RECENT CASES

FIRST AMENDMENT — FREE SPEECH — FIRST CIRCUIT STRIKES DOWN STATE BAN ON BALLOT SELFIES. — *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016).

Vote buying, a practice carried over from England's early experiments with democracy, was widespread in United States elections until the modern era.[1] A 1905 study of a New York City election, for example, found that 170,000 people sold their votes at a going rate of five dollars.[2] Around this time, states began to introduce the secret ballot and enact other laws intended to prevent voter corruption and intimidation.[3] Since then, the outright buying of votes has receded as a significant issue though occasional prosecutions continue and many Progressive era statutes remain in force. Recently, in *Rideout v. Gardner*,[4] the First Circuit held that a New Hampshire law prohibiting voters from sharing photographs of marked ballots — which came to be known as a ban on "ballot selfies"[5] — was unconstitutional under the First Amendment. Despite the possibility that legislatures may be better suited than courts to determine if election regulations are needed, the court found New Hampshire's stated justification — to prevent vote buying and coercion — insufficiently strong. The *Rideout* court's approach shows how First Amendment free speech doctrine fails to consider the institutional competence of legislatures when it comes to regulating elections.

New Hampshire first passed a law forbidding voters from showing others their marked ballots in 1911.[6] This statute remained on the books in substantially the same form until 2014, when the provision, section 659:35 of the New Hampshire Code, was amended to include the specification that "[t]his 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."[7] The

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[1] *See* Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1327 (2000).

[2] Jac. C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 PUB. CHOICE 107, 109 (1995).

[3] *See* Hasen, *supra* note 1, at 1327–28; *see also* Jill Lepore, *Rock, Paper, Scissors*, NEW YORKER (Oct. 13, 2008), http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors [https://perma.cc/8KFM-9GNM] (discussing the introduction of the government-provided ballot).

[4] 838 F.3d 65 (1st Cir. 2016).

[5] *Id.* at 67.

[6] *See id.* at 68.

[7] N.H. REV. STAT. ANN. § 659:35(I) (2016). According to a review by the Associated Press, twenty-four states have some form of a ban on voters sharing ballot photographs. Bruce Shipkowski, *Posting a Ballot Selfie? Better Check Your State Laws First*, ASSOCIATED PRESS: THE BIG STORY (Oct. 23, 2016, 8:12 PM), http://bigstory.ap.org/article/709338e5557a49e7ad5c68109ffecfca/posting-ballot-selfies-personal-choice-or-illegal-act [https://perma.cc/M2B9-VMRD].

amendment was introduced by State Representative Timothy Horrigan, who explained his rationale as "prevent[ing] situations where a voter could be coerced into posting proof that he or she voted a particular way."[8] Violations of the ban were to be punishable by a fine of up to $1000.[9]

At the time of the district court's decision, the New Hampshire Attorney General was investigating four individuals for violating the statute, three of whom were plaintiffs in *Rideout*.[10] Two, Leon Rideout and Brandon Ross, were candidates for the 400-person New Hampshire House of Representatives.[11] They each posted a picture of their 2014 Republican primary ballots, marked with votes for themselves and other candidates, on social media.[12] The third plaintiff, Andrew Langlois, wrote in the name of his deceased pet dog (Akira) in a U.S. Senate primary vote.[13] He then took a photo of his ballot and posted it on Facebook, explaining that he did not like any of the candidates.[14] After the Attorney General initiated the investigations, the three filed suit against New Hampshire Secretary of State William Gardner, seeking a declaration that the statute was unconstitutional and an injunction to prevent its enforcement.[15]

The district court invalidated the statute on summary judgment, holding the ballot selfie ban unconstitutional.[16] Judge Barbadoro of the United States District Court for New Hampshire first determined that the statute was subject to strict scrutiny as a content-based regulation "because it restricts speech on the basis of its subject matter."[17] In other words, because the statute prohibits sharing only photographs with certain content, namely marked ballots, the court held that the statute was a content-based restriction of expression.[18] Judge Barbadoro then found that the Secretary failed to meet his burden to

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[8] *Rideout*, 838 F.3d at 68.

[9] N.H. REV. STAT. ANN. §§ 659:35(IV), 651:2(IV)(a).

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

[11] *Id.* at 70.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Rideout v. Gardner, 123 F. Supp. 3d 218, 235–36 (D.N.H. 2015).

[17] *Id.* at 229.

[18] The Supreme Court has long held that content-based speech regulations are subject to a higher level of scrutiny than those that are content neutral. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (exploring the reasons for the distinction, and concluding that the doctrine "makes sense" but "is more subtle and complex than might at first appear," *id.* at 251).

show a compelling government interest.[19] The court was not satisfied by the state's asserted interests in preventing vote buying and voter coercion because there was no evidence that either was, in fact, a problem in modern-day New Hampshire.[20] Judge Barbadoro further found the statute "vastly overinclusive,"[21] noting that the state failed to explain why prohibiting only the sharing of photographs in connection with vote buying or coercion would be insufficient.[22] The district court granted the plaintiffs' motion for summary judgment.[23]

The First Circuit affirmed. Writing for the panel, Judge Lynch[24] began by discussing the history of electoral corruption that led the New Hampshire legislature to enact reforms at the turn of the nineteenth century.[25] She then addressed section 659:35, noting that the 2014 amendment's "legislative history . . . does not contain any corroborated evidence of vote buying or voter coercion in New Hampshire during the twentieth and twenty-first centuries."[26] Unlike the district court, the court of appeals declined to decide whether the statute was subject to strict scrutiny as a content-based restriction, instead assuming for the sake of argument that it was a content-neutral regulation subject only to intermediate scrutiny.[27]

To survive intermediate scrutiny, a statute must "serve a significant governmental interest" and be "narrowly tailored" to that end.[28] The First Circuit held that the statute failed to satisfy either part of the test. The state did not establish a significant interest, according to the court, because "the assertion of abstract interests" is not enough.[29] Secretary Gardner compared the state's interest to that of protecting voters from in-person interference at polling places, which the Supreme Court has held is compelling.[30] Specifically, Secretary Gardner argued that New Hampshire had an analogous interest in "preventing voter intimidation [and] vote buying and maintaining the integrity" of elections by prohibiting the sharing of photographs that could be used to prove how an individual voted.[31] Rejecting this argument, Judge Lynch noted that the precedent cited by Secretary

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

[20] *Id.* at 232–33.

[21] *Id.* at 234.

[22] *Id.* at 235.

[23] *Id.* at 236.

[24] Judge Lynch was joined by Senior Judge Lipez and Judge Thompson.

[25] *Rideout*, 838 F.3d at 68.

[26] *Id.* at 69.

[27] *See id.* at 72 n.4.

[28] *Id.* at 72 (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014)).

[29] *Id.*

[30] *Id.* at 73; *see* Burson v. Freeman, 504 U.S. 191, 206 (1992).

[31] Brief of the Appellant, William M. Gardner, in His Official Capacity as Secretary of State of New Hampshire at 33, *Rideout*, 838 F.3d 65 (1st Cir. 2016) (No. 15-2021); *see also id.* at 8–10.

Gardner focused on protecting the physical election space while the New Hampshire law restricted a form of speech "regardless of where, when, and how that imagery is publicized."[32]

The court then held that the statute failed to meet the narrow tailoring requirement for two reasons: first, the prohibition applies to all voters, not just those involved in vote selling or subject to coercion; second, the state failed to explain why other regulations, including federal bans on vote buying and intimidation, insufficiently protected its interests.[33] Judge Lynch agreed with the district court that there were less restrictive alternatives for the state to pursue its interest in the integrity of its elections.[34]

Citing an amicus brief submitted by Snapchat, the court ended by pointing to the value of the speech prohibited by the statute.[35] The ballot selfie ban implicated "core political speech" in the view of the court,[36] and so sharing photographs of ballots could not be banned "to combat an unsubstantiated and hypothetical danger."[37] The court noted that although the technologies involved in ballot selfies are not all that novel, there have been no reported increases in vote buying or coercion in New Hampshire, suggesting that the prohibition could not be a justified restriction of political speech.[38]

Both the district court and the First Circuit employed the conventional analysis for First Amendment cases, first inquiring whether the regulation was content-based and then applying the appropriate level of scrutiny. *Rideout* demonstrates some of the shortcomings of this approach. To properly answer the question of whether the state had a sufficiently weighty interest, it is important to consider the comparative institutional competencies of courts and legislatures. Recent history and scholarship provide reason to think that legislatures are better than courts at assessing the necessity of election regulation, and, as *Rideout* shows, First Amendment free speech doctrine does not easily account for this disparity.

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[32] *Rideout*, 838 F.3d at 73.

[33] *Id.* at 74. Judge Lynch cited the federal prohibitions in 18 U.S.C. § 597 (2012) (vote buying and selling); 52 U.S.C. § 10307(b) (2012) (voter coercion and intimidation); and 52 U.S.C. § 10307(c) (giving false information, paying, or accepting payment for registering to vote or voting), along with several related New Hampshire statutes. *Rideout*, 838 F.3d at 74.

[34] *Rideout*, 838 F.3d at 74.

[35] *Id.* at 75 & n.9 ("Amicus Snapchat stresses that 'younger voters participate in the political process and make their voices heard' through the use of ballot selfies." *Id.* at 75 n.9 (quoting Brief Amicus Curiae of Snapchat, Inc. in Support of Appellees and Affirmance at 4, *Rideout*, 838 F.3d 65 (1st Cir. 2016) (No. 15-2021)).

[36] *Id.* at 75.

[37] *Id.* at 76.

[38] *See id.* at 73.

Shelby County v. Holder[39] demonstrates the danger of courts invalidating legislatively enacted election regulations. In *Shelby County*, the Supreme Court struck down the provision of the Voting Rights Act determining which jurisdictions must show that proposed electoral changes are not discriminatory before going into effect, a process known as preclearance.[40] Justice Ginsburg dissented, arguing that "[t]hrowing out preclearance when it has worked and is continuing to work . . . is like throwing away your umbrella in a rainstorm because you are not getting wet."[41] Racial minorities' improved access to the vote shows that the Voting Rights Act had (and continues to have) a positive effect, she argued, not that it was no longer needed. Later developments arguably vindicated Justice Ginsburg's opinion. Shortly after *Shelby County*, the legislature of North Carolina — a state with forty jurisdictions previously subject to preclearance — imposed voting restrictions that the Fourth Circuit found were motivated by discriminatory intent.[42] The court held that the legislature "target[ed] African Americans with almost surgical precision"[43] by enacting a statute that likely would have been invalidated before *Shelby County*.[44]

Although the context and stakes are markedly different, *Rideout* and *Shelby County* both required the court to decide whether a legislature had enough evidence that an election law addressed a real problem. The relative institutional competencies of legislatures and courts when it comes to understanding the electoral system are relevant in answering this question. It is well established that there are advantages to having some decisions made by courts and others by legislatures.[45] For example, courts are said to be adept at answering questions of procedure.[46] On the other hand, courts lack the popular

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[39] 133 S. Ct. 2612 (2013).

[40] *See id.* at 2631.

[41] *Id.* at 2650 (Ginsburg, J., dissenting). Judge Sutton of the Sixth Circuit made a similar argument when considering a challenge to a statute analogous to section 659:35: "The fact that these laws have been in effect for a long period of time . . . makes it difficult for the States to put on witnesses who can testify as to what would happen without them." Crookston v. Johnson, 841 F.3d 396, 400 (6th Cir. 2016) (quoting Burson v. Freeman, 504 U.S. 191, 208 (1992)).

[42] N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016). The challenged provisions included requiring certain forms of ID and limiting methods of registration and voting, all of which disproportionately affected African Americans. *Id.* at 216; *see also* Recent Case, North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016)*, 130 HARV. L. REV 1752 (2017).

[43] *McCrory*, 831 F.3d at 214.

[44] *Id.* at 228–29.

[45] *See, e.g.*, Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366 (1984) ("When the Court addresses constitutional issues, it typically must choose a principal decisionmaker from among the various institutions of government, including the judiciary itself. . . . These institutions differ from one another, and the force and implication of these differences vary from one type of social issue to another.").

[46] *See id.* at 367.

accountability and factfinding capabilities of legislatures, so they may be a worse institution for questions involving complex social facts.[47]

This difference is something that the U.S. system of election regulation often recognizes.[48] Professor Richard Briffault explains that courts often defer to legislatures' decisions about the electoral system because "there is no one right mechanism for calculating collective preferences" in a complex democracy.[49] Some rules are needed, but "[g]iven the multiple, conflicting values at stake, it would be difficult to show that any particular rule, including rules that regulate election-related political expression, are [sic] strictly necessary."[50] Perhaps recognizing this tension, the Supreme Court in *Munro v. Socialist Workers Party*[51] allowed states to impose restrictions on third-party access to the ballot, for example, without requiring much evidence of the effect on the states' claimed interests.[52] Since making the rules to govern elections inevitably involves complex political and social judgments, there is reason to think legislatures should be in charge with minimal judicial oversight. There is precedent supporting deference to legislatures even when constitutional rights are involved, as in *Rideout*. In *Burson v. Freeman*,[53] which involved a restriction on voter solicitation outside of polling places, the Court repeated its earlier guidance from *Munro* that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights."[54]

Looking more specifically at New Hampshire's stated interests in *Rideout*, there is reason to question the court's rejection of the state's argument. Both the district court and the court of appeals noted that the state's interests were "compelling in the abstract,"[55] implying that their disagreement with the enacting legislature's judgment arose from a different view of the facts. A major problem for the state was that the legislative history contained only a third-hand allegation of recent vote buying in New Hampshire: a state representative reported that a constituent told her that one party paid college students fifty dollars to

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[47] *See* David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 552–53, 555 (1988).

[48] Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1766–67 (1999).

[49] *Id.* at 1766.

[50] *Id.*

[51] 479 U.S. 189 (1986).

[52] *See* Briffault, *supra* note 48, at 1766–67 (citing *Munro*, 479 U.S. 189).

[53] 504 U.S. 191 (1992).

[54] *Id.* at 209 (quoting *Munro*, 479 U.S. at 195–96 (emphasis added)).

[55] *Rideout*, 838 F.3d at 72 (quoting Rideout v. Gardner, 123 F. Supp. 3d 218, 231 (D.N.H. 2015)).

vote in the 2012 election.[56] But, as Secretary Gardner pointed out, there have been vote-buying prosecutions in the United States in recent years.[57] And photographs have been used elsewhere to facilitate voter coercion. Professor Rick Hasen points to the example of Russian college students who were directed to vote for Vladimir Putin's United Russia party and send a picture of their ballots to an official.[58] This kind of intimidation is unlikely to occur in New Hampshire state elections, but it shows that the legislature was not responding to an imaginary problem. If one institution must balance the low, but real, risk of corruption facilitated by sharing photographs against an arguably trivial infringement on expressive rights, an accountable state legislature, with superior factfinding resources, seems preferable to the courts.

Supporters of section 659:35 in the legislature also mentioned broader concerns about preventing "un[due] influence" and protecting privacy as motivations for the law.[59] These statements suggest that the court's focus on the buying and selling of votes misses an aspect of the state's interest in ensuring voters are free from more subtle forms of pressure. In addition to making it easier to ensure a voter follows through with a vote-buying agreement, new technology making it easier to take and share photos could lead to a norm of proving your vote, deterring voters from making unpopular choices. Given the pattern of judicial deference in this area, preventing this phenomenon is not clearly out of line with other election-ordering choices courts have approved.[60] One can only speculate about the effects of technology on future elections, but again, legislatures are likely better at making these predictions and selecting desirable electoral practices than courts.[61]

One possible reason that the *Rideout* court did not consider institutional competence is that the First Amendment doctrinal framework,

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[56] *Id.* at 69.

[57] *See* Brief of the Appellant, *supra* note 31, at 8–10 (citing United States v. Thomas, 510 F.3d 714, 717 (7th Cir. 2007); United States v. Shatley, 448 F.3d 264, 265–66 (4th Cir. 2006); United States v. Johnson, No. 5:11-CR-143, 2012 WL 3610254, at *1 (E.D. Ky. Aug. 21, 2012)).

[58] Rick Hasen, *Ballot Selfies Used to Coerce Voters in Russia (or More Evidence Why Mark Joseph Stern Is Wrong)*, ELECTION L. BLOG (Sept. 26, 2016, 12:09 PM), https://electionlawblog.org/?p=86873 [https://perma.cc/M8G9-3SFU].

[59] *Rideout*, 123 F. Supp. 3d at 222 (alteration in original) (citation omitted).

[60] *See* Briffault, *supra* note 48, at 1766–67 ("[T]he avoidance of factionalism and the narrowing of choice in order to produce a majority (rather than a plurality) winner have repeatedly been treated as legitimate electoral goals.").

[61] A prominent example of an election-law decision with unforeseen consequences is *Citizens United v. FEC*, 558 U.S. 310 (2010). The opinion, written by Justice Kennedy, pointed to donation disclosure requirements as a "less restrictive alternative to more comprehensive regulations." *Id.* at 369 (citation omitted). Justice Kennedy later admitted that campaign finance disclosure is "not working the way it should," though he continued to stand by the decision. Marcia Coyle, *Justice Anthony Kennedy Loathes the Term "Swing Vote,"* NAT'L L.J. (Oct. 27, 2015), http://www.nationallawjournal.com/id=1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term-Swing-Vote [https://perma.cc/8QR5-S4FR].

with its relatively rigid categories and levels of scrutiny, provides no obvious place to do so.[62] Any argument for a new approach to the First Amendment would require a much longer discussion. But it is worth noting two proposals that would provide a more natural route to consider this factor in appropriate cases. Professors Frederick Schauer and Richard Pildes propose treating issues of electoral politics differently under the First Amendment than ordinary political speech, a position they call "electoral exceptionalism."[63] Schauer and Pildes, attempting to provide a foundation for campaign finance regulation, argue that deeper democratic values may justify more governmental regulation within the limited area of elections.[64] More generally, Justice Breyer has suggested that the correct inquiry for courts is "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives."[65] Under this more flexible analysis, courts could readily incorporate ideas of institutional competence. It is unclear whether the outcome in *Rideout* would be different using either approach;[66] the point is that it is not obvious that the First Amendment requires courts to ignore the relative merits of institutional decisionmakers in this context.

There are of course countervailing reasons for courts to be especially vigilant in protecting individual rights.[67] Still, it is worth considering Justice Breyer's counsel that "[t]he First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories . . . would permit."[68] In future cases like *Rideout*, courts would benefit from recognizing that legislatures likely have better insight into "the public's legitimate need for regulation" in the election context.

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[62] *See generally* Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1982–84 (2016) (explaining that current free speech doctrine "aggressively subdivides the known world into endless categories and describes distinctive rules and tests to evaluate the constitutionality of regulations that fall within those categories," *id.* at 1982).

[63] Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805 (1999).

[64] *See id.* at 1805–06 (arguing that "the values of democratic deliberation, collective self-determination, guarding against the abuse of power, searching for truth, and even self-expression," *id.* at 1806, could be advanced by increased regulation).

[65] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235–36 (2015) (Breyer, J., concurring).

[66] The district court stated it would have reached the same result under Justice Breyer's analysis. Rideout v. Gardner, 123 F. Supp. 3d 218, 235 (D.N.H. 2015). Justice Breyer's statement that his approach would "permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment," *Reed*, 135 S. Ct. at 2236 (Breyer, J., concurring), suggests it would have at least been a closer decision.

[67] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[68] *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).