AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

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Rideout v. Gardner, No. 15-2021 (1st Cir., 2016)

In 2014, New Hampshire updated its long-standing law designed to hamper vote-buying and made it a criminal offense, punishable with a fine, for a citizen to photograph their marked ballot. Leon Rideout was a Republican state representative and objected to the law. In protest, he took a "ballot selfie" of his state primary ballot (in which he voted for himself) and posted it on Twitter and Facebook. When the state launched an investigation, Rideout, working with the American Civil Liberties Union, filed suit in federal district court to enjoin prosecution and have the law declared to be an unconstitutional infringement on his First Amendment rights. Rideout won in the district court, and on appeal the First Circuit affirmed that ruling.

JUDGE LYNCH,

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In the late nineteenth century, political parties, unions, and other organizations had the power to print their own ballots, each of which was easily identifiable and distinguishable from other ballots by size and color. This practice allowed the ballot-printing organizations to observe how individuals voted at the polls, which in turn created an obviously coercive environment. During this period, New Hampshire undertook a series of reforms to combat widespread vote buying and voter intimidation. In 1891, the State passed legislation requiring the Secretary of State to prepare ballots for state and federal elections. The State then passed a statute to forbid any voter from "allow[ing] his ballot to be seen by any person, with the intention of letting it be known how he is about to vote."

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The legislative history of the [2014] bill does not contain any corroborated evidence of vote buying or voter coercion in New Hampshire during the twentieth and twenty-first centuries. . . .

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The First Amendment, which applies to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." Standards to evaluate justifications by the state of a restriction on speech turn, inter alia, on whether the restriction focuses on content, that is, if it applies to "particular speech because of the topic discussed or the idea or message expressed." . . .

In contrast, content-neutral regulations require a lesser level of justification. These laws do not apply to speech based on or because of the content of what has been said, but instead "serve[] purposes unrelated to the content of expression." . . . Content-neutral restrictions are subject to intermediate scrutiny, which demands that the law be "narrowly tailored to serve a significant governmental interest." "[U]nlike a content-based restriction of speech, [a content-neutral regulation] 'need not be the least restrictive or least intrusive means of' serving the government's interests." *McCullen v. Coakley* (2014).

We reach the conclusion that the statute at issue here is facially unconstitutional even applying only intermediate scrutiny. . . .

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As the district court noted, the prevention of vote buying and voter coercion is unquestionably "compelling in the abstract." But intermediate scrutiny is not satisfied by the assertion of abstract interests. Broad prophylactic prohibitions that fail to "respond[] precisely to the substantive problem which legitimately concerns" the State cannot withstand intermediate scrutiny.

Digital photography, the internet, and social media are not unknown quantities—they have been ubiquitous for several election cycles, without being shown to have the effect of furthering vote buying or voter intimidation. As the plaintiffs note, "small cameras" and digital photography "have been in use for at least 15 years," and New Hampshire cannot identify a single complaint of vote buying or intimidation related to a voter's publishing a photograph of a marked ballot during that period. Indeed, Secretary Gardner has admitted that New Hampshire has not received any complaints of vote buying or voter intimidation since at least 1976, nor has he pointed to any such incidents since the nineteenth century. "[T]he government's burden is not met when a 'State offer[s] no evidence or anecdotes in support of its restriction.'"

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New Hampshire has "too readily forgone options that could serve its interests just as well, without substantially burdening" legitimate political speech. At least two different reasons show that New Hampshire has not attempted to tailor its solution to the potential problem it perceives. First, the prohibition on ballot selfies reaches and curtails the speech rights of all voters, not just those motivated to cast a particular vote for illegal reasons. New Hampshire does so in the name of trying to prevent a much smaller hypothetical pool of voters who, New Hampshire fears, may try to sell their votes. New Hampshire admits that no such vote-selling market has in fact emerged. And to the extent that the State hypothesizes this will make intimidation of some voters more likely, that is no reason to infringe on the rights of all voters.

Second, the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified. . . . New Hampshire suggests that it has no criminal statute preventing a voter from selling votes. That can be easily remedied without the far reach of this statute. The State may outlaw coercion or the buying or selling of votes without the need for this prohibition.

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There are strong First Amendment interests held by the voters in the speech that this amendment prohibits. As the Supreme Court has said, "[t]he use of illustrations or pictures . . . serves important communicative functions: it attracts the attention of the audience to the [speaker's] message, and it may also serve to impart information directly."

The restriction affects voters who are engaged in core political speech, an area highly protected by the First Amendment. As amici point out, there is an increased use of social media and ballot selfies in particular in service of political speech by voters. A ban on ballot selfies would suppress a large swath of political speech, which "occupies the core of the protection afforded by the First Amendment." . . . Ballot selfies have taken on a special communicative value: they both express support for a candidate and communicate that the voter has in fact given his or her vote to that candidate.

New Hampshire may not impose such a broad restriction on speech by banning ballot selfies in order to combat an unsubstantiated and hypothetical danger. We repeat the old adage: "a picture is worth a thousand words."

Affirmed.