# Selfie-Informed Voting: How the Ballot Selfie Contributes to Rational Ignorance

*"[A] picture of a valid voted ballot, unlike a simple expression of how someone voted, is unique in being able to prove how someone voted."*[1]

## I. INTRODUCTION

The First Amendment to the U.S. Constitution protects citizens from government encroachment on speech.[2] The First Amendment also protects the right to form political parties.[3] States are permitted, however, to regulate elections by enacting "reasonable regulations of parties, elections, and ballots."[4] Depending on the nature of the restriction, courts will either apply strict or intermediate scrutiny to determine the constitutionality of a state statute attempting to regulate elections.[5]

The Supreme Court has extended First Amendment protection to Internet speech.[6] Facebook posts, blog posts, and tweets clearly fall into the category of protected speech, as they can convey opinions to people all over the country and the world.[7] In our ever-increasingly technological world, courts have considered Facebook "likes" speech under the First Amendment, leading to the

1. 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/ [http://perma.cc/A66L-SREH].

2. *See* U.S. CONST. amend. I (enumerating text of First Amendment). The First Amendment states, "Congress 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." *Id.*

3. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) (explaining fundamental right to advance political ideas).

4. *Id.* (discussing government's ability to maintain order in elections); *see also* Storer v. Brown, 415 U.S. 724, 730 (1974) (describing ways Constitution authorizes states to regulate elections). The *Storer v. Brown* Court recognized that, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 415 U.S. at 730.

5. *See* Rideout v. Gardner (*Rideout I*), 123 F. Supp. 3d 218, 228 (D.N.H. 2015) (stating intermediate scrutiny applied to content-neutral restrictions while strict scrutiny applied to content-based restrictions).

6. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997) (concluding First Amendment should apply to Internet content); *see also* Alicia D. Sklan, Note, *@SocialMedia: Speech with a Click of a Button? #SocialSharingButtons*, 32 CARDOZO ARTS & ENT. L.J. 377, 378 (2013) (observing Supreme Court extended First Amendment protection to online speech).

7. *See* United States v. Cassidy, 814 F. Supp. 2d 574, 583 (D. Md. 2011) (considering tweets protected speech under First Amendment); Sklan, *supra* note 6, at 386-87 (stating Facebook and blog posts constitute "pure speech").

conclusion that courts will also consider shares of other users' content as protected speech.[8] Therefore, it is no surprise that digital images and photographs are also granted First Amendment protection.[9] Recently, digital images and videos in polling places have become increasingly popular.[10] Specifically, more and more voters are taking so-called "ballot selfies"—photos of marked ballots posted on social media.[11] When legislatures attempt to regulate this collision between technology, political affiliations, the secret ballot, and free speech by placing prohibitions on ballot selfies, the courts must determine whether these laws pass constitutional muster.[12]

In August 2015, a federal court in New Hampshire invalidated a state law prohibiting voters from taking and posting ballot selfies.[13] Subsequently, the First Circuit Court of Appeals affirmed the holding of the New Hampshire District Court, applying the lesser standard of intermediate scrutiny.[14] In October 2015, a federal court in Indiana overturned a similar law.[15] Both the New Hampshire and Indiana district courts held that the respective state law failed strict scrutiny and violated the First Amendment's right to free speech.[16] Additionally, the courts found the governments unpersuasive in their arguments that ballot selfies can lead to vote buying and voter coercion.[17]

This Note explores the history of vote buying and voter coercion as it relates

8. *See* Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (explaining nature of "like" clearly qualifying into speech category); *see also* Sklan, *supra* note 6, at 389 (arguing Internet requires protecting "social share buttons" because its status of twenty-first century gathering place).

9. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 373-74 (2011) (noting images and film can claim constitutional protection).

10. *See* Clifton Rogers, *Ballot Selfies: Where Social Media and Voting Rights Collide*, U. KY. ELECTION L. SOC'Y (Nov. 3, 2015), http://www.uky.edu/electionlaw/analysis/ballot-selfies-where-social-media-and-voting-rights-collide [http://perma.cc/3DGM-WWFW].

11. *See id.* (defining ballot selfie).

12. *See generally* Indiana Civil Liberties Union Found., Inc. v. Indiana Sec'y of State (*Indiana Civil Liberties Union*), No. 1:15-cv-01356-SEB-DML, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015) (analyzing constitutionality of Indiana law prohibiting ballot selfies); *Rideout I*, 123 F. Supp. 3d (evaluating and deciding constitutionality of New Hampshire ballot selfie ban).

13. *See Rideout I*, 123 F. Supp. 3d at 235 (holding law constitutes content-based restriction that fails strict scrutiny); *see also* Eugene Scott, *Judge Lifts Ban on Posting 'Ballot Selfies' in New Hampshire*, CNN (Aug. 12, 2015), http://www.cnn.com/2015/08/12/politics/voting-booth-ballots-new-hampshire/ [http://perma.cc/87ZG-HTNK] (summarizing outcome of *Rideout I*).

14. *See* Rideout v. Gardner (*Rideout II*), No. 15-2021, 2016 WL 5403593, at *1 (1st Cir. Sept. 28, 2016) (holding New Hampshire law fails intermediate scrutiny).

15. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *5 (declaring statute does not pass strict scrutiny); *see also* David Kravets, *Judge Overturns Ban on Ballot Selfies*, ARS TECHNICA (Oct. 22, 2015), http://arstechnica.com/tech-policy/2015/10/judge-overturns-ban-on-ballot-selfies/ [http://perma.cc/DNU8-Z26N] (explaining court's decision in *Indiana Civil Liberties Union*).

16. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *9; *Rideout I*, 123 F. Supp. 3d at 235.

17. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *5 (highlighting State's inability to show coercion linked to cell phone photos); *Rideout I*, 123 F. Supp. 3d at 234 (noting State could not show any actual connection between ballot selfies and coercion).

to the First Amendment protection of the right to free speech.[18] Part II.A examines the history and evolution of the secret vote and Australian ballot system.[19] Part II.B discusses the conflict between the First Amendment right to free speech—focusing on the realm of political speech—and statutes enacted to prohibit electioneering and protect the sanctity of the voting booth.[20] Part II.C continues with an examination of the First Amendment implications of social media posts.[21]

Part II.D considers the unconstitutional New Hampshire and Indiana statutes banning ballot selfies, as well as statutes that seemingly legalize the ballot selfie.[22] Part II.D also discusses the district courts' decisions in *Rideout I* and *Indiana Civil Liberties Union*, as well as the First Circuit's holding in *Rideout II*.[23] Part II.E concludes by confronting the lingering problem of uninformed voters and the theory of rational ignorance.[24]

Part III of this Note analyzes and addresses the main arguments against ballot selfies, and proffers that states should harness the power of social media in political campaigns in an effort to inform the electorate.[25] Part III.A discusses the unpersuasive argument that an outright ban on ballot selfies is constitutionally permissible as a means of preventing voter fraud.[26] Part III.B asserts that, while ballot selfies and similar political posts encourage the electorate to become engaged in the political process, they also foster uninformed voting.[27] Finally, Part III.C argues that states should be proactive in informing their electorate and use social media to accomplish this goal.[28]

## II. HISTORY

### *A. The Evolution of the Secret Ballot and the Introduction of the Australian Ballot System*

Voting was once a very public affair.[29] Initially, states conducted elections

18. *See Rideout I*, 123 F. Supp. 3d at 234 (refuting State's arguments regarding vote buying and voter coercion in context of free speech infringement).

19. *See infra* Part II.A.

20. *See infra* Part II.B (explaining history of litigation surrounding electioneering prohibitions).

21. *See infra* Part II.C (discussing treatment of social media posts under First Amendment jurisprudence).

22. *See infra* Part II.D (highlighting statutes both prohibiting and permitting ballot selfies).

23. *See id.*

24. *See infra* Part II.E.

25. *See infra* Part III.

26. *See infra* Part III.A (explaining why explicit ballot selfie ban can never pass constitutional bar).

27. *See infra* Part III.B.

28. *See infra* Part III.C (proffering ways states should use social media to inform electorate).

29. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 488-89 (2003) (discussing public nature of voting pre-American Revolution); Jerrold G. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908*, 64 AM. POL. SCI. REV. 1220, 1221 (1970), http://www.jstor.org/stable/1958367 (describing lack of privacy in voting pre-Australian ballot).

by a showing of hands, a voice vote, or even dispensing beans into jars.[30] Gradually, written ballots replaced these voting methods.[31] By the end of the Revolutionary War, almost every state voted by written ballot.[32]

When the written ballot was introduced, it was not issued by the government; rather, voters created their ballots.[33] Political parties took advantage of this liberty and prepared their own ballots.[34] Parties printed party ballots, which came to be known as "party strips" or "unofficial" ballots, on colored paper in various sizes so that each party's ballot was distinct.[35] Creating and distributing distinctive ballots allowed parties to keep track of constituents and identify for whom they voted.[36] The party strip ballots guaranteed that there was no right to a secret vote even with written ballots, and opened the door to vote buying and coercion.[37]

A major shift occurred when states began to adopt the Australian ballot

30. *See* Fortier & Ornstein, *supra* note 29, at 489; *see also* ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 1 (1917) (stating first method of voting constisted of raising hands). Having been previously practiced in England, this hand-vote procedure was adopted in New England in the early 1600s. *See* EVANS, *supra*, at 1. As early as the mid-1600s, colonies began to shift to bean counting and paper balloting. *See id.* Some colonies adopted paper balloting prior to the introduction of the party ballot or the Australian ballot. *See* Fortier & Ornstein, *supra* note 29, at 489.

31. *See* Fortier & Ornstein, *supra* note 29, at 489 (discussing change toward voting by written ballot in early 1800s).

32. *See* EVANS, *supra* note 30, at 6 (recognizing ballot used almost exclusively in United States by mid-1800s); *see also* Fortier & Ornstein, *supra* note 29, at 489 (summarizing shift from alternative methods of voting to written ballots); Rusk, *supra* note 29, at 1220-21 (stating most states adopted secret ballot by 1890s).

33. *See* Fortier & Ornstein, *supra* note 29, at 489. Voters would write down the names of candidates for whom they wished to vote, and then bring that piece of paper to a voting location. *See id.* The written ballot was not successful in eliminating voter fraud, vote buying, or coercion, however, because there was no record of how votes were cast, allowing political parties to stuff ballot boxes. *See id.*

34. *See* Rusk, *supra* note 29, at 1221 n.5 (recounting emergence of party-prepared ballot). In the early 1800s, parties attempted to replace handwritten ballots with party ballots. *See id.* The Supreme Judicial Court of Massachusetts upheld the use of party ballots and as a result, party ballots were not again challenged until the introduction of the Australian ballot. *Id.*; *see also* Henshaw v. Foster, 26 Mass. (9 Pick.) 312, 324-25 (1830) (upholding legality of printed ballots because they constituted "written" ballots).

35. *See* Rusk, *supra* note 29, at 1221 (characterizing distinctions adopted by parties to differentiate ballots). Parties produced their own ballots, which consisted only of their party's candidates. *See id.*; *see also* EVANS, *supra* note 30, at 2-3 (chronicling evolution of ballot-printing regulations in Northeast). Maine did not allow ballots to be printed in assorted colors. *See* EVANS, *supra* note 30, at 2. Instead, parties had to print ballots on plain white paper, free of any distinguishing marks. *Id.*

36. *See* Rusk, *supra* note 29, at 1221 (explaining how parties kept track of voters). Party workers distributed ballots amongst voters. *See id.* These workers would then watch as citizens voted and could instantly determine who had voted for their party. *See id.* One of the advantages of the distinct party ballot was that it allowed an uninformed voter to easily identify the ballot he wanted to vote on. *See* EVANS, *supra* note 30, at 7. Unfortunately, it was incredibly easy to abuse the distinct party ballot system. *See id.* (explaining ease with which parties counterfeited opposition ballots and monitored voters).

37. *See* Rusk, *supra* note 29, at 1221 (addressing parties' control over elections and ability to keep track of voters); *see also* EVANS, *supra* note 30, at 10-11 (highlighting flaws of unofficial ballot system). Although some states enacted laws requiring that ballots be printed on plain white paper, political parties were able to circumvent this restriction by printing on different shades of white paper. *See* EVANS, *supra* note 30, at 11. Due to the states' failure to maintain the secrecy of the ballot, political parties were able to corrupt the electoral process. *See id.*

system.[38] Under the new system, the state prepared all ballots.[39] The new ballots listed candidates from both parties and were cast in secret.[40] Proponents of the Australian ballot system asserted that a secret ballot would eliminate much of the fraud in elections.[41] Those in favor of the Australian ballot argued that it would eliminate parties' abilities to see how someone voted, thereby reducing vote buying.[42] Supporters also believed that the Australian ballot would prevent employers and creditors from intimidating or coercing citizens to vote a certain way.[43]

Opponents of the Australian ballot system raised numerous arguments against the secret ballot.[44] For instance, they claimed that it would be an undue burden on voters' time.[45] They also contended that producing the ballots constituted another unnecessary expense to the state.[46] Additionally, they asserted that the Australian ballot system opened the door to abuse by ballot clerks, who distributed and collected the secret ballots.[47]

While the arguments on both sides were valid, the proponents' predictions seem to have been right.[48] After the Australian ballot was introduced, vote buying and voter intimidation subsided.[49] This trend continued throughout this

38. *See* Fortier & Ornstein, *supra* note 29, at 487-88, 490-92 (reciting history of Australian ballot and its adoption in the United States). The Australian ballot originated in Australia in 1856. *Id.* at 487. Under the Australian ballot system, votes are cast in private rooms. *See id.* Additionally, protections are implemented to guarantee that the ballot is official (produced by the state) and to ensure that each voter only casts one vote, which prevents ballot stuffing. *See id.* Each ballot lists all of the candidates for office, not simply those affiliated with one party. *See id.* Inspired by the success of the secret ballot in Australia, England adopted a similar system. *See id*. at 487-88. Today, the term "secret ballot" is synonymous with "Australian ballot." *Id.* at 488.

39. *See* Rusk, *supra* note 29, at 1221 (recounting shift from "unofficial" party ballots to "official" Australian ballots).

40. *See* Fortier & Ornstein, *supra* note 29, at 488 (explaining Australian ballot system and privacy protections it contained).

41. *See* EVANS, *supra* note 30, at 21-24 (setting forth arguments for adopting Australian ballot in late 1800s). In addition to reducing vote buying and voter coercion, proponents of the Australian ballot system believed that it would allow independents to actually compete in elections where cost was previously a hindrance. *See id*. at 23. Additionally, supporters thought the secret ballot would reduce violence and disorder at the polling place. *See id.* Finally, they argued it would illustrate that "a vote was a privilege and not an article of merchandise." *See id*. at 24.

42. *See id*. at 21 (maintaining no one buys "commodity when he could not know if it had been delivered"). Critics of this argument claimed that vote buying would continue—and likely increase—because paying ballot clerks to cheat the system would be cheaper than paying individual voters. *See id*.

43. *See id*. at 22.

44. *See id*. at 24-26.

45. *See* EVANS, *supra* note 30, at 25 (noting critics believe distinctive ballots expedite voting).

46. *See id*. (arguing printing and distributing ballots too expensive for state).

47. *See id.* at 25-26 (contending ballot clerks could considerably abuse their duties and maintain too much control).

48. *See* Rusk, *supra* note 29, at 1221 (asserting "intimidating party aura which . . . permeated . . . voting . . . under the old system had been effectively dispelled.")

49. *See* Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1327 (2000) (explaining history of vote buying). Vote buying has been traced back to eighteenth-century England where voters were "treated" to "food and drink in heroic quantities." *See* James A. Gardner, *Consent, Legitimacy and Elections: Implementing*

past century with very few known cases of vote buying or voter intimidation.[50]

Both the Australian ballot system and the nonpublic polling place were adopted as a means to prevent voter fraud, intimidation, and vote buying.[51] As a result of the secret ballot, the polling place became a nonpublic forum.[52] Due to the adoption of the Australian ballot system, "the only expressive activity" that takes place at the polling place "is each voter's communication of his own elective choice."[53]

### *B. Balancing the Right to Free Speech with Prohibitions on Electioneering*

Nevertheless, the introduction of secret ballots failed to eliminate all vote buying and coercion.[54] In response to continued voting issues, states and the federal government began to enact laws specifically aimed at vote buying, voter intimidation, and electioneering.[55] While statutes prohibiting vote buying and voter intimidation were quite commonplace and generally accepted, opponents often challenged statutes prohibiting electioneering on constitutional grounds—arguing that the bans were in direct conflict with the right to free political discourse.[56]

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*Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 232 (1990). Hasen asserts that it was the lack of privacy in voting that "facilitated the widespread practice of vote buying." *See* Hasen, *supra*, at 1327; *see also* Rusk, *supra* note 29, at 1221 (highlighting increased privacy of Australian ballot). Rusk argues that the new ballot system "effectively dispelled" party influence over voting. *See* Rusk, *supra* note 29, at 1221. However, while parties continued to influence votes through both vote buying and voter intimidation, they simply were no longer able to do so openly and legally. *See* Fortier & Ornstein, *supra* note 29, at 491. "[F]or example, party workers abused the provision that voters unable to vote by themselves could be 'assisted' by poll workers." *Id.* Additionally, a new issue that arose—electioneering—was likely born out of political parties' presence at the polls. *See infra* notes 56, 65-69 and accompanying text.

50. *See Rideout I*, 123 F. Supp. 3d at 232 (finding few examples of vote buying in recent history); Hasen, *supra* note 49, at 1328 (noting while vote buying remains hard to detect, some prosecutions do occur).

51. *See* James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 274 (2011) [hereinafter Woodruff, *Where the Wild Things Are*] (claiming voting booth constitutes "temporary establishment with restricted access" not intended to hold political debate).

52. *See* Marlin v. D.C. Bd. of Elections and Ethics, 236 F.3d 716, 719 (D.C. Cir. 2001) (holding polling place embodies nonpublic forum); *see also* Woodruff, *Where the Wild Things Are*, *supra* note 51, at 274 (maintaining polling place nonpublic "[s]ince its inception in the late 1880s").

53. *Marlin*, 236 F.3d at 719.

54. *See* EVANS, *supra* note 30, at 11 (emphasizing largely unavoidable nature of voting coercion).

55. *See* 18 U.S.C. § 594 (2012) (providing fine for voter intimidation); 52 U.S.C. § 10307 (2012) (prohibiting voter fraud, threats, intimidation, and coercion); *see also* United States v. Slone, 411 F.3d. 643, 644 (6th Cir. 2005) (affirming conviction for vote buying under federal law); United States v. Garcia, 719 F.2d 99, 102 (5th Cir. 1983) (determining welfare food vouchers constituted payment under federal law prohibiting vote buying); United States v. Carmichael, 685 F.2d 903, 905 (4th Cir. 1982) (convicting defendants who bought votes and aided and abetted others in doing so); United States v. Malmay, 671 F.2d 869, 869 (5th Cir. 1982) (affirming conviction under federal voting law where defendant intended only to influence school board election); United States v. Sayre, 522 F. Supp. 973, 974 (W.D. Mo. 1981) (allowing federal claims for state vote buying potentially influencing federal election); Hasen, *supra* note 49, at 1323 (discussing illegal nature of vote buying in both state and federal elections).

56. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding Tennessee statute prohibiting vote

First Amendment protection fundamentally extends to political speech.[57] Political speech includes "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."[58] The First Amendment is implicated most fully in political campaigns.[59] Courts balance two competing interests in deciding cases involving political speech at the polling place: the fundamental interest in freedom of political speech, and the important interest of protecting citizens from undue influence at the polling place.[60]

In evaluating restrictions on speech, the Supreme Court first determines whether the restriction is content-based or content-neutral.[61] The Court applies strict scrutiny to content-based restrictions, where the restriction targets the message the speech conveys.[62] On the other hand, the Court applies intermediate scrutiny to content-neutral restrictions, which regulate "time, manner, and place."[63]

solicitation within 100 feet of polling place constitutional); Minn. Majority v. Mansky, 708 F.3d 1051, 1057 (8th Cir. 2013) (holding statute prohibiting display of political material "at or about" polling place constitutional); Schirmer v. Edwards, 2 F.3d 117, 119 (5th Cir. 1993) (concluding state has compelling interest in prohibiting electioneering within 600 feet of polling place); Am. Fed'n. of State, Cty. and Mun. Emps., Council 25 v. Land, 583 F. Supp. 2d 840, 849 (E.D. Mich. 2008) (holding election inspectors' ability to ask voters to remove campaign materials constitutional). In *Burson v. Freeman*, Justice Blackmun stated, "This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." 504 U.S. at 198.

57. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (noting "practically universal agreement" on First Amendment's applicability to speech regarding government affairs).

58. *Id.* at 218-19 (defining political speech).

59. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971) (reasoning newspaper could publish candidate's criminal charge because of its relevance to fitness for office).

60. *See Burson*, 504 U.S. at 198 (proclaiming case required balancing freedom of speech with right to vote); Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 108 (1999) (recounting how balancing these political interests remains hot topic in current election law).

61. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1348 (2006) (describing strict or intermediate scrutiny determined by content approach).

62. *See id.* (explaining strict scrutiny applied to content-based speech while intermediate scrutiny applied to content-neutral); *see also Rideout I*, 123 F. Supp. 3d at 229 (defining content-based restriction). A law will only pass strict scrutiny if it is narrowly tailored to serve some compelling government interest. *See Rideout I*, 123 F. Supp. 3d at 231. Compelling interests are those that address "actual" problems. *Id.* Restrictions are not significantly narrowly tailored where they are overinclusive. *See id.* at 234.

63. *See* McDonald, *supra* note 61, at 1367-68 (noting time, place, and manner regulated by both content-based and content-neutral restrictions). Content-based restrictions, however, also regulate certain content. *See id.* at 1367; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (asserting court considered regulation content-neutral where it did not address content of expression). In determining whether a restriction is content-neutral, a court will look to the government's intent in enacting the restriction. *See Ward*, 491 U.S. at 791; *see also Rideout II*, 2016 WL 5403593, at *5 (clarifying, "The government's purpose is the controlling consideration"). Where the government is not concerned with the content of the expression, the restriction will be deemed content-neutral. *See Ward*, 491 U.S. at 791. Courts subject content-neutral restrictions to intermediate scrutiny, which asks whether the law is "narrowly tailored to serve a *significant* governmental

In the flagship case of *Burson*, the Supreme Court held that a prohibition on electioneering within a certain radius of the polling place was constitutional.[64] The Court acknowledged that protecting voters from intimidation and maintaining control of elections were both compelling government interests.[65] Applying strict scrutiny, the Court stated, "some restricted zone is necessary" to ensure that the State's compelling interests are served.[66] In *Burson*, the Court disagreed with the respondent's argument that the law was overinclusive, and opined that ordinary intimidation laws address only those acts that obviously interfere with elections.[67] The Court also rejected the respondent's argument that the statute was underinclusive because it did not address all kinds of speech around the polling place.[68]

While the Supreme Court held that some restrictive zone around the polling place was necessary in *Burson*, the Court struck down an Alabama law that made it a crime to electioneer or solicit votes on election day in *Mills v. Alabama*.[69] The Court overturned the Alabama Supreme Court's holding that the law was reasonable despite restricting the freedoms of speech and press.[70] The law's fatal flaw was that it allowed any and all political discourse up until the final minute on the eve of the election, but prohibited such dialogue as soon as the clock struck midnight on election day.[71]

Scholars agree with the Supreme Court that some regulation is necessary to

interest." *Id.* (emphasis added).

64. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding 100-foot radius outside polling place for solicitors constitutionally permissible).

65. *See id.* at 199 (recognizing "a State has a compelling interest in protecting voters from confusion and undue influence"). The Court went on to recite precedent that, "a state 'indisputably has a compelling interest in preserving the integrity of its election process.'" *Id.* (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

66. *See Burson*, 504 U.S. at 206 (holding restricted zones prevent voter intimidation and election fraud). The Court in *Burson* examined the history of vote buying and voter intimidation before coming to the conclusion that restricted zones were necessary to prevent these kinds of voter fraud. *See id.* The Court declined to accept the argument that statutes prohibiting voter intimidation and vote buying were sufficient to serve the compelling government interests. *See id.* at 206-07.

67. *See id.* (explaining Court's reasoning). The Court argued that ordinary statutes prohibiting voter coercion and intimidation did not inhibit the need for the restrictive zone, particularly because law enforcement officers were generally not allowed in the polling place. *See id.*

68. *See id.* at 207. The Court noted that states respond to the problems they face, so failing to prohibit certain kinds of speech in the protected zone is not fatal to an otherwise valid law. *See id.*

69. 384 U.S. 214, 219 (1966) (holding Alabama law violated freedom of speech and press). The Court reasoned that the Framers of the Constitution specifically included freedom of the press in the First Amendment in order to hold politicians accountable for their actions and to encourage a system that would challenge and criticize the government. *See id.*

70. *See id.* (opining ban silencing journalists on day of election "obvious and flagrant abridgement" of freedom of press).

71. *See id.* at 220 (stating law does not protect electorate "from confusive last-minute charges and countercharges"). By striking down the Alabama law, the Supreme Court established that it is unconstitutional to prohibit newspaper editors from encouraging citizens to vote a certain way. *See id.*

protect voters from fraud and intimidation.[72] Unfortunately, it remains unclear what kinds of regulations courts and legislators should implement.[73] As a result, the same problem that plagued the Court in *Burson* and *Mills* is still present today: How do we balance the right to free speech with the right to vote?[74]

### *C. The First Amendment in the Twenty-First Century and Protected Speech on Social Media*

With the emergence of social media, the legal community has begun to grapple with which types of social media posts should fall within the scope of protected speech.[75] It is easy to see how courts consider some social media posts speech for purposes of First Amendment jurisprudence.[76] Recently in the Fourth Circuit, even Facebook likes were deemed protected under the First Amendment.[77] Courts have yet to consider other types of social media posts, such as "re-tweets" and "shares," although they likely constitute symbolic speech that is also protected by the First Amendment.[78]

Photographs and videos have long been part of American political discourse, and as a result, courts have generally given them First Amendment protection without an inquiry into their content.[79] Courts have protected digital images under the First Amendment for nearly a decade.[80] The ability to post images

72. *See* Moramarco, *supra* note 60, at 109 (opining courts and legislators must draw line between electioneering and freedom of speech); James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 MERCER L. REV. 331, 367 (2014) [hereinafter Woodruff, *Freedom of Speech*] (arguing limitations permissible to maintain order but should not prohibit political speech); Robert Brett Dunham, Note, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 GEO. L.J. 2137, 2194 (1989) (advocating for small zone restricting political expression in order to bar blatantly incompatible voting conduct).

73. *See* Moramarco, *supra* note 60, at 109 (noting both legislators and courts have grappled with balancing electioneering and freedom of speech).

74. *See* Burson v. Freeman, 504 U.S. 191, 198 (1992) (noting particular difficulty of this question); *Mills*, 384 U.S. at 219-20 (balancing reasonableness of ban with restriction on press).

75. *See* Sklan, *supra* note 6, at 379 (stating First Amendment principles "do not provide complete guidance" on twenty-first century communications); *see also* Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 235 (2014) (arguing application of "offline" First Amendment doctrine to "online" speech threatens core First Amendment principles).

76. *See* Sklan, *supra* note 6, at 383 (maintaining new media constitutionally protected and noting online activities constitute speech).

77. *See* Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (holding Facebook "like" constitutes speech for purposes of First Amendment jurisprudence); *see also* Sklan, *supra* note 6, at 387 (comparing "pure" speech of blog posts to symbolic nature of "likes" and "shares").

78. *See* Sklan, *supra* note 6, at 386-87 (opining nontraditional nature of social media buttons should not preclude First Amendment protection).

79. *See* Kreimer, *supra* note 9, at 373 (describing Court's avoidance of content inquiry in considering images part of political discourse).

80. *See id.* at 367-68 (enumerating court decisions recognizing First Amendment protection of images). Opponents of protecting images as speech under the First Amendment argue that a photograph "records data rather than communicating ideas." *See id*. at 370. Kreimer responds by analogizing image capture to symbolic

online qualifies as an "opportunity to communicate ideas," and doing so is one way to distribute these ideas to an audience.[81] Therefore, First Amendment jurisprudence protects digital images shared to social media as methods of speech.[82]

### *D. Today:* Rideout I*,* Rideout II*,* Indiana Civil Liberties Union*, and the Ways States Have Taken Action to Permit Ballot Selfies*

Before the 2014 elections, taking photos of a marked ballot was illegal in thirty-five states.[83] These statutes, however, were enacted long before the days of social media.[84] Two states, New Hampshire and Indiana, enacted laws explicitly prohibiting posting ballot selfies on social media.[85] At the time of this Note's publication, federal judges have declared both of these statutes unconstitutional.[86] At the same time, other state legislatures have passed laws to explicitly permit taking and posting ballot selfies.[87]

speech, where the weight of the analysis is given to the "presence or absence of a 'message conveyed.'" *See id.* at 371 (quoting Rumsfield v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 63 (2006)).

81. *See id*. at 376 (enunciating communication of ideas to an audience constitutes element of free speech).

82. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *1 (invalidating similar Indiana law); *Rideout I*, 123 F. Supp. 3d at 221 (overturning New Hampshire law banning ballot selfies).

83. *See State Law: Documenting the Vote 2012*, DIGITAL MEDIA L. PROJECT (Nov. 9, 2012), http://www.dmlp.org/state-law-documenting-vote-2012 [http://perma.cc/P9YG-T2HH] (listing states that prohibit and allow ballot selfies in 2012) [hereinafter DIGITAL MEDIA PROJECT]; *see also* Tessa Berenson, *Why You Might Not Want to Take a Selfie at Your Polling Place*, TIME (Nov. 4, 2014), http://time.com/ 3556228/ballot-selfies-instagram-twitter-photos/ [http://perma.cc/LLD2-APWP] (citing DIGITAL MEDIA PROJECT, *supra*).

84. *See* Berenson, *supra* note 83 (noting laws adopted before advent of social media and subsequent pervasive online sharing).

85. *See* Use of Cell Phones and Other Electronic Devices at Polling Places, IND. CODE § 3-11-8-17.5 (2015), *invalidated by Indiana Civil Liberties Union*, 2015 WL 12030168; Showing or Specially Marking Ballot, N.H. REV. STAT. ANN. § 659:35 (2014), *invalidated by Rideout I*, 123 F. Supp. 3d 218. The New Hampshire law provided that "[n]o 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." § 659:35. The law went on to specifically point out that it included sharing digital images of marked ballots on social media. *See id.* Similarly, the Indiana law prohibited "[t]ak[ing] a digital image or photograph" of a marked ballot except to report an equipment malfunction. § 3-11-8-17.5(b). The Indiana law also went on to specifically prohibit distributing and sharing the image via social media. *See id.*

86. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *9 (invalidating Indiana law prohibiting ballot selfies); *Rideout I*, 123 F. Supp. 3d at 235 (declaring New Hampshire law prohibiting ballot selfies unconstitutional under strict scrutiny). In both cases, the courts held the laws were unconstitutional as facially content-based, and that they were not the least restrictive means by which the government could achieve the compelling interest of preventing vote buying and coercion. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *9 (stating law not narrowly tailored and does not serve compelling interest); *Rideout I*, 123 F. Supp. 3d at 235 (articulating strict scrutiny test and stating law does not pass).

87. *See* Erik Eckholm, *Selfies in Voting Booths Raise Legal Questions on Speech and Secrecy*, N.Y. TIMES (Aug. 24, 2015), http://www.nytimes.com/2015/08/25/us/selfies-in-voting-booths-raise-legal-questions-on-speech-and-secrecy.html?_r=0 (noting Maine, Oregon, and Utah revised laws legalizing ballot selfies); Ethan Wilson, *Ballot Seflies Are Constitutionally Protected. Now What?*, NAT'L CONF. ST. LEGISLATURES (Aug. 27, 2015), http://www.ncsl.org/blog/2015/08/27/ballot-selfies-are-constitutionally-protected-now-what.aspx [http://perma.cc/46Q9-CY2A] (explaining Utah's revised law and noting Arizona also now permits ballot selfies).

In 2013, New Hampshire State Representative Timothy Horrigan introduced a bill to prohibit taking and posting ballot selfies.[88] In testimony before the New Hampshire House and Senate, he argued that ballot selfies destroy the principle of the secret ballot.[89] Representative Horrigan stated that the primary purpose of the law was to prevent voter coercion associated with ballot pictures on social media.[90] The bill passed the House Election Law Committee unanimously.[91] Subsequently, both the House and the Senate voted to pass the bill; Governor Maggie Hassan signed it into law, making it effective just over a week before the New Hampshire state primary elections.[92]

Once the law took effect, the New Hampshire Attorney General began

88. *See* An Act Relative to Showing a Ballot, H.B. 366, 2013 Gen. Ct., 163rd Sess. (N.H. 2013) (as introduced); *see also Rideout I*, 123 F. Supp. 3d at 221-23 (recounting history of bill); *HB 366: "AN ACT Relative to Showing a Ballot,"* TIMOTHYHORRIGAN.COM, http://www.timothyhorrigan.com/documents/ 2013 .hb366.html (last visited Nov. 28, 2016) [http://perma.cc/8E97-D8YX] [hereinafter HB 366] (featuring excerpts from legislative testimony and personal commentary). Representative Horrigan was inspired to create the bill prohibiting ballot selfies by a worker at his campaign office. *See* HB 366, *supra*. The employee wanted to take a photo of her marked absentee ballot to post on social media. *See id*. Representative Horrigan said that his campaign office "began to worry" that taking this kind of photo would be illegal under state and federal election laws. *Id*. Representative Horrigan decided that, while a ballot selfie may not be illegal when looking at the law on its face, he believed that ballot selfies violated the "spirit" of the law. *See id.*

89. *See* HB 366, *supra* note 88 (stating, "[t]his practice . . . compromises the secrecy of the ballot").

90. *See id.* (explaining rationale behind creation of bill); *see also Rideout I*, 123 F. Supp. 3d at 221-23 (detailing legislative history). In the House Election Law Committee's statement of intent, Representative Mary Till stated that the law was "put in place to protect voters from being intimidated or coerced into proving they voted a particular way by showing their completed ballot or an image of their completed ballot." *Rideout I*, 123 F. Supp. 3d at 222. At least one scholar has suggested prohibiting cameras, including camera phones, from the polling place in order to reduce the efficacy of voter intimidation. *See* Woodruff, *Where the Wild Things Are*, *supra* note 51, at 277 (arguing prohibiting cameras will combat voter intimidation through ballot selfies).

91. *See* HB 366, *supra* note 88 (stating House Election Law Committee voted unanimously); *cf. Rideout I*, 123 F. Supp. 3d at 222-23 (elaborating on more extensive legislative history of bill). The court further elaborated on the process through which the bill was passed by pointing out that the House Election Law Committee requested both "a slight organizational change," and that posters be hung at polling places to inform voters of the new law. *See Rideout I*, 123 F. Supp. 3d at 222.

92. *See Rideout I*, 123 F. Supp. 3d at 223. Before the New Hampshire House and Senate received the bill, it was referred to the House Committee on Criminal Justice and Public Safety. *See id*. at 222. The House Committee on Criminal Justice and Public Safety recommended that the penalty for breaching the ban on ballot selfies be a violation rather than a misdemeanor as it was originally written. *See id*. The court noted, however, that a minority of the House Committee on Criminal Justice and Public Safety did not support the bill at all. *See id*. (noting minority's view on "very bad bill"). The minority believed that the bill was unnecessary because other laws were already in place to prevent vote buying and voter coercion. *See id*.; *see also* 18 U.S.C. § 594 (2012) (setting out penalty for voter intimidation); 52 U.S.C. § 10307 (2012) (prohibiting voter intimidation, coercion, and threatening). Regardless, the bill was amended to reflect the recommendations of the House Committee on Criminal Justice and Public Safety and the House passed it 198-96, making it veto-proof. *See Rideout I*, 123 F. Supp. 3d at 223; *see also* HB 366, *supra* note 88. The bill was then presented to the Senate Committee on Public and Municipal Affairs, which recommended it pass. *Rideout I*, 123 F. Supp. 3d at 223. Finally, the Senate passed the bill, and Governor Maggie Hassan signed it into law on June 11, 2014. *Id*. The law went into effect on September 1, 2014. *Id*. The State primary took place on September 9, 2014. Garry Rayno, *NH Law Prohibits Displaying Votes on Social Media*, N.H. UNION LEADER (Sept. 20, 2014), http://www.unionleader.com/article/20140921/NEWS0621/140929909/1010/news06 [https://perma.cc/Y9PW-2VT3].

investigating individuals who posted ballot selfies on social media after the primary election on September 9, 2014.[93] Among those investigated were the three plaintiffs in *Rideout I*: Leon Rideout, Andrew Langlois, and Brandon Ross.[94] Rideout and Ross posted their ballot selfies to voice their opposition to the newly-passed law.[95] Both Rideout and Ross were candidates for election for the New Hampshire House of Representatives, and posted photos reflecting that they voted for themselves as well as other candidates in their parties.[96] Meanwhile, Langlois's ballot selfie was intended to show his displeasure with the candidates for whom he had the option of voting.[97]

The court began its analysis by concluding the statute was facially content-based and, therefore, subject to strict scrutiny.[98] The court went on to say that the state failed to meet its burden of proof, and held the statute unconstitutional.[99] The court stated:

> In the present case, neither the legislative history nor the evidentiary record compiled by the Secretary in defense of this action provide any support for the view that the state has an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter

93. *See Rideout I*, 123 F. Supp. 3d at 226-27 (relaying Attorney General's investigation of four individuals, including three plaintiffs). The court noted that, although the Attorney General was investigating four individuals for posting ballot selfies, the State did not argue that any of these individuals were engaged in vote buying. *See id.* at 226.

94. *See id*. at 226-27 (describing each plaintiff). Plaintiff Leon Rideout is a House Representative in the New Hampshire House. *See id.* at 226. Rideout took photos of his marked ballot, which showed that he voted for himself and other Republicans, and posted them to Twitter and Facebook. *See id.* The second plaintiff, Andrew Langlois, wrote the name of his deceased dog on his ballot and posted a photo of said ballot to social media. *See id*. at 226-27. Finally, Brandon Ross was a candidate for the New Hampshire House of Representatives. *See id*. at 227. He, like Rideout, took a photo of his ballot to show that he voted for himself as well as other Republican candidates. *See id*.

95. *See id.* at 226-27 (implying Rideout and Ross posted ballot selfies in opposition to new law). Rideout was well aware of the new law and strongly opposed it. *See id*. at 226. He purposely posted his ballot selfie because he believed it to be a form of political speech that is constitutionally protected. *See id.* "I did it to make a statement . . . I think [RSA 659:35, is] unconstitutional." *Id*. (internal citations omitted). Ross, on the other hand, was more apprehensive about posting his ballot selfie. *See id.* at 227. Initially, he did not intend to post the photo he had taken of his marked ballot because he was aware of the new law prohibiting such conduct. *See id*. Once he learned that others were being investigated for their ballot selfies, Ross posted his on Facebook with the caption, "Come at me, bro." *See id*.

96. *See id.* at 226-27.

97. *See Rideout I*, 123 F. Supp. 3d at 227 (quoting Langlois's caption: "Because all of the candidates SUCK, I did a write-in of Akira . . . ").

98. *See id.* at 229 (considering law content-based because "it restricts speech on the basis of its subject matter"); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226-27 (2015) (explaining difference between regulating content-based versus content-neutral speech). The court's conclusion that the law was content-based stemmed from the fact that the only photographs prohibited by the law were those that displayed marked ballots. *See Rideout I*, 123 F. Supp. 3d at 229. The court went on to say that the law is a content-based restriction because regulators need to inquire into the content of the photograph to determine whether it violates the law. *See id*.

99. *See Rideout I*, 123 F. Supp. 3d at 231-35 (explaining State failed to show any compelling interest or a narrowly tailored law).

coercion.[100]

The court rejected the State's argument that the plurality's decision in *Burson* was applicable, citing the fact that the statute at issue in *Burson* was directly linked to combatting voter intimidation, whereas the New Hampshire law had not been connected to any actual evidence of voter fraud.[101]

The court went even further to clarify its position on the constitutionality of the statute in dicta.[102] Judge Barbadoro opined that, even if the law had served some compelling government interest, it would still fail strict scrutiny because it was overinclusive and not narrowly tailored.[103] The court reasoned that the innocent voter who wished to post a ballot selfie to broadcast how they chose to vote was more likely to be harmed by the New Hampshire law than anyone participating in a vote-buying scheme.[104] The court also recognized that the New Hampshire law could easily have been more narrowly tailored by simply prohibiting the use of marked ballot photos in connection with vote-buying and coercion schemes.[105]

On September 28, 2016, the First Circuit Court of Appeals affirmed the judgment of the United States District Court for the District of New Hampshire, applying the lesser standard of intermediate scrutiny.[106] The court reasoned that the ban on ballot selfies did not advance the State's objective to prevent vote buying.[107] Digital cameras and social media, the court noted, have been pervasive in American society for many years, including many election years,

100. *Id*. at 232.

101. *See id.* at 233. The court distinguished between the content-based restriction in *Burson* and the one at issue in *Rideout I* by looking to evidence of voter fraud. *See id*. The court articulated that the statute at issue in *Burson* was deemed appropriate because of a "long, uninterrupted and prevalent" history of similar statutes in the country, as well as the uncertainty surrounding repercussions should the law be repealed. *See id*. (quoting Burson v. Freeman, 504 U.S. 191, 208 (1846)). In contrast, the court explained there was no evidence that vote buying or coercion were factors in New Hampshire elections in over a century. *See id*. The court went on to say that, because cell phones, digital cameras, and social media had been in existence for years before the enactment of the New Hampshire law, it was likely that the State would be able to show some evidence of actual vote buying if it existed. *See id*.

102. *See id*. at 234 (suggesting law fails narrowly-tailored test even if serving compelling interest).

103. *See Rideout I*, 123 F. Supp. 3d at 234. The court noted that the law was significantly overinclusive because it restricted a large portion of political speech while only intending to prevent fraud by a small group of people. *See id*.

104. *See id*. (considering plaintiffs' proof of bill's likelihood of punishing innocent voters). The court stressed that anyone participating in a vote-buying or coercion scheme would be unlikely to post on social media because these schemes are illegal. *See id*.

105. *See id.* at 235 (noting "obviously" less restrictive means). When a content-based restriction is at issue, it is up to the government to prove that less restrictive alternatives will not be effective. *See id*. at 234. The court stressed that the State was incapable of demonstrating why less restrictive means—prohibiting ballot selfies that are posted in order to further voter intimidation and vote-buying schemes–were not effective. *See id*. at 235. To that end, the court held that the New Hampshire law was not, and could not possibly be, the least restrictive means to achieve the compelling government interest. *See id*.

106. *See Rideout II*, 2016 WL 5403593, at *1 (holding law unconstitutional under intermediate scrutiny).

107. *See id.* at *5-6 (reasoning State's failure to present evidence of vote buying renders ban unconstitutional).

yet states have not seen even an uptick in vote buying or coercion.[108] The State relied on *Burson* to assert they had a compelling interest in regulating elections, but the court refuted this argument, distinguishing the restriction in *Burson* regulating only the physical space of the polling place from the New Hampshire law banning ballot selfies, "regardless of where, when, and how" they were shared.[109] In addition, the court held that the statute was overbroad because the ban would affect both guilty and innocent voters, and the State had failed to show that other laws would be unable to prevent vote buying and voter intimidation.[110]

Indiana's ballot selfie law met a similar fate to the New Hampshire law at the district court level.[111] The Indiana District Court held the statute unconstitutional, adopting the reasoning of *Rideout I*, and even quoting from the opinion.[112] The court held that the law was a content-based restriction on political speech and the government failed to meet its burden of proof that it was narrowly tailored to a compelling state interest.[113] The court held that the law was too overinclusive, and enjoined the State from enforcing it.[114] In *Indiana Civil Liberties Union*, however, the court went even further—foreshadowing the First Circuit's decision in *Rideout II*—and maintained that the law would not even pass a constitutional challenge under intermediate scrutiny due to its overinclusiveness.[115]

Meanwhile, some states passed laws explicitly permitting ballot selfies while others repealed laws that would have prohibited the same.[116] For example, Arizona's newly passed law makes ballot selfies an exception to the ban on

108. *See id.* at *6 (noting State presented no vote-buying evidence although digital photography available for fifteen years); *see also* Brief Amicus Curiae of Snapchat, Inc. in Support of Appellees and Affirmance at 11-12, *Rideout II*, 2016 WL 5403593 (No. 15-2021), 2016 WL 2848745, at *11-12 [hereinafter Snapchat, Inc. Brief] (highlighting statistics on social media use in previous elections).

109. *Rideout II*, 2016 WL 5403593, at *6 (distinguishing between regulating physical polling place and digital imagery).

110. *See id.* at *6-7 (holding statute overbroad without showing less restrictive means).

111. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *9 (holding law does not pass strict scrutiny).

112. *See id.* at *4-5 (reasoning law invalid absent State's evidence of vote buying).

113. *See id.* at *6-7 (noting law too broad; narrower language required). The court found the government's argument that the statute was content-neutral unpersuasive, citing that voters would be able to take photos of anything and everything else in the polling place other than their ballot. *See id.* at *3. The court went on to note that the law was content-based because determining whether a photo violated the statute required examining the content of the image. *See id.* When applying strict scrutiny, the court noted that the state could not point to any incidences of vote buying since the 1980s aside from one "third-hand allegation" from 2003. *See id.* at *4.

114. *See id.* at *6 (questioning how prohibiting photos of unmarked ballots could prevent voter coercion).

115. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *7 (explaining statute's overinclusive nature fails intermediate scrutiny even if content-neutral). In order to withstand intermediate scrutiny, a law must be narrowly tailored to the government's *significant*, rather than compelling, interest. *See id.* The Indiana statute was far too overinclusive to meet this standard. *See id.*

116. *See supra* note 87 and accompanying text.

taking photos in the voting booth.[117] The legislature in Utah amended its law to allow for the photographic transmission of one's own ballot.[118] Similarly, a recently signed law in California legalizes the ballot selfie.[119] Many are still skeptical of legalizing ballot selfies; one scholar believes that the ruling in *Rideout I* will inevitably lead to vote buying and coercion, arguing that ballot selfies provide the unique opportunity to prove how one has voted.[120]

### *E. The Problem of Voter Ignorance and Uninformed Voters*

It is a generally accepted principle that a large number–if not a majority–of voters are uninformed.[121] Scholars have credited front-loading primaries and the theory of rational ignorance, among other reasons, for the abundance of uninformed voters.[122] American citizens lack the incentive to become informed and as a result, many are not; scholars have coined this phenomenon, "rational ignorance."[123] Rather than attempting to influence candidates to act on behalf

117. *See* Additional Unlawful Acts by Persons with Respect to Voting; Classification, ARIZ. REV. STAT. ANN. § 16-1018 (2015) (providing text of Arizona law). The Arizona law states, "[a] voter who makes available an image of the voter's own ballot by posting on the internet or in some other electronic medium is deemed to have consented to retransmittal of that image and that retransmittal does not constitute a violation of this section." *Id.*; *see also* Wilson, *supra* note 87 (explaining Arizona law).

118. *See* UTAH CODE ANN. § 20A-3-504 (West 2016) (codifying Utah "does not prohibit an individual from transferring a photograph of the individual's own ballot"); *see also* Wilson, *supra* note 87 (noting Utah introduced bill legalizing ballot selfies).

119. *See* John Myers, *Sorry, Californians, You Still Can't Take Ballot Selfies on Nov. 8*, L.A. TIMES (Oct. 28, 2016), http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-state-elections-officials-are-still-1476379986-htmlstory.html [http://perma.cc/A549-ACZR] (describing when ballot selfie legalization will take effect in California); *see also* Christine Mai-Duc, *Ballot Selfies Are Illegal, But This Bay Area Legislator Says They Shouldn't Be*, L.A. TIMES (Jan. 11, 2016), http://www.latimes.com/politics/la-pol-sac-ballot-selfies-voter-turnout-bill-20160111-story.html [http://perma.cc/4KFD-HHWQ] (interviewing assemblyman who introduced bill permitting ballot selfies). The California lawmaker who spearheaded the movement to legalize ballot selfies argued that the social media posts could help increase voter turnout, stating, "[i]t's time to make voting cool and ubiquitous, and ballot selfies are a powerful way to do that." *See* Mai-Duc, *supra*. California Governor Jerry Brown signed the bill into law in September 2016, but it did not go into effect until January 1, 2017. *See* Myers, *supra*.

120. *See* Hasen, *supra* note 1 (arguing posting ballot selfies different from expressing vote choices because former *proves* fact).

121. *See* Christopher S. Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L.J. 1846, 1850-51 (2012) [hereinafter Elmendorf & Schleicher, *Districting*] (claiming most voters lack political attentiveness and knowledge of basic government institutions).

122. *See* Brigham Daniels, *Governing the Presidential Nomination Commons*, 84 TUL. L. REV. 899, 901 (2010) (arguing early primaries exacerbate uninformed voting); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 371 (2013) [hereinafter Elmendorf & Schleicher, *Informing Consent*] (explaining political theorists' philosophies on voter ignorance).

123. *See* Elmendorf & Schleicher, *Districting*, *supra* note 121, at 1850-51 (describing politically uninformed nature of voters); *see also* Elmendorf & Schleicher, *Informing Consent*, *supra* note 122, at 371 (discussing pundits' view voters lack incentive to form political opinions). Elmendorf and Schleicher summarize political theorist, Joseph Schumpeter's, principle as the following, "[c]itizens . . . have little incentive to learn about politics, in contrast to their strong monetary and social incentives to be good at their jobs." Elmendor & Schleicher, *Informing Consent*, *supra* note 122, at 371.

of the voters, people often simply vote for candidates in accordance with their predetermined views instead of with the necessary knowledge to make informed voting decisions.[124]

Although generally uninformed, voters do have means by which they can sufficiently perform their civic duty of voting.[125] One way that voters can "perform reasonably well" is through aggregation.[126] Uninformed voters can also participate effectively in the electoral system by referencing political party platforms.[127]

The problem of uninformed voters comes into play with the juxtaposition of political speech and voting rights.[128] Political speech cases involve the kind of information dispersed amongst the voting public, and therefore, directly impact the level to which voters are informed.[129] As Justice Blackmun has opined, these cases pose a "particularly difficult reconciliation" that requires a balance between the flow of information received by the voter and the right to a protected and secret vote.[130] Some scholars have argued that each Supreme Court decision addressing electioneering and freedom of speech is actually the Supreme Court attempting to ensure a more informed electorate.[131]

## III. ANALYSIS

### *A. Why an Explicit Ban on Ballot Selfies Does Not Pass Constitutional Muster*

In *Rideout I*, *Rideout II*, and *Indiana Civil Liberties Union*, the government put forth the argument that ballot selfies would lead to vote buying and voter

124. *See* Elmendor & Schleicher, *Informing Consent*, *supra* note 122, at 371 (noting Schumpeter believes citizens vote passively under rational ignorance).

125. *See* Elmendorf & Schleicher, *Districting*, *supra* note 121, at 1851.

126. *See id*. (defining aggregation). Under aggregation theory, each uninformed vote will be evened out by another uninformed voter who chose the other side. *See id.* As a result, the remaining votes will belong to those who are informed, and "the electorate as a whole will converge on the 'right answer.'" *See id*. (internal quotations omitted).

127. *See id*. at 1853 (asserting consistent political party platforms enable sensible ballot choices by even uninformed voters). Voters can keep a list of parties' stances on particular issues, and then at the voting booth, they can use that list to determine what party they wish to vote for. *See id*.; *see also* EVANS, *supra* note 30, at 7 (noting distinguishable party ballots provided uninformed voters with means of making decisions).

128. *See* Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 225-26 (2003) (chastising Supreme Court for "stealthily and improperly" using political speech cases to ensure informed voters).

129. *See id*. at 226 (arguing Supreme Court decisions have limited what voters may hear regarding elections).

130. *See* Burson v. Freeman, 504 U.S. 191, 198 (1992).

131. *See* Levine, *supra* note 128, at 276-77. Levine argues that Supreme Court cases have evolved in a way that proves the Court is attempting to mitigate the effects of a confused and uninformed electorate. *See id.* at 277. Levine claims that *Burson* highlights the Supreme Court's inappropriate desire to control uninformed voters and ensure that they are not confused by "last minute" information they receive upon entering the polling place. *See id.* at 276-77. While her argument is persuasive, it seems to downplay the very real issue of voter ignorance and how it clashes with freedom of speech and the right to vote. *See infra* Part III.

coercion.[132] As the courts explained, these arguments are unpersuasive given that neither state could offer any evidence linking ballot selfie posts to vote buying or coercion.[133] While preventing voter coercion is considered a compelling government interest, an explicit ban on all ballot selfies is a content-based ban on speech and, therefore, will not pass constitutional muster.[134] Until a state can show that there is actual, tangible evidence that ballot selfies have been used to further a voter coercion scheme, a prohibition on ballot selfies for the compelling government reasons previously set forth will not stand; it simply is not the least restrictive means of preventing voter intimidation and coercion.[135] Even if courts considered such a prohibition content-neutral, courts are still unlikely to uphold a ban on ballot selfies.[136]

As the court in *Rideout I* noted, it is not the ballot selfie posted on Instagram, Twitter, Facebook, or Snapchat that will lead to voter coercion, it is the photo taken and sent via text message, iMessage, or e-mail to the ringleader of a vote-buying scheme that should worry legislatures.[137] Therefore, a less restrictive means of banning ballot selfies to prevent voter fraud and coercion would be to ban ballot selfies for these specific purposes.[138] The problem with this type of ban, however, is that it ignores another government interest: establishing an informed electorate.[139]

### *B. The Ballot Selfie Encourages but Fails to Inform the Electorate*

Social media posts have the capacity to encourage and entice citizens to

132. *See Rideout II*, 2016 WL 5403593, at *4 (explaining State's compelling interest argument for prevention of vote buying and coercion); *Indiana Civil Liberties Union*, 2015 WL 12030168, at *4 (setting forth State's argument supporting ballot selfie ban's prevention of vote buying); *Rideout I*, 123 F. Supp. 3d at 221-22 (recounting State Representative Timothy Horrigan's statement arguing ban would protect from coercion).

133. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *4 (reasoning State lacked evidence of "threat to the integrity of the electoral process"); *Rideout I*, 123 F. Supp. 3d at 232 (highlighting State did not show actual voter fraud).

134. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *4 (holding law facially content-based). The United States District Court for the Southern District of Indiana held that the prohibition on ballot selfies was facially content-based because it specifically regulated which photographs were prohibited and which were permitted. *See id.* at *3-4. The court went on to say that, without evidence of actual voter fraud schemes, the State's argument that banning ballot selfies would eliminate the threat of voter coercion, intimidation, and vote buying was unpersuasive. *See id.* at *5.

135. *See id.* (explaining state's burden of showing content-based restriction least restrictive means). The State admitted that the law could have been more narrowly tailored by prohibiting taking photos and posting them on social media for the purpose of engaging in a vote-buying scheme. *See id.* at *6.

136. *See Rideout II*, 2016 WL 5403593, at *5 (holding New Hampshire law fails intermediate scrutiny).

137. *See Rideout I*, 123 F. Supp. 3d at 234. The court in *Rideout I* believed that innocent voters, who wished to post images of their marked ballot to highlight their political beliefs, would be more likely to fall victim to the statute than those actually participating in vote-buying schemes. *See id.*

138. *See id.* at 235.

139. *See* Levine, *supra* note 128, at 227 (contending Supreme Court found compelling interest in informed voters); Dunham, *supra* note 72, at 2155, 2157 (highlighting informed electorate has constitutional value implicated by election day restrictions).

engage in the democratic process, but they will not eradicate the uninformed voter problem.[140] Rather, social media posts (ballot selfies included) can contribute to the pieces of information individuals consume every day, supplying voters with additional information on political parties and allowing them to perform their civic duty of voting relatively well.[141] Social media posts will not, however, result in an informed electorate.[142]

Ballot selfies were the campaign buttons of the 2016 election year.[143] Similar to a campaign button, the ballot selfie—and other social media posts—allows voters to voice support or opposition for a particular candidate or issue.[144] Neither the ballot selfie nor the campaign button, however, contribute to informing the electorate.[145] As a result, the burden falls on the state to ensure that information passes to citizens in such a way that they can make informed choices.[146]

### *C. States Should Embrace Social Media As the New Way to Inform Voters*

Social media is undeniably an easily accessible gathering place for people all over the world.[147] People of every age, race, and ethnicity join together on social media websites to share, discuss, and gather information.[148] The Internet is much more powerful than town squares and certainly is a better medium than front yard signs through which to voice political views.[149] Using social media, individuals can communicate and have the capability to reach millions of users.[150] With information accessible at the click of a button, the question

140. *See* Snapchat, Inc. Brief, *supra* note 108, at *12-13 (setting forth argument social media may engender civic duty in millenials); Elmendorf & Schleicher, *Districting*, *supra* note 121, at 1851 (arguing political information citizens receive acquired unintentionally, not in conscious educational effort).

141. *See* Elmendorf & Schleicher, *Districting*, *supra* note 121, at 1853 (discussing political parties help voters to perform civic duty well).

142. *See id.* at 1851 (explaining information gathered daily does not result in informed voting).

143. *See* Snapchat, Inc. Brief, *supra* note 108, at *5 (likening ballot selfie to campaign button).

144. *See id.*

145. *See* Levine, *supra* note 128, at 280-81 (arguing *Burson* upheld campaign materials ban with goal of avoiding last-minute swaying of uninformed voters).

146. *See* Elmendorf & Schleicher, *Informing Consent*, *supra* note 122, at 416 (calling for unbiased information on performance of government to allow effective voter participation).

147. *See* Sklan, *supra* note 6, at 401 (considering Internet provides modern-day substitute for historical meeting spots). "Cyberspace is not the public town hall, the street corner, or the water cooler—but it has become the twenty-first century equivalent." *Id.*; *see also* Tutt, *supra* note 75, at 239 (reiterating connection between present online communities and past social gathering spots). Tutt imagines a world ten years from now where online forums become the new place for debate, or replace conventional "book clubs" or "knitting groups;" however, this world has seemingly already emerged with social media. *See* Tutt, *supra* note 75, at 239.

148. *See Indiana Civil Liberties Union*, 2015 WL 12030168, at *6 (addressing State's contention "three-quarters of Americans" participate in social media); *see also* Reno v. ACLU, 521 U.S. 844, 870 (1997) (emphasizing social media's reach, noting Internet users more effective than town criers in spreading messages).

149. *See* Sklan, *supra* note 6, at 386.

150. *See id.* at 387 (noting social media's importance to generation).

remains: Why are voters still uninformed?[151]

States should take advantage of the Internet's pervasiveness and make information easily accessible on social media.[152] Not only must this information be readily available, but it must also be interesting and presented in a compelling way.[153] Doing so will encourage "clicks," "likes," and "shares," drawing a wider audience.[154]

Individuals are already civically involved in social media, and candidates for political offices have likewise taken full advantage of the platform.[155] Today more than ever, candidates are posting on all forms of social media about social and political issues, their opponents, and even their personal lives.[156] It is now up to the states to do something similar with the issues they face.[157] By creating active social media pages centered on informing voters about the issues that affect them, governments can reach wider audiences and attempt to inform those voters who have been inspired to vote by ballot selfies and similar social media posts.[158]

Overcoming the hurdle of rational ignorance is not entirely in the state's hands, however.[159] It is up to citizens to actively attempt to become informed, rather than stand by idly with the notion that their vote does not count.[160] By engaging with voters on social media, states can facilitate the flow of (ideally) unbiased information.[161] They can utilize social media in a comprehensive and interesting way to capture the attention of the younger generation, encourage

151. *See* Elmendorf & Schleicher, *Districting*, *supra* note 121, at 1851 (stressing voters have little incentive to become informed because they do not influence outcome); *supra* Part II.E (explaining theory of rational ignorance).

152. *See* Elmendorf & Schleicher, *Informing Consent*, *supra* note 122, at 416 (arguing "low-cost, reliable information" will help voters differentiating between national and local political parties); Sklan, *supra* note 6, at 387 (claiming social media transformed how this generation communicates and disseminates ideas).

153. *See* Kreimer, *supra* note 9, at 343 (asserting shared images conveying "information . . . stories, or emotions" create sense of community); *see also* Snapchat, Inc. Brief, *supra* note 108, at *6 (explaining ballot selfies can "dramatize" act of voting).

154. *See* Sklan, *supra* note 6, at 389 (asserting liking posts on Facebook brings content to larger audience).

155. *See* Snapchat, Inc. Brief, *supra* note 108, at *10-13 (highlighting political engagement on social media and opportunity to engage younger voters); Sklan, *supra* note 6, at 385 (discussing President Obama's revolutionary 2012 social media campaign).

156. *See* Sklan, *supra* note 6, at 408-09 (detailing President Obama's September 24, 2012 tweet and contending retweets illustrate personal views).

157. *See id*. at 385 (claiming Internet upheaved public debate process and how public officials participate in politics).

158. *See* Elmendorf & Schleicher, *Informing Consent*, *supra* note 122, at 409-10 (suggesting more information on ballot might increase informed voting); Sklan, *supra* note 6 at 386 (arguing social media provides ability to voice opinions "cheaply and effectively").

159. *See* Elmendorf & Schleicher, *Districting*, *supra* note 121, at 1850-51 (discussing theory of rational ignorance).

160. *See id.* at 1851 (asserting even those who accidentally acquire political information remain uninformed).

161. *See* Sklan, *supra* note 6, at 386 (reporting voters often discussed selections in 2012 presidential election on social media).

citizens to pay attention, and entice them to share information with their friends and followers.[162] While no one can force the electorate to escape rational ignorance, social media has the potential to help reinstill the importance of the civic duty to vote, and can be a means through which states distribute information on important ballot measures.[163]

## IV. CONCLUSION

Social media greatly permeates into our everyday lives and, to an extent, we should accept this urge to update and be updated. The courts in *Rideout I*, *Rideout II*, and *Indiana Civil Liberties Union* set out lengthy analyses of how voter fraud previously affected the United States. Each court also noted that states have the ability to regulate elections. The decisions did not, however, address the importance of informed voters.

At the same time, social media's influence should not be downplayed. Individuals and candidates can encourage others to go out and vote. States can utilize social media to inform their electorate. State governments can use social media to attract new voters, spread information about polling places, share arguments for and against certain ballot measures, and even stream or "live-tweet" debates. Rational ignorance continues to affect the electorate of the United States—there are simply too many issues and too much to learn to become completely informed, so why bother? With social media, states may not be able to guarantee a completely informed electorate, but they can make more information widely available, possibly attracting those who have become interested in the electoral process because of a friend's ballot selfie.

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162. *See* Snapchat, Inc. Brief, *supra* note 108, at *10-13 (detailing statistics and claiming ballot selfies can increase voter turnout).

163. *See id.* at *12-13 (claiming ballot selfies can instill duty to vote in younger generations); *see also* Sklan, *supra* note 6, at 386 (arguing sharing social media posts constitutes an effective means of disseminating information to wide audience); Mai-Duc, *supra* note 119 (claiming ballot selfies could increase voter turnout).