

2014

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Lisa Marshall Manheim

*University of Washington School of Law*

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## Recommended Citation

Lisa Marshall Manheim, *The Nudging Ballot? A Response to Professor Foley*, 89 N.Y.U. L. REV. ONLINE 65 (2014), <https://digitalcommons.law.uw.edu/faculty-articles/182>

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# THE NUDGING BALLOT? A RESPONSE TO PROFESSOR FOLEY

LISA MARSHALL MANHEIM\*

For those committed to greater “equality of campaign discourse,”<sup>1</sup> Edward Foley offers a shrewd proposal: Stop trying to limit speech in preexisting forums. The Supreme Court simply won’t allow it. Instead, Professor Foley suggests, create new forums—forums that even the Supreme Court is likely to concede may be subject to equality-promoting measures—and tailor them as needed. For Professor Foley, the first place to turn is the ballot. The state could transform that space from what it is now (according to the Supreme Court, a state-controlled tool for electing candidates, not a “forum for political expression”)<sup>2</sup> into a digitized forum for speech. By analogy to the broadcasting precedents,<sup>3</sup> Professor Foley argues, the government would be free to set the terms of the debate.

Professor Foley’s central insight is powerful, and his turn to the ballot both thought-provoking and creative. Though the Supreme Court has repeatedly expressed its aversion to the government interjecting itself “into the debate over who should govern,”<sup>4</sup> the implementation of a “speaking ballot” seemingly would have a stronger case for constitutionality under current doctrine than do many of the existing, beleaguered restrictions on campaign-related speech.<sup>5</sup> Moreover, the speaking ballot appears to have the potential

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\* Copyright © 2014 by Lisa Marshall Manheim, Assistant Professor, University of Washington School of Law. I am deeply grateful to Ned Foley for the opportunity to join this debate and also to the Brennan Center for hosting the conference that inspired this symposium. My gratitude extends, in addition, to Kate Andrias, Ryan Calo, Ron Collins, Johanna Kalb, Liz Porter, and Zahr Said for their insights regarding this response.

<sup>1</sup> Edward B. Foley, *The Speaking Ballot: A New Way to Foster Equality of Campaign Discourse*, 89 N.Y.U. L. REV. ONLINE 52 (2014).

<sup>2</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (“Ballots serve primarily to elect candidates, not as forums for political expression.”); see also *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 461 (2008) (Roberts, C.J., concurring) (stating that the Court never has considered the ballot a public forum).

<sup>3</sup> See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (upholding limits on participation in publicly broadcasted candidate debate).

<sup>4</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (internal quotation marks omitted).

<sup>5</sup> Cf. *Forbes*, 523 U.S. at 676 (confirming, in the context of a state-owned public television broadcaster sponsoring a candidate debate, that reasonable, viewpoint-neutral exercises of the state actor’s discretion are constitutional). The Supreme Court also has

to influence elections.<sup>6</sup> It is rare, in the world of campaign-related speech, to encounter proposals for reform that enjoy both these qualities: the potential to make a difference and the ability to secure five votes from the Roberts Court. As a result, those committed to greater equality in the speech market are well advised to accept Professor Foley's inspired invitation to explore new speech forums. At the same time, ushering in a new era for ballots—transforming them from a utilitarian tool into a heavily regulated forum for speech—comes at a potentially high cost. While the speaking ballot may, in fact, affect elections, that influence may be due less to a flourishing of informed and reasoned debate and more to the exploitation of subtle forms of voter manipulation.

The speech of Professor Foley's proposed forum, which must compete with so many others in order to be effective, has a significant advantage: It is delivered via one of the most important and influential tools in a democracy. And that is the ballot.<sup>7</sup> As Professor Mary Beth Beazley has explained, when government actors design a ballot, they become, to quote Richard Thaler and Cass Sunstein, “choice architects,”<sup>8</sup> and, as such, “they must be aware that ‘small

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indicated, in a different context, that “last-minute campaigning” is more likely to be protected than prohibited by the Constitution. *Burson v. Freeman*, 504 U.S. 191, 217–18 (1992) (Stevens, J., dissenting); *see also* *Mills v. Alabama*, 384 U.S. 214, 220 (1966) (holding that a newspaper could not be barred from running an election-day editorial attempting to persuade readers how to vote). It nevertheless remains possible that some variation of Professor Foley's proposal, as implemented, could fall before a novel constitutional challenge, *cf. Wash. State Grange*, 552 U.S. at 465 (Scalia, J., dissenting) (acknowledging constitutional concerns that can arise in light of the “special role that a state-printed ballot plays in elections”); *id.* at 460 (Roberts, C.J., concurring) (“[W]hat makes the ballot ‘special’ is precisely the effect it has on voter impressions.”), particularly if future litigants were to fashion their lawsuit as an as-applied challenge, *cf. id.*; 552 U.S. 442 (2008) (rejecting a facial challenge to an allegedly confusing ballot format while acknowledging that a later as-applied challenge might be successful). Presumably, the strength of such a challenge would depend in part on how much control, and what type of control, the state had attempted to exercise over the speech contained in the ballot. *Cf. McCutcheon*, 134 S. Ct. at 1441–42 (articulating concerns over the Government “impermissibly inject[ing]” itself into “the debate over who should govern” and insisting that “those who govern should be the *last* people to help decide who *should* govern” (internal quotation marks omitted)).

<sup>6</sup> The speaking ballot may influence elections through the facilitation of speech, as Professor Foley so eloquently explains. *See* Foley, *supra* note 1, at 53. Yet, as discussed below, the adoption of a speaking ballot also may affect elections by increasing the opportunity for design-related nudging and manipulation.

<sup>7</sup> *See, e.g.,* E. Scott Adler & Thad E. Hall, *Ballots, Transparency, and Democracy*, 12 ELECTION L.J. 146, 148 (2013) (confirming that, in the transition away from the “vote market” that had dominated American politics prior to the late 1800s, the most important reforms involved ballot design and regulation).

<sup>8</sup> Mary Beth Beazley, *Ballot Design as Fail-Safe: An Ounce of Rotation Is Worth a Pound of Litigation*, 12 ELECTION L.J. 18, 19 (2013) (quoting RICHARD H. THALER &

and apparently insignificant details can have major impacts on people's behavior."<sup>9</sup> Professor Beazley discusses, for example, the errors that voters tend to make in response to particular ballot-design flaws, as well as the tendency of some voters to vote for whichever candidate happens to be listed first on the ballot.<sup>10</sup> Drawing on empirical research demonstrating the effect of such votes,<sup>11</sup> Professor Beazley's work helps to confirm the significance of each and every seemingly innocuous decision surrounding the design and implementation of any ballot.

For choice architects employed by a Secretary of State's office, the transition to a speaking ballot would introduce a host of new decision points. Must, for example, the state ensure that all videos load at the same speed? Presumably it must. But what if a state official slows down *all* load times after realizing that an opposition party's candidates have a particularly effective batch of videos in a given election? And there are, of course, many appearance-related options. Who, for example, chooses which photo or graphic will appear to announce each video? Particularly flattering (or unflattering) screenshots would have at least the potential to affect close elections.<sup>12</sup> What about timing? Would candidates be able to update videos as the election draws closer? Could a state change its rules on timing if some controversy emerged? The list of potentially consequential rules and decisions is as deep as the creativity of those seeking to exploit them. And they affect elections in ways that are normatively troubling. As the work of Professor Beazley and others has shown, these types of rules and decisions often prey on the tendency of individuals to make "predictable mistakes" in their interaction with visual information.<sup>13</sup>

It is into this sensitive area that Professor Foley proposes we introduce not only speech, but digital speech. This turn to digital

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CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (2008)); *see also id.* (explaining that the term "choice architects" describes individuals who "design the structures that people use to exercise a choice").

<sup>9</sup> Beazley, *supra* note 8, at 19 (quoting THALER & SUNSTEIN, *supra* note 8, at 3).

<sup>10</sup> Beazley, *supra* note 8, at 20–21. She terms these "position-influenced votes," defined as valid votes that were "influenced in some way by the position of particular candidates within each contest" on the ballot. *Id.* at 20.

<sup>11</sup> *See, e.g., id.* at 21 n.22–24 and accompanying text.

<sup>12</sup> This discussion triggers another line of concerns: how featuring a candidate's appearance so prominently on the ballot might affect electoral outcomes. *See, e.g.,* Carol K. Sigelman et al., *Gender, Physical Attractiveness, and Electability: An Experimental Investigation of Voter Biases*, 16 J. APPLIED SOC. PSYCHOL. 229 (1986) (analyzing the impact of perceived physical attractiveness on female political candidates).

<sup>13</sup> Beazley, *supra* note 8, at 29.

media is both timely and sensible, for the digitalization of campaign-related speech is already underway.<sup>14</sup> Yet the potential for manipulation is fast on its heels. Consider, for example, Jonathan Zittrain's description of an emerging phenomenon—which he terms “digital gerrymandering”<sup>15</sup>—that might be exploited to influence elections. Professor Zittrain points to a 2010 study in which researchers found they could influence voting behavior through simple tweaks to users' Facebook accounts—a link to a polling place, a button to click to indicate a user had voted, the selective display of particular friends' profiles. It is not hard to imagine the next step, as Professor Zittrain adeptly does: Simply limit this get-out-the-vote effort to those users whose political preferences appear to match the intermediary's, and—faster than a team of lawyers can attack a collection of hanging chads—an election starts swinging.

The potential for such influence may be concerning, but it is not surprising. Privacy scholars, such as my colleague Ryan Calo, have offered vivid accounts of the potential for “digital market manipulation,” where the “manipulation” in question refers to deliberate efforts to nudge individuals toward certain outcomes through the exploitation of irrational human tendencies.<sup>16</sup> So defined, digitally facilitated manipulation appears to be growing as quickly as the implementing technology will allow it. Website “morphing,” for example, uses digital data to match a particular individual with the advertising pitch most likely to persuade her to act—an implementation of so-called “persuasion profiling.”<sup>17</sup> While it may be impossible to pinpoint exactly why individuals tend to respond to such seemingly slight tweaks to an advertisement's messaging (text rather than images, or an appeal to popularity rather than some other frame), irrationality tells at least part of the tale; it is otherwise hard to understand, for example, how subtly blending a photograph of a politician with the photograph of a subject tends to make that subject

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<sup>14</sup> See, e.g., Jim Rutenberg, *Data You Can Believe in*, N.Y. TIMES, June 23, 2013 (Magazine), at 22 (describing how staffers used digital data, along with other resources, to develop highly effective marketing techniques for President Obama's reelection campaign).

<sup>15</sup> See Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 336 (2014), <http://harvardlawreview.org/2014/06/engineering-an-election/> (defining digital gerrymandering as the “selective presentation of information by an intermediary to meet its agenda rather than to serve its users”).

<sup>16</sup> Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1000–03 (2014). Professor Calo's article begins with the seminal work of Jon Hanson and Douglas Kysar before overlaying it with the prospect of systematic, digitally enabled personalization. *Id.*

<sup>17</sup> *Id.*

more inclined to trust the politician.<sup>18</sup>

Professor Foley's speaking ballot is, of course, not Facebook. And his calls for easily accessible campaign videos and mediated debates among candidates are a far cry from the intentionally intrusive, personalized attempts at digital manipulation that are beginning to emerge in the private sector. That said, even Professor Foley's more tempered proposal quickly leads to difficult questions related to privacy and manipulation—such as who, if anyone, might be entitled to access speaking-ballot metadata, which presumably would yield invaluable insight into how voters chose to interact, or decline to interact, with the relevant media and how that might have affected their votes. Moreover, it is not clear whether or how techniques that lead to nudging should be regulated in this context. At core, the purpose of the speaking ballot is not to facilitate weakly effective speech, but rather to facilitate speech that can compete with outside campaign discourse. And it is hard to compete when only the latter type of discourse can incorporate the most effective forms of nudging available.

In short, Professor Foley, through his call for the facilitation, rather than the limitation, of campaign-related speech, advances a powerful insight. And by combining the ballot with digital technology, he very well may have identified the rarest of creatures: a potentially effective and constitutionally permissible counterweight to other forms of campaign-related speech. The reform-minded nevertheless should tread carefully. "That the current information landscape has its distortions . . . is no reason to entertain the idea of adulterations from new quarters."<sup>19</sup>

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<sup>18</sup> For a discussion of a study that exposed participants to images of well-known politicians subtly blended with photographs of the participants themselves, see *id.*

<sup>19</sup> Zittrain, *supra* note 15, at 340–41 (footnote omitted).