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NOTE

Social Networking and Freedom of Speech: Not "Like" Old Times

Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012)

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I. INTRODUCTION

Facebook is a website that allows users to share photos, news, stories, and personal anecdotes from their daily lives in an easy to follow online community.[1] The website has developed a huge following and just recently reached the milestone of having over 1 billion users worldwide.[2] Each Facebook user has a "profile" that typically shares the user's name, a brief biographical background, pictures the user has uploaded to the site, a list of the user's Facebook friends, and a list of Facebook "pages" the user has "liked."[3] Unlike personal "profiles," Facebook "pages" are set up for various groups, such as businesses, organizations, religious groups, political groups, music groups, sports teams, and brands in order for them to connect with users and share that group's messages or simply represent their respective identities.[4]

With such a large amount of users logged on to Facebook at any given time, the website has become an extremely efficient way to communicate messages, both commercially and personally. Accordingly, the website has become one of the central means of conveying a message throughout the world. On average, Facebook processes 2.7 billion "likes," 300 million photo uploads, and 2.5 billion status updates every day.[5] As Facebook continues to

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1. Brief of Facebook, Inc. as Amicus Curiae in Support of Plaintiff-Appellant Daniel Ray carter, Jr. and in Support of Vacatur at 3, Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671) [hereinafter Facebook Amicus Brief], *available at* http://www.aclu.org/files/assets/bland_v._roberts_appeal_-__facebook_amicus _brief.pdf.

2. Aaron Smith, Laurie Segall & Stacy Cowley, *Facebook Reaches One Billion Users*, CNN MONEY (Oct. 4, 2012), http://money.cnn.com/2012/10/04/technology/facebook-billion-users/index.html?hpt=hp_bn5.

3. Facebook Amicus Brief, *supra* note 1, at 4.

4. *Id.*

5. Ashlee Vance, *Facebook: The Making of 1 Billion Users*, BUSINESSWEEK (Oct. 4, 2012), http://www.businessweek.com/articles/2012-10-04/facebook-the-making-of-1-billion-users#p2.

grow and provide an effective and efficient forum to present thoughts and ideas, it is essential that the courts protect these expressions of speech through the First Amendment.

In *Bland v. Roberts*, the United States District Court for the Eastern District of Virginia was presented with the issue of whether "liking" a page on Facebook is speech protectable by the First Amendment.[6] This Note argues that the court's holding, that "liking" something on Facebook is not worthy of First Amendment protection, is a disturbing result that endangers one of our most fundamental rights guaranteed by the Constitution. In Part II, this Note analyzes the facts and holding of *Bland v. Roberts*. Next, in Part III, this Note describes in detail how Facebook operates and explains the legal background of the first amendment and its interaction with online communication. Part IV examines the court's rationale in *Bland v. Roberts*. Lastly, Part V explains the flaws in the court's reasoning and provides suggestions to courts facing similar controversies in the future.

II. FACTS & HOLDING

Plaintiff Daniel Ray Carter, Jr., worked in the Hampton sheriff's office in Hampton, Virginia, as a sworn, uniformed deputy sheriff.[7] Defendant B.J. Roberts was the sheriff in that office.[8] In November 2009, Roberts was up for re-election for the sheriff position.[9] Jim Adams, former lieutenant colonel in the sheriff's department, opposed Roberts in the election.[10] Roberts won the election and subsequently decided not to reappoint Carter.[11] Carter alleged that in the months leading up to the election, Roberts learned that Carter expressed support for his opponent, Adams.[12] On March 4, 2011, Carter filed suit against Roberts "in his individual and official capacities" in the United States District Court for the Eastern District of Virginia alleging that Roberts violated his First Amendment rights by retaliating against him for supporting Adams in the election.[13]

Specifically, Carter alleged that Roberts retaliated against him for his expressions of support for Adams via Facebook.[14] Carter argued that this retaliation violated his right to free speech.[15] Carter claimed that he sent a message of support to Adams on his Facebook page and also "liked" Adams'

6. 857 F. Supp. 2d 599.
7. *Id.* at 601.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 602.
14. *Id.* at 602-03.
15. *Id.*

page.[16] Roberts conceded that he was aware of Carter's activity on his opponent's Facebook page.[17]

Roberts claimed that his failure to reappoint Carter after his re-election was not retaliatory in nature.[18] He asserted that his decision was because of Carter's "unsatisfactory work performance or for [Roberts'] belief that [Carter's] actions 'hindered the harmony and efficiency of the [o]ffice.'"[19] On December 9, 2011, Roberts moved for summary judgment arguing that Carter did not adequately allege a free speech violation under the Constitution, and alternatively that even if his speech was protected under the First Amendment, Carter failed to raise a genuine issue of material fact as to the retaliation claim.[20]

On April 24, 2012, the district court ruled in favor of Roberts' motion for summary judgment on all counts.[21] The court found Carter's evidence of his alleged statement of support to be insufficient to support his claim.[22] In regards to Carter's "like" of Adams' Facebook page, the court held that merely "liking" a Facebook page does not constitute a substantive statement worthy of First Amendment constitutional protection.[23]

III. LEGAL BACKGROUND

The First Amendment to the United States Constitution guarantees "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 redress of grievances."[24] Rights guaranteed under the First Amendment, and free speech specifically, have always been some of the most cherished rights offered under the Constitution.[25] However, despite the fundamental nature of the First Amendment, it is also the center of many dis-

16. *Id.* at 603.

17. *Id.*

18. *Id.* at 601-02.

19. *Id.* at 602.

20. *Id.* Furthermore, Roberts claimed he was entitled to qualified immunity in his individual capacity on all claims and sovereign immunity in his official capacity on all claims. *Id.*

21. *Id.* at 601.

22. *Id.* at 604.

23. *Id.* at 603.

24. U.S. CONST. amend. I.

25. In 1920, the Supreme Court stated, "[t]hat freedom of speech and of the press are elements of liberty all will acclaim. Indeed, they are so intimate to liberty in everyone's convictions – we may say feelings – that there is an instinctive and instant revolt from any limitation of them either by law or a charge under the law." Schaefer v. United States, 251 U.S. 466, 474 (1920).

putes and controversies.[26] Since the passage of the First Amendment, the Supreme Court of the United States has developed a rather complex set of rules and doctrines that have evolved over the last century to govern different modes of speech and expression.[27]

This Part will begin by describing in detail how Facebook operates. It will also summarize important cases that demonstrate how courts have attempted to reconcile the free speech doctrine with activity online. Next, this Part will briefly explore the difference between traditional pure speech and symbolic expression. Finally, this Part will discuss the rights to free speech provided to public employees.

A. Facebook

In order to have a better understanding of the legal issues at play in this particular case, it is important to fully understand how Facebook operates. When a user logs on to Facebook, he or she typically begins on the home page.[28] The home page is the starting point for Facebook and contains multiple links that allows users to navigate to different areas of the site.[29] Additionally, the home page contains the "News Feed," which is the primary place a user views and interacts with shared stories and news from his or her fellow Facebook friends or followed pages.[30] The user's News Feed is a customizable and continuously updated flow of posts made by the user's friends and selected pages.[31] Every time a user makes a comment or shares a story, it is placed in his or her friends' News Feeds for their viewing pleasure.[32]

An additional feature of the Facebook website is the "like" button, which is represented by a thumbs-up icon.[33] The "like" button is placed underneath many types of content on Facebook, including user comments and group pages.[34] By clicking the "like" button, the user generates a "like story" which is placed on that user's profile page and additionally could appear in friends' News Feed.[35] "For example, if Jane Smith [l]iked the UNICEF Facebook page, the statement 'Jane Smith likes UNICEF' would appear on her profile page along with the title of the [p]age and an icon selected by the

26. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 1:1 (West 2012).

27. Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1566 (2003) (reviewing ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Goeffrey R. Stone eds., 2003)).

28. Facebook Amicus Brief, *supra* note 1, at 5.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 6.

[p]age's administrator."[36] If a fellow user were to click on the title of the page or icon, it would bring him or her to that particular Facebook page just like a hyperlink.[37] When the "like [s]tory" is placed on the user's friends' News Feeds, it appears with that user's name and profile picture to clearly indicate who likes that particular page.[38]

With a more complete understanding of how Facebook operates, it will be easier for courts to determine what message a user is trying to send when he or she posts something on Facebook, including "liking" a page or story.

B. Free Speech on the Internet and Facebook

Today's Internet era ushers in many new questions concerning free speech. The Supreme Court of the United States must now determine what kind of Internet activity should be protected under the First Amendment. The Court has observed that "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."[39] All courts are going to be continuously challenged as the Internet era continues to change how people communicate their ideas to the world.

In 1997, *Reno v. ACLU*[40] answered an important inquiry – whether speech on the Internet should be viewed just like any other speech covered under the First Amendment. The Supreme Court of the United States ruled that speech conducted on the Internet should be treated no differently than any other, more traditional avenues of speech.[41] Years later the Court re-emphasized the importance of communications on the Internet and its subsequent protection stating, "[t]he [i]nternet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[42]

The decision in *Reno* has paved the way for many activities on the Internet to be deemed worthy of First Amendment protection by lower courts. The Second Circuit in *Universal City Studios v. Corley* held that posting a hyperlink online was speech protectable under free speech principles.[43] *T.V. v. Smith-Green Community School Corporation* held that the posting of photos to Facebook was protected speech.[44] *J.C. v. Beverly Hills Unified School*

36. *Id.*
37. *Id.*
38. *Id.*
39. City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2629 (2010).
40. 521 U.S. 844 (1997).
41. *Id.* at 870.
42. Ashcroft v. Am. Civ. Liberties Union, 535 U.S. 564, 566 (2002) (quoting 47 U.S.C. § 230(a)(3) (Supp. V 1994)) (internal quotation marks omitted).
43. 273 F.3d 429, 446 (2d Cir. 2001).
44. 807 F. Supp. 2d 767, 776 (N.D. Ind. 2011).

District similarly held that uploading a video to YouTube qualified as speech.[45]

Facebook played a central role in two other recently decided cases regarding free speech on the Internet. In *Mattingly v. Milligan*,[46] Mattingly posted comments on her Facebook page referring directly to the firing of various employees.[47] The United States District Court for the Eastern District of Arkansas ruled that Mattingly's post was an expression of constitutionally protected speech.[48] Similarly, in *Gresham v. City of Atlanta*,[49] the district court ruled that a plaintiff's post on Facebook describing the arrest of a police officer's son for fraud should be considered speech on a matter of public concern.[50]

While *Mattingly* and *Gresham* illustrate that free speech protection is available to Facebook users for actual statements made on the site, the cases do not address the central issue in *Bland v. Roberts*, which asks whether "liking" something on Facebook can be protected under the First Amendment.[51]

C. Pure Speech Versus Symbolic Expression

This subsection will briefly discuss the differences between the protections offered for traditional, or pure speech, and speech that falls under the category of symbolic expression. The distinctions are important because activity on the Internet may fall under either category of speech, each of which has a different set of rules a court must follow.

The most basic and straightforward application of free speech occurs in cases involving pure speech. Pure speech is entitled to "comprehensive protection."[52] This means the government cannot regulate pure speech based on the speech's content.[53] For example, the government could not make a law outlawing books on how to legally avoid paying taxes.[54] Pure speech generally encompasses words that are spoken or written, including "books, magazines, newspapers, radio, television, [and] public speeches."[55]

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45. 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010).

46. Mattingly v. Milligan, No. 4:11 CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).

47. *Id.* at *2-3.

48. *Id.* at *3-4.

49. Gresham v. City of Atlanta, No. 1:10-CV-1301-RWS, 2011 WL 4601020 (N.D. Ga. Sept. 30, 2011).

50. *Id.* at *2.

51. Bland v. Roberts, 857 F. Supp. 2d 599, 603-04 (E.D. Va. 2012).

52. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

53. *Free Speech (Supreme Court Drama)*, ENOTES, http://www.enotes.com/free-speech-reference/freedom-speech-299523 (last visited Feb. 1, 2013).

54. *Id.*

55. *Id.*

One area of pure speech that has been particularly well protected is politically oriented speech. In *McIntyre v. Ohio Elections Commission*,[56] the Supreme Court of the United States reversed a fine imposed on a pamphleteer who distributed an anonymous pamphlet opposing a proposed school tax levy.[57] The Court reasoned:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[58]

The Court recently reiterated this view in the landmark case *Citizens United v. Federal Elections Commission*,[59] by stating political speech "is central to the meaning and purpose of the First Amendment."[60]

The Supreme Court of the United States has also long held that putting up a political sign on a private residence warrants protection under the free speech doctrine as pure speech.[61] In *City of Ladue v. Gilleo*, the Court stated that when a citizen places a sign at a residence, it creates "a message quite distinct from placing the same sign someplace else . . . [S]uch signs provide information about the identity of the 'speaker.'"[62] In addition, "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."[63]

Beyond pure speech, the First Amendment free speech doctrine also protects symbolic expression.[64] The Supreme Court of the United States in *Texas v. Johnson* stated, "[t]he First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."[65] Symbolic expression encompasses activities such as gestures and conduct.[66] For instance, the Supreme Court in

56. 514 U.S. 334 (1995).

57. *Id.* at 357.

58. *Id.* at 346 (quoting Buckley v. Valeo, 424 U.S. 1, 14-15 (1976)) (internal quotation marks omitted).

59. 130 S. Ct. 876 (2010).

60. *Id.* at 892.

61. *See* City of Ladue v. Gilleo, 512 U.S. 43, 54-55 (1994).

62. *Id.* at 56.

63. *Id.* at 57.

64. Texas v. Johnson, 491 U.S. 397, 400 (1989).

65. *Id.* at 404.

66. James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 2 (2008).

West Virginia State Board of Education v. Barnette[67] held that refusing to recite the pledge of allegiance was protected by free speech.[68] The Court went on to say, "[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."[69]

Over the years, the Supreme Court of the United States has demonstrated the breadth of activities that may constitute protected symbolic expression. In *Tinker v. Des Moines Independent Community School District*,[70] the Court held that wearing black armbands was symbolic speech "closely akin to 'pure speech.'"[71] In *Schacht v. United States*,[72] the wearing of a military uniform in an attempt to criticize American involvement in Vietnam was held as protected speech.[73] A sit-in by African Americans in a whites-only area to protest segregation was held to be symbolic speech in *Brown v. Louisiana*.[74] *Texas v. Johnson* held that the burning of the American flag was protected as symbolic free speech as well.[75]

The problem that arises for courts is deciding what type of behavior and activity is truly worthy of being protected as symbolic expression. As the Supreme Court of the United States has pointed out, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[76] The modern test for what constitutes symbolic expression is derived from *Spence v. Washington*.[77] In protest of the United States' invasion of Cambodia and the killings at Kent State University, Spence hung an American flag upside-down from his residence with a peace sign affixed to the flag.[78] Spence's stated purpose was to show that America stood for peace instead of war and violence.[79] He was convicted under a Washington state statute that penalized the improper display of an American flag.[80] The Supreme Court overturned the conviction and found that Spence had engaged in symbolic expression worthy of First Amendment protection.[81]

67. 319 U.S. 624 (1943).
68. *Id.* at 642.
69. *Id.* at 632.
70. 393 U.S. 503 (1969).
71. *Id.* at 505-06.
72. 398 U.S. 58 (1970).
73. *See generally id.*
74. 383 U.S. 131, 141-42 (1966).
75. 491 U.S. 397, 405-06 (1989).
76. City of Dall. v. Stanglin, 490 U.S. 19, 25 (1989).
77. 418 U.S. 405 (1974).
78. *Id.* at 405, 407-08.
79. *Id.* at 408.
80. *Id.* at 406-07.
81. *Id.* at 415.

The Court defined symbolic speech as being "imbued with elements of communication" with "a particularized message" as to which "the likelihood was great that the message would be understood by those who viewed it."[82]

D. Speech by Public Employees

Regardless of whether the speech being analyzed is pure speech or symbolic expression, the context of where the speech is delivered is also of great importance.[83] Otherwise protectable speech may not receive protection if the speech occurs in a place where the government has a sufficient interest in regulating that speech, such as a public school or public place of employment.

Pickering v. Board of Education[84] developed special rules about what speech can be protected in the case of public employees.[85] In *Pickering*, a teacher made comments to a newspaper criticizing the school administration's proposals to raise new revenues for the school.[86] As a result, she was fired.[87] The Illinois Supreme Court upheld the teacher's termination, stating that the comments were detrimental to the best interests of the school.[88] The Supreme Court of the United States disagreed, concluding that public employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."[89] The Court stated that these First Amendment rights can be defeated if they are outweighed by the government's interests, as an employer, in the operation of the public workplace and the efficient delivery of public services by public employees.[90] However, the public interest in "having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment – is . . . great . . . ."[91]

The Supreme Court has defined public concern as speech that is the "subject of legitimate news interest" and speech that is the "subject of general interest and of value and concern to the public . . . ."[92] The Ninth Circuit Court of Appeals has added, "[t]o deserve First Amendment protection, it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested."[93] One such topic that has

82. *Id.* at 409-11.
83. *Id.* at 410.
84. 391 U.S. 563 (1995).
85. *See generally id.*
86. *Id.* at 564.
87. *Id.*
88. *Id.* at 565.
89. *Id.* at 568.
90. *Id.*
91. *Id.* at 573.
92. City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004).
93. Roe v. City of S.F., 109 F.3d 578, 585 (9th Cir. 1997); *see also* Dishnow v. Sch. Dist., 77 F.3d 194, 197 (7th Cir. 1996).

consistently been held to be a matter of public concern is a public employee's speech on the merits of a candidate for public office.[94] Courts have even gone so far as to recognize that public employees are often in the best position to make comments on political candidates.[95]

The Fourth Circuit uses the test developed in *McVey v. Stacey*, its version of the *Pickering* test, to determine if speech regards a matter of public concern.[96] *McVey* established that a public employee must show:

> (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking . . . outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's termination decision.[97]

Public employee speech on matters of public concern is subject to exception.[98] In *Garcetti v. Ceballos*, a deputy district attorney claimed he was retaliated against for writing his opinions to his superiors on what he perceived to be an inaccurate warrant being used in a prosecution by his office.[99] The appellate court held that governmental misconduct, such as Ceballos alleged, was "inherently a matter of public concern" and protected free speech.[100] The Supreme Court of the United States disagreed, noting that the appellate court did not consider whether Ceballos' speech was made in his capacity as a private citizen or in his role as an employee.[101] The Court stated that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursu-

94. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983) (characterizing issues of public concern as subjects "relating to any matter of political, social, or other concern to the community"); Conley v. Elkton, 190 Fed. App'x 246, 252 (4th Cir. 2006) (unpublished) (discussing comment by deputy to bystander concerning whom he should vote for Sheriff was a matter of public concern); Orga v. Williams, 996 F.2d 1211 (4th Cir. 1993) (unpublished) (stating speech regarding who was most qualified to be Sheriff is undoubtedly protected).

95. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions"); Sanjour v. EPA, 56 F.3d 85, 94 (D.C. Cir. 1995) ("[G]overnment employees are in a position to offer the public unique insights into the workings of government generally and their areas of specialization in particular.").

96. McVey v. Stacy, 157 F.3d 271 (4th Cir. 1998).

97. *Id.* at 277-78.

98. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

99. *Id.* at 414-15.

100. *Id.* at 416.

101. *Id.*

ant to an employment responsibility."[102] The Court found that a part of Ceballos' duties as a calendar deputy was to exercise "supervisory responsibilities over other lawyers."[103] Accordingly, his memo alleging misconduct was made under his role as an employee and not as a private citizen and thus not worthy of First Amendment protection.[104]

IV. INSTANT DECISION

In *Bland v. Roberts*, the court began its analysis by determining the standard Carter needed to prove in order to recover for his freedom of speech retaliation claim.[105] In order to obtain relief, Carter had to satisfy the test developed in *McVey v. Stacey*.[106] The court stated that if the first prong of the *McVey* test was not satisfied,[107] the remaining prongs did not need to be analyzed, as there would be no speech worthy of protection.[108]

The court ruled that Carter failed to satisfy the first prong of the *McVey* test, meaning the court did not believe that Carter had engaged in speech as a citizen on a matter of public concern.[109] While the court acknowledged that Roberts was aware of Carter's "like" of his opponents Facebook page, the court found it to be irrelevant.[110] Since the court did not consider Carter's "like" to be speech, Roberts' admission of his awareness of the "like" had no bearing on the analysis.[111] The court concluded "that merely 'liking' a Facebook page is insufficient speech to merit constitutional protection."[112]

Citing *Mattingly v. Milligan* and *Gresham v. City of Atlanta*, the court acknowledged that other courts have found certain activity on Facebook to be constitutionally protected speech.[113] The court distinguished the current fact pattern because "[b]oth *Gresham* and *Mattingly* involved actual statements."[114] The court claimed that "liking" a Facebook page does not amount

102. *Id.* (internal quotation marks omitted).
103. *Id.* at 413.
104. *Id.* at 421.
105. 857 F. Supp. 2d 599, 602-03 (E.D. Va. 2012).
106. *Id.*
107. The first prong is "whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest." McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998); *see also supra* Part III.C.
108. *Bland*, 857 F. Supp. 2d at 603.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 603-04. For more detail on these cases, see *supra* Part III.A.
114. *Bland*, 857 F. Supp. 2d at 604.

to an actual statement such as those protected in *Mattingly* and *Gresham*.[115] The court stated:

> Simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection. The [c]ourt will not attempt to infer the actual content of Carter's posts from one click of a button on Adams' Facebook page. For the [c]ourt to assume that the [p]laintiff[] made some specific statement without evidence of such statements is improper.[116]

Because the court ruled that Carter's "like" was not sufficient speech to warrant protection under the First Amendment, the court granted Roberts' motion for summary judgment.[117]

V. COMMENT

The district court's curtailed and conclusory analysis of the First Amendment issue in *Bland v. Roberts* did not adequately represent the decades of free speech precedent set by the Supreme Court of the United States. Carter's Internet activity should have been protected under the free speech doctrine just like other forms of pure speech.[118] Even if the court were unwilling to classify "liking" something on Facebook as pure speech, Carter's activity surely then should have fallen under the category of symbolic expression.[119] In today's society, as the Internet continues to expand into almost every facet of our daily lives, judicial decisions that fail to comprehend the true nature of Internet activity pose a serious threat to the liberties guaranteed by the First Amendment.

This Part will begin by pointing out the flawed reasoning of the court, which led it to a holding that cannot be sustained under the current interpretation of the free speech doctrine. This Part will conclude with what conflicts courts should expect going forward in the ever growing Internet era as well as a guide of how to best handle these conflicts.

115. *See id.* Interestingly, the court did not engage in any discussion of whether the "like" could qualify as an act of symbolic expression because the plaintiffs did not "sufficiently allege[] that they engaged in expressive speech." *Id.* at 602.

116. *Id.* at 604.

117. *Id.* at 610.

118. *See supra* Part III.C.

119. *See supra* Part III.C.

A. The Court's Misguided Opinion

The court made two mistakes in analyzing whether a "like" should be protected under the free speech doctrine. First, the court mistakenly concluded that "liking" a page on Facebook does not amount to an actual statement. Second, the court failed to consider if Carter's Facebook activity constituted symbolic expression.

1. Failing to Recognize a "Like" as a Statement

With the basic understanding of how Facebook operates, it is easy to see the flaws in the court's opinion. The court claimed that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection."[120] Furthermore, the court distinguished this case from other Facebook cases where free speech protection was granted because those cases "involved actual statements."[121] The court was simply wrong to view "liking" a political candidate's Facebook page as not engaging in an actual statement. When Carter "liked" Jim Adams' Facebook page, the "like [s]tory" was published on Carter's Facebook profile page.[122] This ensured that any Facebook user who visited Carter's profile page would see the words "Daniel Carter likes Jim Adams for Hampton Sheriff."[123] Furthermore, by "liking" Adams' page, Carter also ensured that an announcement would appear on his friends' News Feeds comprised of the same words that appeared on his profile page, and would even be accompanied by Carter's picture to clearly identify the source of the words.[124]

The court further justified its view that Carter's activity was not an actual statement by stating, "[t]he [c]ourt will not attempt to infer the actual content of Carter's posts from one click of a button on Adams' Facebook page. For the [c]ourt to assume that the [p]laintiff[] made some specific statement without evidence of such statements is improper."[125] The problem with this reasoning, however, is that the court simply did not have to make any inferences nor did it lack evidence of the content of Carter's statement. As explained above, the actual content of Carter's "like" was the statement "Daniel Carter likes Jim Adams for Hampton Sheriff." The court did not need to make any further inferences to decipher Carter's speech. It should

120. *Bland*, 857 F. Supp. 2d at 603.

121. *Id.* at 604.

122. *See supra* notes 33-38 and accompanying text.

123. *See supra* notes 33-38 and accompanying text. "Jim Adams for Hampton Sheriff" was the title of the Jim Adams' Facebook Page. *Jim Adams for Hampton Sheriff*, FACEBOOK, http://www.facebook.com/pages/Jim-Adams-for-Hampton-Sheriff/101482822031 (last visited Feb. 8, 2013).

124. *See supra* notes 33-38 and accompanying text.

125. *Bland*, 857 F. Supp. 2d at 604.

not matter that Carter accomplished making an actual statement through one click of the button rather than through multiple keystrokes; the message was the same. Just because Carter accomplished his message in a more efficient manner does not mean that he did not engage in speech worthy of protection.

If the court had recognized the fact that Carter generated an actual statement by clicking the "like" button, then the only rational holding would have been to grant free speech protection to the "like" as a statement of pure speech. Carter's endorsement of a political candidate on Facebook through "liking" the candidate's page should be treated no differently than if he had put up a sign on his front yard stating, "I like Jim Adams for Hampton Sheriff."

As previously above, the Supreme Court of the United States has held that putting a political sign at a private residence warrants protection.[126] The Court's rationale for recognizing free speech for political residential signs should apply with equal strength to "liking" a political candidate's Facebook page. "Liking" a Facebook page provides information about the identity of the speaker since the content of the speech is located on that user's own profile and is even accompanied by a picture of the speaker.[127] Additionally, there is absolutely no cost associated with "liking" a page on Facebook and is ultimately even more convenient than putting up a sign in the front yard or window. "Liking" a page on Facebook should therefore be treated just as favorably by the courts as putting up a sign on residential property.

In its analysis, the court also proclaimed "[s]imply liking a Facebook page . . . is not the kind of substantive statement that has previously warranted constitutional protection."[128] The court here was again mistaken as the Supreme Court of the United States has found that the First Amendment is not limited to "substantive statements."[129] In fact, the Court has expressly stated that a "succinctly articulable message is not a condition of constitutional protection."[130] Additionally, political endorsements need not be elabo-

126. *See supra* notes 61-63 and accompanying text.

127. *See supra* notes 33-38 and accompanying text.

128. *Bland*, 857 F. Supp. 2d at 604.

129. *See* United States v. Alvarez, 132 S. Ct. 2537, 2545-47 (2012) (rejecting argument that the limited value of false statements exempts them from First Amendment protection); United States v. Stevens, 130 S. Ct. 1577, 1591 (2010) ("Most of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation." (emphasis omitted) (internal quotation marks omitted)); IMS Health Inc. v. Sorrell, 630 F.3d 263, 271-72 (2d Cir. 2010) ("The First Amendment protects '[e]ven dry information, devoid of advocacy, political relevance, or artistic expression.'" (alteration in original) (quoting Universal City Studios, Inc. v. Corley, 273 F.3d 429, 446 (2d Cir. 2001))), *aff'd*, 131 S. Ct. 2653 (2011).

130. Hurley v. Irish-Am. Gay, Lesbian & Bi-Sexual Grp. of Bos., 515 U.S. 557, 569 (1995).

rate or detailed in order to constitute speech.[131] As *City of Ladue* demonstrates, a simple sign endorsing a preferred candidate is enough.[132] Carter's "like" of Adams' Facebook page therefore is indeed the kind of "substantive statement" that has previously been granted protection.

2. Failing to Consider Symbolic Expression

Even if the court refuses to acknowledge that "liking" a Facebook page comprises pure speech, the activity should fall under the umbrella of symbolic expression. Surprisingly, nowhere in the opinion did the court even consider Carter's actions as symbolic expression. As previously noted, the free speech doctrine goes beyond the written and spoken word and encompasses many other human actions.[133] Undoubtedly, Carter's "like" of Adams' Facebook page should constitute symbolic expression. Clearly, the intent of Carter's activity was to convey the particularized message that he supported Adams for Hampton sheriff.

Furthermore, Facebook users clearly understand the meaning of clicking the "like" button.[134] Even non-Facebook users would have an easy time understanding the message conveyed by "liking" a political candidate's Facebook page. The word "like" is used proficiently in the English language and conveys the exact same meaning in this context as its common everyday usage. Finally, "liking" something on Facebook is also accompanied with the universal sign of approval – the thumbs-up symbol. Thus, even if the court was unwilling to say Carter engaged in actual pure speech, his activity still conveyed an actual message that was understandable to the public and should therefore have been covered by the free speech doctrine as symbolic expression.

B. Going Forward

Currently, three out of every four Americans use some sort of social media.[135] This percentage should continue to rise as the Internet continues to evolve. As mentioned above, this court's interpretation of the First Amendment and how the doctrine relates to the online community presents great concerns. It is essential that courts in the future spend greater effort in fully understanding how United States citizens use the Internet in communicating

131. *See supra* notes 61-63 and accompanying text.

132. City of Ladue v. Gilleo*,* 512 U.S. 43, 54-55 (1994).

133. *See supra* Part III.C.

134. Every minute there are over 300,000 "likes" on Facebook. *One Minute on Facebook*, TIME, http://www.time.com/time/video/player/0,32068,711054024001_2037229,00.html (last visited Feb. 15, 2013).

135. Ethan Zelizer, *Embracing and Controlling Social Media in the Workplace*, CBA REC., Nov. 2010, at 52, 53.

ideas instead of reaching conclusory decisions such as in the instant decision. The judicial system should have ample opportunities to explore this topic in future decisions as free speech issues relating to Internet activity will doubtlessly continue to fill up dockets.

Incidents involving political campaigns on social media websites and free speech, such as the conflict between Carter and Roberts, are bound to arise. In 2006, Facebook for the first time allowed candidates to create campaign pages dedicated to rally support for his or her election.[136] Those pages ended up playing a significant role in congressional elections and in the presidential election in 2008.[137] During the 2012 presidential campaign, candidates Barack Obama and Mitt Romney both used Facebook applications and pages to gather support.[138] Social media websites give political candidates the ability to reach millions of voters they never had access to in the past.[139] With the increased amount of campaigning on sites such as Facebook, speech commenting on these campaigns will continue to rise online as well. This online political commentary deserves the same protection as has been given traditional political speech.[140]

The problem will lie in how Internet users effectuate their political message on the Internet. Simple typed messages on social media websites should not present courts many challenges in applying the doctrine of free speech.[141] But more nuanced mechanisms, such as "liking" something on Facebook, to convey a political message may present more of a problem for the courts. To make matters even more complicated, technology is rapidly changing and new methods for conveying a message will continually be developed. For instance, along with the "like" button, Facebook also has the option to "share" a story.[142] For example, if Carter saw an article online entitled "Why You Should Oppose Sherriff Roberts for Re-election", he could share it with his Facebook friends by clicking the "share" button. When this happens, Facebook would post on Carter's profile page and in his friends' News Feeds the words "Carter shared the article '[W]hy You Should Oppose Sheriff Roberts for Re-election." While "sharing" a story on Facebook seems similar to "liking" a story on Facebook, the latter seems to be speech comprised of part

136. Facebook Amicus Brief, *supra* note 1, at 12.

137. *Id.*; *see* Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 659, 659 n.79 (2009).

138. Sara Burnett, *GOP, Democrats Take Political Scrap Online*, THE DENVER POST, May 28, 2012, http://www.denverpost.com/politics/ci_20724874/gop-.

139. *See id.*

140. *See supra* notes 40-42 and accompanying text.

141. *See* Mattingly v. Milligan, No. 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011); Gresham v. City of Atlanta, No. 1:10-CV-1301-RWS, 2011 WL 4601020 (N.D. Ga. Sept. 30, 2011).

142. *See How Sharing Works*, FACEBOOK, https://www.facebook.com/about/sharing (last visited Feb. 15, 2013).

advocacy and part information sharing, while the former is simply information sharing. Should the two activities receive the same treatment?[143]

Even more mind boggling, Facebook recently developed technology that automatically posts in a user's friends' News Feeds whenever the user read an article or watched a video online without ever having to click a "like" or "share" button.[144] For example, if Carter read a *New York Times* article online entitled "Why Sheriff Roberts is Evil," Facebook would post on Carter's profile page and in his friends' News Feeds, "Carter read 'Why Sheriff Roberts is Evil.'" Should this sort of activity be given free speech protection? The message delivered by this activity may be less clear to the public as the previous example. Should a court assume that Carter was making some sort of conveyable message just because he read an article online?

In the imminent future, many challenging Internet free speech issues will be presented to courts. The proper first step for any court presented with such a challenge should be to fully comprehend the Internet activity being scrutinized before trying to apply the appropriate free speech principles. Without fully understanding what the citizen actually did on the Internet, and the motivation and intent behind that particular activity, it is almost impossible for a court to correctly conduct the proper First Amendment analysis.[145] This type of misunderstanding is what led an erroneous holding in the instant decision.

VI. CONCLUSION

The First Amendment doctrine of free speech is a bedrock principle in the United States. Free speech is one of the core liberties that underlies our democracy and protects against the tyranny of an overreaching government, and as such, deserves the utmost protection. If followed, the court's holding in *Bland v. Roberts* endangers the decades of precedent established by the Supreme Court of the United States and clouds the future of free speech in this country.

The court failed to comprehend that activity on the Internet, such as "liking" a page on Facebook, is simply a new means for people to communicate ideas in an efficient and effective manner. Internet expression and speech deserve the same treatment by the courts as more traditional avenues of speech. It should not matter how a person accomplishes the communication of a message; be it through oral speech on a street corner, a book printed

143. Sharing a story on Facebook appears strikingly similar to posting a hyperlink online which the court has deemed constitutional in *Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 449, 457-58 (2d Cir. 2001).

144. Burnett, *supra* note 138.

145. This responsibility should be even more vital for an attorney representing a client claiming free speech as a defense. A zealous advocate should not leave the Court in a position to misunderstand the online expressions of his or her client.

on Gutenberg's printing press, a set of moving images shot through a film recorder, a symbol flown from a window, or a message sent through the click of a mouse. If a person is communicating an idea that others will comprehend, it deserves First Amendment protection. It is impossible to predict what new technologies the future will bring, but we know for certain that methods we use to communicate will continually evolve just as they have for thousands of years. If courts are unwilling to adapt to these changes, then we risk losing one of our most cherished freedoms.