial] ban."[193] "Andrew Langlois [ ]wrote in the name of his recently deceased dog, Akira, for the office of U.S. senator [and posted a photo of it] on Facebook [to demonstrate his feeling that] 'all of the candidates [sucked].'"[194] These three opponents brought suit against New Hampshire's Secretary of State, seeking a declaration that the statute violated their First Amendment rights.[195] The District Court agreed and granted the plaintiffs' declaratory relief after finding the statute to be vastly overinclusive and therefore unconstitutional.[196]

C. A Missed Opportunity in Rideout II

In *Rideout II*, the First Circuit did not firmly reinforce the district court's finding that the New Hampshire law was content-based, and that completed ballots are not a form of government speech.[197] While holding that the prohibition on taking and sharing

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[190] N.H. REV. STAT. ANN. §659:35 (2017).

[191] Barnes, *supra* note 111.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] Rideout v. Gardner, 123 F. Supp. 3d 218, 227 (D.N.H. 2015).

[196] *Id.* at 235–36.

[197] Generally, government speech and action has traditionally fallen outside First Amendment protections. Walker v. Texas Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2245–46 (2015) (citing Johanss v. Livestock Marketing Assn., 544 U.S. 550, 559 (2005)). Relying on the analysis and factors set forth in Pleasant Grove City v. Summum, the Court in Walker held that

digital photographs of completed ballots was not narrowly tailored,[198] the First Circuit did not fully reach the First Amendment issue present in *Rideout I*.[199] Instead of firmly reinforcing the district court's strict scrutiny analysis, the First Circuit analyzed the case of ballot-selfies under the less stringent standard of intermediate scrutiny.[200] Given that the law regarding ballot selfies is extremely inconsistent and in a state of flux,[201] this reinforcement would have been particularly advantageous because it would have reaffirmed the proper standard to be applied to government speech,[202] categorized ballot selfies as either

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specialty license plate designs constitute government speech and therefore were not privy to First Amendment protection. *Id.* "[Government speech] is needed to execute laws and regulations. A legislator or executive officer might give a speech outlining a new law; an agency might issue guidance on how a law or regulation is to be understood or enforced. Some state speech fills gaps in the marketplace of ideas, supplementing private speech that might be skewed toward profit or other not publicly regarding ends. Consider government agency provision of information regarding the environment, or public health. Governmental actors or entities might reach conclusions about matters of public concern that ought to be shared just as anyone's ideas ought to be shared—because perhaps we have a duty to share with others what we believe to be true or good. The state may have distinctive views and an obligation as fiduciary to say what it believes to be true. Its speech may be distinctive in various ways, providing points of view not otherwise available, or aggregating views of different persons or providing a centralized perspective." Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 354 (2016).

[198] "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest. If these standards are met, courts should defer to the government's reasonable determination." Ward v. Rock Against Racism, 491 U.S. 781, 782–83 (1989); *see infra* notes 225–227 and accompanying text.

[199] *See* Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016) (analyzing the New Hampshire statute as content-neutral as opposed to content-based).

[200] *See id.* at 71–72.

[201] *See* discussion *supra* Sections III.A–B.

[202] Government speech is the government speaking for itself and expressing its own viewpoint. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009) (citing *Johanns*, 544 U.S. at 553; Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring)

government or non-government speech, and provided clarification for voters throughout the country. The circuit court affirmed the district court's decision on the narrower ground that the New Hampshire statute failed to meet the test for intermediate scrutiny under the First Amendment.[203]

It is unclear why the First Circuit neglected to address these First Amendment issues in its opinion.[204] Nevertheless, a determination of a government restriction being content-based[205] is necessary to this analysis, and deserves adequate deliberation in the current discussion on the constitutionality of ballot selfies.[206]

A law that is inherently content-based will be subject to a strict scrutiny analysis.[207] The "common sense" interpretation of "content-based" material necessarily requires a court to consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[208] If a law either permits or prohibits speech solely based on "the subject matter, function, or purpose of the speech[,]" it is content based.[209] Even a law found to be facially-neutral will not escape a content-based categorization

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("Government is not restrained by the First Amendment from controlling its own expression . . . ").

[203] *Rideout*, 838 F.3d at 65. Intermediate scrutiny is used when analyzing and deciding equal protection challenges. It is a heightened form of scrutiny but less intense than the strict scrutiny that is applied in cases involving fundamental rights and suspect classes. Intermediate scrutiny requires that a challenged statute is substantially related to the purported governmental objective. *Id.*; 16B C.J.S. Constitutional Law § 1278 (2017); *see supra* note 105 and accompanying text (defining intermediate scrutiny and its requirements).

[204] *See generally Rideout*, 838 F.3d at 65.

[205] A law is considered content based where the government seeks to regulate particular speech "because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

[206] Content-based laws are "those that target speech based on its communicative content . . . [They] are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)).

[207] Rideout v. Gardner, 123 F. Supp. 3d 218, 229 (D.N.H. 2015).

[208] *Reed*, 135 S.Ct. at 2227 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011)).

[209] *Rideout*, 123 F. Supp. 3d at 229 (citing *Reed*, 135 S.Ct. at 2227).

if the regulation differentiates the speech based on the speaker's point of view or "cannot be justified without specific reference to the content of the speech."[210] Accordingly, one could confidently consider the law under review in *Rideout* to be "content based on its face because it restricts speech on the basis of its subject matter."[211] The New Hampshire government sought to bar digital or photographic images of marked ballots that are deliberately taken to show how a voter has voted whereas images of unmarked ballots may be freely shared without any curtailment.[212] Such legislation would require those regulating the conduct to carefully probe and analyze the speech's content to determine whether it includes permissible or impermissible subject matter, inescapably making it content based.[213]

Because the New Hampshire state law is a content-based restriction on speech, it can only stand if it survives strict scrutiny.[214] Strict scrutiny requires the state government to first prove that the regulation furthers a compelling state interest and second that it is narrowly tailored to attain that interest.[215] The interest advanced by the government in *Rideout* was the desire to guard against "images of completed ballots being used to facilitate either vote buying or voter coercion."[216] However, the Supreme Court has held that "the state must identify an 'actual problem' in need of solving[.]"[217] In *Rideout*, Judge Barbadaro found that "[t]he law's legislative history contains only a single

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[210] *Id.* ("A law that distinguishes between permitted and prohibited speech based on the subject matter, function, or purpose of the speech is content based on its face. Additionally, even a facially-neutral law will be deemed to be content based if it either cannot be justified without reference to the content of the speech or discriminates based on the speaker's point of view.").

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* at 231; *see* discussion *supra* Section I.A.i. (discussing the strict scrutiny standard and its requirements).

[215] AZ. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011) (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010)).

[216] *Rideout*, 123 F. Supp. 3d at 232.

[217] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (citing United States v. Playboy Entm't Grp., 529 U.S 803, 822–23 (2000)).

unsubstantiated third-hand report that vote buying occurred in Goffstown[218] during the 2012 election."[219] The government failed to come forward with evidence that vote buying or voter coercion were current problems in New Hampshire or that digital or photographic images of completed ballots have been used in the past fifteen years to facilitate vote buying or voter coercion.[220] Because the government failed to demonstrate that the law serves a compelling state interest, it failed to satisfy the rigorous strict scrutiny standard.[221]

Had the government proven that the law furthered a compelling state interest, the court found it still would have failed because it was not narrowly tailored.[222] To determine whether a law is narrowly tailored, a court will typically ask "whether the challenged regulation is the least restrictive means among available, effective alternatives."[223] The burden to prove that the law is narrowly tailored rests with the state.[224] A law that is significantly overinclusive and which punishes the innocent while punishing the guilty is not narrowly tailored.[225] In addition to the

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[218] Goffstown is a scenic town in the southern section of New Hampshire bordered by the towns of Bedford, Dunbarton, Hooksett, Manchester, New Boston and Weare. *Description*, TOWN OF GOFFSTOWN N.H., http://www.goffstown.com/community (last visited Dec. 29, 2017).

[219] *Rideout*, 123 F. Supp. 3d at 232.

[220] *Id*.

[221] *Id*. at 232–33.

[222] *Id*. at 233.

[223] Aschcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004) *but cf.* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1671 (2015) ("The First Amendment requires that [the state law] be narrowly tailored, not that it be 'perfectly tailored.'").

[224] *Rideout*, 123 F. Supp. 3d at 233 (citing *Aschcroft*, 542 U.S. at 666).

[225] *See e.g.* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121, 123 (1991) (finding a law which required that an accused or convicted criminal's income be deposited in an escrow account and made available to the victims of the crime was over inclusive and therefore not narrowly tailored); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 793 (1978) (finding a statute that prohibited corporations from making contributions or expenditures to influence the outcome of a vote on any question submitted to voters other than questions materially affecting the property, business or assets of the corporation to be both under-inclusive and overinclusive with respect to the asserted purpose of protecting rights of corporate shareholders).

government's failure to demonstrate an imminent problem of vote buying or voter coercion in New Hampshire, the law was also overinclusive because its realistic effect would be to punish the innocent while not harming those who participated in vote buying or voter coercion.[226] The citizens who are most likely to be caught within the net of the New Hampshire law were those whose intentions were to make a political point rather than buy votes or pressure others to vote a certain way.[227] The few individuals who may be involved with vote buying or voter coercion are much less likely "to broadcast their intentions via social media given the criminal nature of the schemes . . . "[228] Consequently, because the New Hampshire state law was over-inclusive and the state failed to ascertain that less-restrictive alternatives would be ineffective, the law was destined to fail.[229]

Voters are likely to become increasingly enraged by the ballot selfie ban. The plaintiffs in *Rideout* were not the only individuals who decided to fight back against the selfie ban.[230] Shortly before the November 2016 election, the ACLU filed suit in federal court seeking an injunction against California's selfie ban.[231] This indicates that lawsuits similar to the New Hampshire suit may arise in the future. If one of these cases reaches a federal appeals court which rules against voters, ballot selfie bans could become an issue before the Supreme Court.[232] As of April 2017, however, the Supreme Court has declined review of *Rideout v. Gardner*.[233]

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[226] *Rideout*, 123 F. Supp. 3d at 234.

[227] *Id.*

[228] *Id.*

[229] *See id.* at 235.

[230] *See* Sudhin Thanawala, *Civil Liberties Group Sues Over California Ballot Selfies*, ASSOCIATED PRESS (Nov. 1, 2016), http://bigstory.ap.org/article/e10700644d71491688ab8d4d9d10eb03/civil-liberties-group-sues-over-california-ballot-selfies.

[231] Complaint for Declaratory and Injunctive Relief, Am. Civil Liberties Union of Cal. v. Padilla, No. 3:16-CV-06287 (N.D. Cal. Oct 31, 2016).

[232] Chance Seales, *Ballot Selfie Bans: America's Next Supreme Court Fight?*, WRIC, http://wric.com/2016/10/27/ballot-selfie-bans-americas-next-supreme-court-fight/ (last updated Oct. 28, 2016).

[233] Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017); Josh Gerstein, *SCOTUS Won't Hear Case on Ballot Selfies*, POLITICO (Apr. 3, 2017), http://www.politico.com/blogs/under-the-radar/2017/0

This issue is significant because the ability to speak freely about political candidates and opinions is a core part of our democratic process. On the other hand, it is necessary to ensure that voters cannot be coerced when entering the voting booth in order to maintain the integrity of the electoral process.[234] Because laws vary in each state, many individuals do not realize that laws restricting or prohibiting ballot selfies even exist, much less what they expressly allow or prohibit.[235] Even if a ban on ballot selfies were to stand, it would prove ineffective for this reason and lead to numerous unintentional offenses. As such, the ever-present controversy over laws that regulate ballot selfies will likely continue to develop in the lower courts and test the legality of these state regulations. If the Court is drawn into the legal controversy over voters' rights to take and circulate ballot selfies, it could provide a much-needed clarification of state voting laws and end the lingering dispute.[236]

IV. VOTE BUYING AND THE SANCTITY OF THE ELECTORAL PROCESS

One of the main justifications argued by proponents of ballot selfie regulation is that proscribing ballot selfies prevents vote

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4/new-hampshire-ballot-selfies-no-supreme-court-236823.

[234] *See* LIZ KENNEDY ET AL., BULLIES AT THE BALLOT BOX: PROTECTING THE FREEDOM TO VOTE AGAINST WRONGFUL CHALLENGES AND INTIMIDATION 28 (2012), http://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf ("Law enforcement can and should apply [] statutes [prohibiting voter intimidation] to behavior at the polling places that has the effect of intimidating voters about their eligibility to vote, including outside of polling locations. There is still room for legislators in these states to better protect voters from intimidation tactics by passing stronger legislation and increasing the penalties for those engaging in voter intimidation . . . ").

[235] *See* Bruce Shipkowski, *Where is Posting Ballot Selfies Legal?*, PBS (Oct. 23, 2016), http://www.pbs.org/newshour/rundown/posting-ballot-selfies-legal/. Nikola Jordan, a thirty-three-year-old from Omaha, Nebraska, had been taking ballot selfies for several years as a way to share her civic engagement: "I was doing this for years before I learned it was technically illegal . . . It's all about encouraging other people to get involved in the process, to show it can be fun and exciting to make your voice heard (at the polls). Don't think of voting as some boring thing . . . It's your chance to make a difference." *Id.*

[236] Seales, *supra* note 232.

buying.[237] A typical vote buying scenario can be described as one where "a voter is promised money to vote for a specific candidate, and the voter offers proof that he voted for that particular candidate by transmitting a photograph of his completed ballot."[238] "Vote-buyers, [political bullies,] or a boss demanding that you support a candidate, could demand a photograph of the completed ballot to prove how you voted."[239] Secret ballots, originating in Australia, largely ended the intimidation and rampant vote-buying of the 20th century.[240] The secret ballot is credited with ending such nefarious practices because it eliminated a means to verify whether the instructions of vote buyers and political bullies were carried out or not.[241]

A. The Australian Ballot: The Rise of the Secret Ballot

Early voting in America looked substantially different than how it does today.[242] "The earliest voting in colonial America did not even involve a ballot."[243] Voting "was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some."[244] The most common form of voting was by a show-of-hands or the use of voices.[245] Historian Charles S. Sydnor painted a picture of a typical election day from mid-eighteenth century Virginia, distinct from what we would imagine today:

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[237] *See supra* note 5 and accompanying text.

[238] Horwitz, *supra* note 22, at 251.

[239] Eckholm, *supra* note 19.

[240] *Id.*; Edward T. O'Donnell*, What Have We Got to Hide? The Origins of Secret Balloting in America*, In THE PAST LANE (Nov. 4, 2012), http://inthepastlane.com/tag/australian-ballot-in-america/.

[241] Eckholm, *supra* note 19.

[242] Jill Lepore, *Rock, Paper, Scissors*, THE NEW YORKER (Oct. 13, 2008), http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors.

[243] O'Donnell*, supra* note 240.

[244] Burson, v. Freeman, 504 U.S 191, 200 (1992).

[245] O'Donnell, *supra* note 240; *see* Lepore, *supra* note 242 ("Americans used to vote with their voices—*viva voce*—or with their hands or with their feet. Yea or nay. Raise your hand. All in favor of Jones, stand on this side of the town common; if you support Smith, line up over there.").

> [E]ach freeholder came before the sheriff, his name was called out in a loud voice, and the sheriff inquired how he would vote. The freeholder replied by giving the name of his preference. The appropriate clerk then wrote down the voter's name, the sheriff announced it as enrolled, and often the candidate for whom he had voted arose, bowed, and publicly thanked him.[246]

At the time, this practice of public voting was practical since voting was only available to a small number of people,[247] and this practice lasted well into the 19th century.[248] Americans valued transparence[249] and public voting was thought to diminish the likelihood that corrupt officials might attempt to manipulate the voting process.[250]

In the 19th century, many communities made the switch to paper ballots[251] due to population growth[252] in cities, but voting still remained public.[253] Since the paper ballots were not private, they often provided an opportunity for parties to engage in vote buying.[254] One way this was done was by using ballot paper that

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[246] CHARLES S. SYDNOR, GENTLEMEN FREEHOLDERS: POLITICAL PRACTICES IN WASHINGTON'S VIRGINIA 21 (1952); O'Donnell, *supra* note 240.

[247] For example, only men with property would vote because they were thought to be the only people who could vote with the public welfare in mind instead of private gain. Lepore, *supra* note 242.

[248] O'Donnell, *supra* note 240.

[249] *See* Lepore, *supra* note 242 ("Our forebears considered casting a 'secret ballot' cowardly, underhanded, and despicable . . . voting secretly would 'destroy that noble generous openness that is characteristick of an Englishman.'").

[250] O'Donnell, *supra* note 240.

[251] *Id.* While paper ballots were more efficient than the bean tossing method used in Pennsylvania during this time, paper voting was still a hassle. "You had to bring your own ballot, a scrap of paper. You had to (a) remember and (b) know how to spell the name of every candidate and office." *See* Lepore, *supra* note 242.

[252] O'Donnell, *supra* note 240. The population of the United States, which was less than four million in 1790, increased tenfold by 1870. *See* Lepore, *supra* note 242.

[253] O'Donnell, *supra* note 240; *see* Lepore, *supra* note 242 ("Paper voting wasn't meant to conceal anyone's vote . . .").

[254] Rideout v. Gardner, 123 F. Supp. 3d 218, 224 (D.N.H. 2015).

had "flamboyant colors, distinctive designs, and emblems" or was otherwise recognizable from afar to confirm that the voter used the specific ballot he was given.[255] The public process "made elections ripe for bribes and threats[.]"[256] In an effort to combat election bribes and threats, states attempted to standardize ballots, but these attempts were easily defeated.[257] A person buying someone's vote could simply hand a ballot to the bribed voter and watch him until he placed it into the polling box.[258] However, this was still not quite as bad as in Australia, where "criminals and goldbugs made electoral intimidation something of a democratic pastime."[259] To combat this, in the 1850s, Australian colonies adopted the Australian or secret ballot.[260]

The "Australian ballot" or secret ballot was not adopted by the United States until the 1880s.[261] In 1888, Louisville, Kentucky became the first city to adopt the Australian ballot.[262] Prior to the presidential election in 1892, thirty-two states had adopted the Australian ballot and by 1896 another seven states were added to the list.[263] Among the most important features of the Australian ballot were the printing and distribution of ballots, the procedure for placing names of candidates on the ballot, the provisions for publicity, the arrangement of the polling place, and the form and preparation of the ballot.[264] Ballots were printed and distributed by election officers at public expense and contained the names of all nominated candidates.[265] This made it more difficult to effectuate vote buying "because party workers could no longer monitor how

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[255] Burson v. Freeman, 504 U.S 191, 200 (1992).

[256] Sasha Issenberg, *Abolish the Secret Ballot*, THE ATLANTIC (June 20, 2012), http://www.theatlantic.com/magazine/archive/2012/07/abolish-the-secret-ballot/309038/.

[257] *Burson*, 504 U.S at 200.

[258] *Id.*

[259] Issenberg, *supra* note 256.

[260] *Id.*

[261] Lepore, *supra* note 242.

[262] Rideout v. Gardner, 123 F. Supp. 3d 218, 225 (D.N.H. 2015).

[263] ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 27 (1917).

[264] *Id.*

[265] *Id.* at 28; *see Rideout*, 123 F. Supp. 3d at 224–25.

voters voted."[266] Although the Australian ballot significantly reduced people's incentives to resort to vote buying, it did not entirely expunge the phenomenon.[267] While there continue to be some reports of vote buying well into the twenty-first century,[268] these were "'isolated and anachronistic'" and none involve the use of a digital image of a marked ballot as in *Rideout*.[269]

B. Prevalence of Vote Buying and Voter Coercion in the U.S. Today

In spite of the fact that the threat of vote buying and voter coercion has been drastically minimized,[270] it would be unfair and inaccurate to say it has become completely irrelevant.[271] While not as rampant as it once was, vote buying still exists to a degree in some places, such as Kentucky.[272] Vote buying occurred once more during the 2010 general election in Magoffin County, when Randy Salyer, a member of the Board of Elections, was found guilty and sentenced to twenty-one months in prison for paying voters fifty dollars for their absentee ballots.[273] When Salyer was released from prison, he was hired by a judge whose election was ultimately overturned "due to voting irregularities."[274] Ferrell Adkin, who had run for Magoffin County's commonwealth attorney, says part of the problem is that "[vote buying has] almost become kind of a tradition. I wouldn't say the majority thinks it's ok to sell your vote, but there are people who think there's nothing wrong with that. It's kind of a commercial transaction."[275]

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[266] *Rideout*, 123 F. Supp. 3d at 225.

[267] *Id.*

[268] *See, e.g.*, United States v. Thomas, 510 F.3d 714, 717 (7th Cir. 2007); United States v. Shatley, 448 F.3d 264, 265 (4th Cir. 2006); United States v. Johnson, No. 5:11–CR–143, 2012 WL 3610254, at *1 (E.D. Ky. Aug. 21, 2012).

[269] *Rideout*, 123 F. Supp. 3d at 225.

[270] *See* discussion *supra* Section IV.A.

[271] *See* R.G. Dunlop, *Vote Buying: Still a Thing in Kentucky*, KY. CTR. FOR INVESTIGATIVE REPORTING (Aug. 19, 2016), http://kycir.org/2016/08/19/vote-buying-still-a-thing-in-kentucky/.

[272] *See id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

A U.S. Department of Justice study on political corruption identified campaign financing and voter fraud as the "most significant and most common types of election crimes."[276] For example, in 2014, five campaign workers and one campaign manager in Texas pled guilty to charges of vote buying to help ensure that four candidates would maintain control of a school board.[277] Furthermore, in 2014, 264 private citizens were convicted of crimes involving federal public corruption offenses; another 241 were charged with involvement in such offenses, and as of December 31, 2014, 106 were awaiting trial.[278] However, the cases of corruption do not span each district equally.[279] Some districts, such as Southern Alabama and Delaware, were reported to have no federal public corruption convictions in 2014, whereas sixty-six were reported in Central California alone.[280] State governments should be permitted to take precautionary measures by adopting reasonable regulations provided they can show a substantial threat of vote buying and political corruption in the state. New Hampshire, failing to show the prevalence of vote buying and political corruption in the state,[281] properly had its law struck down.[282]

V. SOLUTIONS AND ALTERNATIVES

The *Rideout* decision, while attempting to clarify voters' rights, serves as a warning that the legislative authority to restrict ballot selfies is at a crossroads. On one hand, states must maintain and protect a free flow of political ideas and political expression. On the other hand, states must also be allowed to implement measures that safeguard voters and the electoral process from undue

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[276] CRIMINAL DIV., U.S. DEP'T. OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2014 4 (2014), https://www.justice.gov/criminal/file/798261/download.

[277] *Id.* at 19–20.

[278] *Id.* at 24.

[279] *See id.* at 25–28.

[280] *Id.* at 25.

[281] The U.S. Department of Justice's 2014 survey reported zero federal public corruption convictions between 2011 and 2014 and only one in 2009 and 2010, respectively. *Id.* at 27.

[282] Rideout v. Gardner, 838 F.3d 65, 76 (1st Cir. 2016).

influence and coercion.[283] Daniel Horwitz, an election lawyer in Nashville, Tennessee, argues that there are simpler ways of buying votes and voter fraud, such as absentee voting.[284]

Similarly, another proponent of the selfie ban correctly points out that the threat of voter fraud is ever present today as "[w]e have prosecutions for vote buying every year," many of them through absentee ballots which can also foster voter fraud.[285] Consequently, there are also laws[286] "which prohibit people from selling their votes for financial gain."[287] However, additional measures may still be necessary to curb the potential for voting fraud inherent in ballot selfies, and it may benefit states to be more proactive on this issue rather than waiting until a full-blown crisis or controversy arrives. Gilles Bissonnette, Legal Director of the ACLU of New Hampshire, has stated that "[t]he best way to combat vote buying and coercion is to investigate and prosecute cases of vote buying and coercion."[288] While this is undoubtedly true, it would be imprudent and unwise to just wait and hope for the fruitful investigation and prosecution of voting-related

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[283] In *Rideout I*, the Secretary argued that the state law prohibiting the display of completed ballots served the state's interest in preventing both vote buying and voter coercion. However, the court was not satisfied with the state's asserted interests. Rideout v. Gardner, 123 F. Supp. 3d 218, 231 (D.N.H. 2015).

[284] Horwitz, *supra* note 22, at 251. "Horwitz's law practice consists primarily of criminal and civil appeals, constitutional litigation, *amicus curiae* representation, criminal record expungement, and representing victims of crime." *About*, LAW OFFICE OF DANIEL A. HORWITZ, ESQ., http://danielhorwitz.com/about/ (last visited Dec. 29, 2017).

[285] Richard L. Hasen, *Why the Selfie is a Threat to Democracy*, REUTERS (Aug. 18, 2015), http://blogs.reuters.com/great-debate/2015/08/17/why-the-selfie-is-a-threat-to-democracy/.

[286] *See, e.g.*, 18 U.S.C. § 597 (2012) (prohibiting buying or selling votes); N.H. REV. STAT. ANN. § 659:40 (I) ("No person shall directly or indirectly bribe any person not to register to vote or any voter not to vote or to vote for or against any question submitted to voters or to vote for or against any ticket or candidate for any office at any election."); N.H. REV. STAT. ANN. § 659:40 (II) ("No person shall use or threaten force, violence, or any tactic of coercion or intimidation to knowingly induce or compel any other person to vote or refrain from voting, vote or refrain from voting for any particular candidate or ballot measure, or refrain from registering to vote.").

[287] *Rideout*, 123 F. Supp. 3d at 222.

[288] Eckholm, *supra* note 19.

infractions and crimes when there are preventive steps that could be taken.

Laws prohibiting ballot selfies, if necessary, could be passed if they provide certain exceptions allowing people to distribute photographed ballots if they have a legitimate reason for doing so. State laws prohibiting ballot selfies, if they have the slimmest chance of passing the muster of a strict scrutiny analysis, must provide an exception—a time, place, and manner—in which displaying and distributing ballot selfies is reasonable and does not pose a threat to the sanctity of the voting process and the secret ballot. However, the Supreme Court has made it clear that the state must make a substantial showing that voter fraud or vote buying is clearly present in the state and needs to be curtailed,[289] something New Hampshire failed to do.[290] If the state can achieve this, it will have an ampler chance of surviving a court's stringent strict scrutiny analysis.

A close examination of the legislative history[291] of these state bills may hint at a potential legitimate solution for the treatment of ballot selfies. As both the district court and circuit court observed in *Rideout*, the state "can simply make it unlawful to use an image of a completed ballot in connection with vote buying and voter coercion schemes."[292] The minority of the House Committee on Criminal Justice and Public Safety, who the New Hampshire bill was presented to, suggested amending the bill as follows:

> This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means only if the distribution or sharing is for the purpose of receiving pecuniary

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[289] *See* Brown v. Emtm't Merchs. Ass'n, 564 U.S. 786, 799 (2012) ("The state must specifically identify an 'actual problem' in need of solving . . . ").

[290] *Rideout*, 123 F. Supp. 3d at 231–32.

[291] *See id.* at 221–22 (discussing the legislative history in amending N.H. REV. STAT. ANN. § 659:35(I) (2017)).

[292] Rideout v. Gardner, 838 F.3d 65, 74 (1st Cir. 2016) (quoting *Rideout*, 123 F. Supp. 3d at 235); *see also* McCullen v. Coakley, 134 S.Ct. 2518, 2539 (2014) ("[T]he Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.").

> benefit,[293] as defined in RSA 640:2, II(c), or avoiding harm,[294] as defined in RSA 640:3.[295]

While it is true that there already exist laws prohibiting vote buying, adopting this recommendation would provide an additional layer of reasonable security measures without contravening the intentions of the Founding Fathers when they created the First Amendment. Adopting the minority House's proposal and modification to the New Hampshire statute would ensure dual protections against legitimate vote buying claims, while still protecting the free political speech of voters.

Furthermore, legislation or guidelines on the use of ballot selfies should exist in which individuals can look to and determine what conduct is and is not permissible when they rush to the voting booth to cast their vote. While a blanket prohibition on ballot selfies would be too constricting on individual rights, legislation promulgated by the state[296] which sets out to clarify these guidelines can only be an advantage to society. However, states must tread lightly when passing such legislation—there is a very fine line between clarification and regulation. As has been seen in New Hampshire and other states, regulation of ballot selfies and other content based speech that is not narrowly tailored will not survive a First Amendment analysis.[297] However, clarification in the form of recommendations and suggestions can help elucidate

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[293] Under New Hampshire law, a "pecuniary benefit" is defined as "any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally." N.H. REV. STAT. ANN. § 640:2 (II)(c) (2017).

[294] New Hampshire law defines "harm" as "any disadvantage or injury, to person or property or pecuniary interest, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested, provided that harm shall not be construed to include the exercise of any conduct protected under the First Amendment to the United States Constitution or any provision of the federal or state constitutions." N.H. REV. STAT. ANN. § 640:3 (II) (2017).

[295] *Rideout*, 838 F.3d at 69.

[296] States that have experienced and continue to experience vote buying, albeit on a lesser scale, would have the ability to implement stricter rules pertaining to ballot selfies because they are potentially needed in those states.

[297] *See* discussion *supra* Sections I.A.i–iii.

and encourage the different mechanisms one could use to express their pride in exercising their right to vote.

A. Alternate Ways to Express Civic Engagement

Undoubtedly, there are other methods of expression to illustrate civic engagement and excitement in partaking in the voting process without risking the integrity of the process. While not the task or responsibility of the court, informal, suggested guidelines setting forward other acceptable methods of expressing oneself during the voting process could conceivably encourage individuals to use these methods. One way to show pride after voting could be by posting selfies with "I Voted" stickers.[298] In the September preceding the 2016 presidential election, Facebook allowed users to share a status letting friends know they are registered and ready to vote.[299] Hashtags[300] are another great way for people to demonstrate their enthusiasm for voting. In the 2016 presidential election, hashtags such as #MakeAmericaGreatAgain and #ImWithHer succinctly demonstrated individual political leanings.

While hashtags and voting stickers may satisfy some people as enough expression of their enthusiasm for voting, telling people they can utilize one of these methods instead of the form of expression they would rather choose, such as a ballot selfie, has never been an acceptable solution to First Amendment and other constitutional challenges. A lawyer in the pending Supreme Court

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[298] *Secrecy of the Ballot and Ballot Selfies*, *supra* note 106.

[299] Josh Constine, *Facebook's New Timeline Event Lets You Share You're Registered to Vote, Links to Registrations Sites*, TECHCRUNCH (Sept. 24, 2012), https://techcrunch.com/2012/09/24/facebook-registered-to-vote/.

[300] Hashtags are "words or phrases preceded by the # symbol." They first became popular on Twitter, a social media platform, "as a way for users to organize and search messages." For example, people tweeting about a presidential debate might add the hashtag #Debate2016 to their messages, and those curious about the latest developments in the presidential campaign could simply search for #Election2016. Hashtags are a useful shorthand that "people began using to add humor, context and interior monologues to their messages [] and everyday conversation." *See* Ashley Parker, *Twitter's Secret Handshake*, N.Y. TIMES (June 10, 2011), http://www.nytimes.com/2011/06/12/fashion/hashtags-a-new-way-for-tweets-cultural-studies.html.

case *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, concerning a baker with religious objections to same-sex marriage who refused to create a wedding cake for a gay couple, stated, "[I]t is no answer to say that [a same-sex couple] could shop somewhere else for their wedding cake, just as it was no answer in 1966 to say that African-American customers could eat at another restaurant."[301] While not on the same level as racial segregation or discrimination on the basis of sexual orientation, telling voters they can use a hashtag or wear an "I Voted" sticker instead of taking a ballot selfie is an unconstitutional restriction on speech. Therefore, while society should continue to recommend and encourage different ways voters can share their civic engagement, it is obvious that reform is still necessary. In order to preserve voters' First Amendment rights, state statutes on ballot selfies must be revised to address imminent problems where they exist, and avoid being excessively sweeping and far-reaching.

CONCLUSION

State governments and courts continue to struggle with finding an appropriate balance between protecting free speech and expression while simultaneously protecting the integrity of the electoral process. Achieving this balance has not only proven to be a challenge, but has also been exacerbated by the inconsistencies in various state laws[302] and the constant advancement of new technologies and social media platforms.[303] Photographs can now be generated from cellphones while voting and shared across numerous social media platforms in seconds—something society could never have imagined when the First Amendment was ratified or when the United States adopted the secret ballot.[304] While state

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[301] Adam Liptak, *Justices to Hear Case on Religious Objections to Same-Sex Marriage*, N.Y. TIMES (June 26, 2017), https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html (quoting couples' lawyer).

[302] *See* discussion *supra* Sections III.A–B.

[303] *See generally* discussion *supra* Section II.B; Morrison, *supra* note 139.

[304] *See* Kimberlee Morrison, *How Many Photos Are Uploaded to Snapchat Every Second?*, ADWEEK (June 9, 2015), http://www.adweek.com/digital/how-many-photos-are-uploaded-to-snapchat-every-second/ (noting that Snapchat's

governments may justifiably seek to regulate aspects of the voting process after *Rideout*, it is crucial that these regulations be proportionate to accommodate a real threat to our longstanding voting process in each specific state.[305] However, new technologies will likely continue to make this increasingly difficult.

Nevertheless, while some legal commentators find the preventative laws currently in place in certain states to be faultless,[306] several citizens are rightly protesting these overly-broad regulations and advocating for less-restrictive standards governing the voting process.[307] The Supreme Court has rejected New Hampshire's request to review the First Circuit ruling, declining an opportunity to provide some much needed clarification for voters across the United States and resolve the issue once and for all.[308] Therefore, the *Rideout* decision, as it currently stands, serves as a guidepost for striking the appropriate balance between maintaining a free flow of political ideas and protecting the integrity of the electoral process. The decision is binding in "New Hampshire, Maine, Massachusetts . . . Rhode Island, [and] Puerto Rico"[309] and should also encourage other states to seek clarification for voters around the country.

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200 million users share 8,796 photos per second, Facebook's over 1.39 billion users share 4,501 photos per second and a total of 350 million photos per day, and Instagram's 300 million users post 810 photos per second and a total of 70 million photos per day); *see also Insightly Live Stats*, INSIGHTLY, http://www.internetlivestats.com/one-second/ (last visited Dec. 29, 2017) (recording how many thousands of Tweets, Instagram photos, and Tumblr posts are shared every second since opening the webpage).

[305] *See supra* note 217 and accompanying text (noting the necessity of a real and actual threat within a given state).

[306] Browning, *supra* note 18 ("[V]arious legal commentators have noted that the law (not an old relic remaining on the books but a recently-passed law as of 2014) was underinclusive by selectively precluding only ballot photography when other vote-buying arrangements (such as with absentee ballots) go unmentioned.").

[307] *See* discussion *supra* Section III.B (discussing challenges brought by the three voters in New Hampshire for violation of their free speech rights).

[308] Joe Palazzolo, *Supreme Court Denies New Hampshire Bid to restore Ballot Selfies Ban*, WALL ST. J. (April 3, 2017), https://www.wsj.com/articles/supreme-court-denies-new-hampshire-bid-to-restore-ballot-selfies-ban-1491228848.

[309] Gerstein, *supra* note 233.