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## Election Silence: Revisiting Mills v. Alabama in the Modern Context

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## Election Silence: Revisiting *Mills v. Alabama* in the Modern Context

### Cover Page Footnote

The author would like to thank Professor Chris Roederer for his expertise in exploring the nuances of First Amendment law. The author would also like to thank his family—without their support, love, and dedication, none of this would have been possible.

## COMMENT:

### ELECTION SILENCE: REVISITING *MILLS V. ALABAMA* IN THE MODERN CONTEXT

*Nicholas E. Petrosky\**

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#### I. INTRODUCTION

The future is bringing drastic changes to our elections. Whether hidden interference from foreign states, sudden disruption from a global pandemic, or excessive influence from campaigns whose war chests grow ever larger, elections are no longer the same.<sup>1</sup> In this increasingly

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\* J.D. Candidate 2021, University of Dayton School of Law. The author would like to thank Professor Chris Roederer for his expertise in exploring the nuances of First Amendment law. The author would also like to thank his family—without their support, love, and dedication, none of this would have been possible.

<sup>1</sup> See generally ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019); *Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by COVID-19*, PEW RESEARCH CENTER (April 28, 2020),

polarized political environment, the stakes grow ever higher. The myriad of voices and the numerous ways they are communicated are arguably beginning to overcome voter protections granted by existing law. Modern technology is beginning to cause problems for the American electorate, namely, undue influence on voters or outright voter suppression.<sup>2</sup>

As these new problems arise, new laws need to be enacted to address them. Such laws can be tricky to craft because the solution to these problems lies at the intersection of two fundamental pillars of our country: the right to free speech and the right to vote.<sup>3</sup> On one hand is a robust body of law surrounding the First Amendment, and on the other is the very substance of the American democratic model.<sup>4</sup> To detract from one is to damage the other; restricting free speech may lead to diminished engagement in the democratic process, whereas failing to protect the right to vote may lead to a decreased ability to express one's opinions.<sup>5</sup> A balance must be struck between the two, one that steadfastly guards our First Amendment rights while also ensuring that we can freely exercise our right to vote in a meaningful way to our country.<sup>6</sup>

In 1992, *Burson v. Freeman* represented a new development in defending voters' rights.<sup>7</sup> The Supreme Court recognized that voter protections could sometimes supersede First Amendment concerns if circumstances are compelling enough to warrant them, which was an expansion of doctrine from the earlier *Mills v. Alabama* decision that had effectively rejected any attempt to regulate election speech.<sup>8</sup> The Supreme Court in *Burson* allowed states to regulate speech "in and around the polls," an area left open to regulation by *Mills*.<sup>9</sup> It approved of a state statute to restrict campaign speech within 100 feet of the polling place, which served to protect voters from intimidation efforts by overzealous advocates.<sup>10</sup> These decisions might have been appropriate for an earlier time in 1966, or just at the start of the internet in 1992 when the vast majority of voting was

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<https://www.pewresearch.org/politics/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19>; Zachary Albert, *Trends in Campaign Financing, 1980-2016*, REPORT FOR THE CAMPAIGN FINANCE TASK FORCE (Oct. 12, 2017), <https://bipartisanpolicy.org/wp-content/uploads/2019/05/Trends-in-Campaign-Financing-1980-2016.-Zachary-Albert.pdf>.

<sup>2</sup> See generally Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211 (2017); Kevin Roose, *Misinformation Peddlers Start Early on Election Day*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/11/03/technology/misinformation-peddlers-start-early-on-election-day.html>.

<sup>3</sup> Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 254 (2004).

<sup>4</sup> *Id.*

<sup>5</sup> Richard A. Schurr, *Burson v. Freeman: Where the Right to Vote Intersects with the Freedom to Speak*, 15 WHITTIER L. REV. 869, 895 (1994).

<sup>6</sup> *Id.*

<sup>7</sup> See generally *Burson v. Freeman*, 504 U.S. 191 (1992).

<sup>8</sup> *Id.* at 193; 384 U.S. 214, 220 (1966).

<sup>9</sup> *Burson*, 504 U.S. at 193 (citing *Mills*, 384 U.S. at 218).

<sup>10</sup> *Id.* at 209–210.

still done at the ballot box on Election Day.<sup>11</sup> However, in today's increasingly digital age, *Burson* may no longer be sufficient, and *Mills v. Alabama* needs to be revisited.

Indeed, the voting processes across the country have changed, increasing voter access, expanding mail-in ballots, and even introducing online voting in some very limited circumstances.<sup>12</sup> With these new developments come new dangers. One concern is that there could be undue influence and intimidation on the voter while they are voting, as interested third parties would have greater access to the voter via mail or online as opposed to being restricted 100 feet away from the ballot box.<sup>13</sup> Another area could be actual voter fraud, and although election fraud has historically been low, one can imagine that would-be wrongdoers could seize on the increased volume of non-traditional voting methods to tamper with our elections.<sup>14</sup>

These concerns may feel overblown and dramatic, but it bears remembering that threats to the democratic process are very real, such as the Watergate scandal in 1972, the countless attempts that the United States has made at interfering in other countries' elections, or the time it actually happened to us in 2016.<sup>15</sup> There are reports that attempts to interfere with American elections still continued in the 2020 presidential election.<sup>16</sup>

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<sup>11</sup> Olivia B. Waxman, *Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years*, TIME, <https://time.com/5892357/voting-by-mail-history/> (Sept. 28, 2020, 8:17 PM).

<sup>12</sup> Eric Geller, *Coronavirus boosts push for online voting despite security risks*, POLITICO (May 1, 2020, 7:30 PM), <https://www.politico.com/news/2020/05/01/coronavirus-online-voting-229690>. While cybersecurity is a large component of evaluating the feasibility of online voting, this Comment does not delve into that area. It instead focuses on the practical aspects on the human side of the process, as far as election silence is concerned.

<sup>13</sup> Anyone with a mailbox or a P.O. Box knows how inundated it can be with campaign mail in the final weeks and days of the election season. Some scholars have concluded that direct mail has a measurable impact on turnout and intent to vote. See David Doherty & E. Scott Adler, *The Persuasive Effects of Partisan Campaign Mailers*, 67 POL. RSCH. Q., 562, 569 (2014), <https://www.jstor.org/stable/24371892>. However, others have cast doubt on their effectiveness in certain circumstances. See generally Joshua L. Kalla & David E. Broockman, *The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments*, 112 AM. POL. SCI. REV. 148 (2018). This Comment proceeds with the assumption that there is some impact at some level warranting concerns.

<sup>14</sup> See Amber McReynolds & Charles Stewart III, *Let's put the vote-by-mail 'fraud' myth to rest*, HILL (Apr. 28, 2020, 7:00 AM), <https://thehill.com/opinion/campaign/494189-lets-put-the-vote-by-mail-fraud-myth-to-rest>; see also *Debunking the Voter Fraud Myth*, BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW (Jan. 31, 2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf). The pandemic has led to a vast increase in ballots cast by mail in the 2020 general election, and while there was virtually no apparent fraud, there continued to be doubt cast on the legitimacy of mail-in ballots. See *Election Results, 2020: Analysis of rejected ballots*, BALLOTPEDIA, [https://ballotpedia.org/Election\\_results\\_2020:\\_Analysis\\_of\\_rejected\\_ballots](https://ballotpedia.org/Election_results_2020:_Analysis_of_rejected_ballots) (Sept. 10, 2021); see also Alan Feuer & Zach Montague, *Over 30 Trump Campaign Lawsuits Have Failed. Some Rulings are Scathing*, N.Y. TIMES, <https://www.nytimes.com/2020/11/25/us/elections/trump-campaign-lawsuits.htm> (Dec. 10, 2020).

<sup>15</sup> See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (2d ed. 2012); MUELLER, *supra* note 1; see also Scott Shane, *Russia Isn't the Only One Meddling in Elections. We Do It, Too*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/sunday-review/russia-isnt-the-only-one-meddling-in-elections-we-do-it-too.html>.

<sup>16</sup> Zachary Cohen et al., *FBI director Wray says Russia is actively interfering in 2020 election to 'denigrate' Biden*, CNN Politics, <https://www.cnn.com/2020/09/17/politics/fbi-director-wray-russia->

To be sure, ensuring confidence in election security and polling results will become increasingly important, and the recommendations outlined in this Comment are an important step in preparing for the future.

Due to the inevitable shift in voting procedures brought about by modernizing election protocols, the United States needs to continue expanding voter protections during a short period at the end of an election season. While existing legal doctrines on speech in elections were sufficient for the time in which they were created, we must look forward to the future and adopt stronger regulations for our changing times. This means revisiting the decision in *Mills v. Alabama*, within the modern context, while drawing supporting rationale from *Burson v. Freeman* to provide the necessary justifications as required by constitutional law.

This Comment recommends that “election silence” policies be implemented to limit campaign speech and media reporting for the duration of Election Day in an effort to protect voters and election integrity. Part II provides the background for this recommendation by examining the necessity and rationales espoused by the Supreme Court of the United States in *Mills v. Alabama* and *Burson v. Freeman*, as well as other lower court decisions. This part briefly looks at other states’ laws concerning election silence in light of these judicial rulings. It also details some theoretical consequences and implications of exit polling, increased mail-in balloting, and online voting. Part III will advocate for expanding the rationale of *Burson* to permit a broader scope of election silence and voter protection. It will also be cognizant of potential objections and challenges to the proposal, charting a middle-road approach between the insufficient status quo and a blatantly unconstitutional extreme approach. Part IV concludes with thoughts on how such policies could be approached and their ameliorative effect on the American electorate.

## II. BACKGROUND

This section begins with a discussion of the Supreme Court’s early foray into free speech restrictions with respect to elections in *Mills v. Alabama*.<sup>17</sup> Next, it moves on to the seminal case of *Burson v. Freeman*, in which the Court upheld Tennessee’s 100-foot radius of political speech exclusion as a form of voter protection.<sup>18</sup> Then this section will discuss modern laws on polling place buffer zones as applied in several states, as well as how some others have been challenged in courts. Finally, this

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election-interference/index.html (Sept. 17, 2020, 5:36 PM); Press Release, Off. of the Dir. of Nat’l Intel., Statement by NCSC Director William Evanina: Election Threat Update for the American Public (Aug. 7, 2020) (on file with author).

<sup>17</sup> See generally *Mills v. Alabama*, 384 U.S. 214 (1966).

<sup>18</sup> *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

section will look to the future by covering the potential evolution of election procedures and some of the problems online voting may cause.

A. *Supreme Court Decisions*

Voting in the early history of the United States was not as clean and organized an affair as it is today, even considering the numerous problems we currently face. It was then largely a matter of how many voters a party apparatus could control or how many voters from the opposing side they could intimidate and deter from going to the polls.<sup>19</sup> Citizens were hard-pressed to escape public scrutiny of their decisions at the ballot box due to intense pressure from party bosses or their employers.<sup>20</sup> It was not an uncommon practice for voters to be ferried *en masse* to the polls by party operatives as a show of force to ensure a positive result.<sup>21</sup> Changes were necessary to prevent continued intimidation and interference with the integrity of the voting process.<sup>22</sup>

Enter the Australian ballot, a standardized secret ballot with which voters' choices could be protected from solicitors and onlookers.<sup>23</sup> This ballot was meant to be the solution to direct voter intimidation by allowing voters to make their choices from a predetermined set of candidates on a consistent format that they could trust.<sup>24</sup> However, it was not enough to implement a new balloting system. There existed a need to establish and preserve the secrecy of that ballot from bystanders, and to achieve this, excluding "the general public from the entire polling room" was necessary.<sup>25</sup> Since people were finally able to exercise their right to vote in a room free from interference, some found that the adoption of the Australian ballot was sufficient to protect voters' interests.<sup>26</sup> However, there still remained issues regarding excessive solicitation and intimidation in the spaces *leading up to* and surrounding the polling place and ballot box; voters were still susceptible to others' attempts to influence them as they *approached* the polls.<sup>27</sup>

To address this continuing issue, the state of Alabama enacted a statute which made it "a crime 'to do any electioneering or to solicit any votes'" on Election Day.<sup>28</sup> This was meant to protect "the public from confusive [sic] last-minute charges and countercharges and the distribution

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<sup>19</sup> ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 12 (1917).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 21.

<sup>23</sup> *Id.* at 17, 21.

<sup>24</sup> *Id.* at 23–25.

<sup>25</sup> *Burson v. Freeman*, 504 U.S. 191, 203 (1992).

<sup>26</sup> Schurr, *supra* note 5, at 890; *Burson*, 504 U.S. at 203–04.

<sup>27</sup> Schurr, *supra* note 5, at 890; *Burson*, 504 U.S. at 203–04.

<sup>28</sup> *Mills v. Alabama*, 384 U.S. 214, 216 (1966).

of propaganda in an effort to influence voters.”<sup>29</sup> In other words, Alabama was attempting to regulate political speech so as to guard voters against being unduly influenced by a deluge of campaigning and electioneering, which could have the effect of detrimentally altering their decision-making process when voting.<sup>30</sup> This statute was challenged in *Mills v. Alabama*, and the United States Supreme Court considered the issue of whether such a ban on speech during Election Day was constitutionally permissible.<sup>31</sup> Justice Black, writing for the Court, determined that the law had a “fatal flaw” since it prohibited responses to last-minute campaigning, and in so doing, unconstitutionally suppressed political speech.<sup>32</sup>

What appeared like a flaw to the Court may have been just a part of the political process and inherent in campaigning itself, for *someone* has to get the last word.<sup>33</sup> Either someone makes a statement on the day before the election that is not subject to rebuttal on the day of the election because the Alabama law prohibits it, or someone makes a statement on Election Day that could avoid a response because the issue would become moot the day after.<sup>34</sup> The Court, not finding this distinction relevant, opted to strike down a statute that, in its view, was guilty of having the effect of suppressing speech in the first place.<sup>35</sup> Despite striking down this broad attempt at election silence, the decision left open the question of whether a state could in some form regulate “conduct in and around the polls in order to maintain peace, order and decorum there.”<sup>36</sup>

By 1992, all fifty states had taken advantage of this gray area.<sup>37</sup> Tennessee was one such state that regulated speech and conduct in and around the polls.<sup>38</sup> Tennessee Code § 2-7-111 restricted “posters, signs or other campaign materials” from being displayed or distributed within 100 feet of a polling place’s entrance.<sup>39</sup> This statute served to protect those voters from confusion and undue influence as they decided and entered in their votes.<sup>40</sup> However, as a law that restricted political speech, its constitutionality was challenged on free speech grounds.<sup>41</sup> The Supreme Court in First Amendment jurisprudence traditionally has a “hostility to . . . a prohibition of public discussion of an entire topic,” especially in the context of political

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<sup>29</sup> *Id.* at 219 (citation omitted).

<sup>30</sup> *See id.* at 216.

<sup>31</sup> *Id.* at 215.

<sup>32</sup> *Id.* at 220.

<sup>33</sup> Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RESV. L. REV. 225, 277–78 (2003).

<sup>34</sup> *See Mills v. Alabama*, 384 U.S. 214, 220 (1966).

<sup>35</sup> *See id.*; *see also* Levine, *supra* note 33, at 277–78.

<sup>36</sup> *Mills*, 384 U.S. at 218.

<sup>37</sup> *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) (citation omitted).

<sup>38</sup> *Id.* at 193.

<sup>39</sup> *Id.* (quoting TENN. CODE ANN. § 2-7-111(b) (1991)).

<sup>40</sup> *Id.* at 198–99.

<sup>41</sup> *Id.* at 194.

speech.<sup>42</sup> However, in a departure from its decision in *Mills v. Alabama*, the Court allowed that such prohibitions might survive judicial review if they met three requirements of the strict scrutiny test.<sup>43</sup> First, the government's interest(s) must be compelling; second, the prohibitions in the statute must be necessary; and third, the prohibitions have to be narrowly drawn to meet the necessity of the compelling interest(s) asserted.<sup>44</sup>

In *Burson v. Freeman*, the Court recognized that political speech is vital to the functioning of our country due to its role in our continuing experiment of self-governance.<sup>45</sup> That experiment—democracy—requires the public to engage in communication with one another in an effort to shape public opinion and create policy.<sup>46</sup> To facilitate this, the First Amendment protects political speech and ultimately fosters an environment that is conducive to the “creation of free public opinion.”<sup>47</sup> The Court embraces the idea that the democratic process only works when people “believe that they are . . . potential authors of law” by voting through free and fair elections.<sup>48</sup> After all, what is voting but an expression of one's public opinion?

However, complications exist, as people can be misled or intimidated into altering their speech and votes—or worse—not engaging at all in the process.<sup>49</sup> Thus, the “right of its citizens to vote freely for the candidates of their choice” and “the right to vote in an election conducted with integrity and reliability” needed to be protected.<sup>50</sup> These justifications served as the basis for the Tennessee government's enactment of the 100-foot provision, and they were recognized by a plurality of the Court as compelling interests.<sup>51</sup> Thus, to be constitutional, the contested statute would have to pass “exacting scrutiny” as a content-based restriction.<sup>52</sup> Thus, the statute needed to be necessary to achieve the effects contemplated by the compelling interests and “narrowly drawn to achieve that end.”<sup>53</sup>

When bearing in mind the country's past experiences with subpar voting practices, the necessity of excluding political speech becomes clear.<sup>54</sup> The act of excluding political speech around polling places was required to prevent a return to the unorganized and unreliable electoral processes of the

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<sup>42</sup> *Id.* at 197 (citation omitted).

<sup>43</sup> *Id.* at 198 (quoting *Perry Ed. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>44</sup> *Id.* (quoting *Perry Ed. Ass'n*, 460 U.S. at 45).

<sup>45</sup> *Id.* at 196.

<sup>46</sup> Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).

<sup>47</sup> *Id.* at 487 (emphasis omitted).

<sup>48</sup> *Id.* at 482.

<sup>49</sup> See generally Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343 (2010).

<sup>50</sup> *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 198.

<sup>53</sup> *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>54</sup> *Burson*, 504 U.S. at 200–06; see *supra* notes 19–25 and accompanying text.

past, by allowing voters to have a few moments of peace and security while contemplating their final decision.<sup>55</sup> The Court also observed that “numerous other Western democracies” at the time also utilized the same system of using secret ballots in areas free of political speech.<sup>56</sup> These considerations led the plurality of the Court to decide that Tennessee’s law was necessary to achieve their compelling interests.<sup>57</sup>

However, there had to be limits to the size of the zone of exclusion.<sup>58</sup> Such was the effect of narrowly tailoring the statute to meet the necessity.<sup>59</sup> Create too large of a zone, and the effects of the free speech prohibition exceed what the compelling interest requires; create too small of a zone, and the compelling interest ceases to be protected at all.<sup>60</sup> The Court did not specify what would be too large or too small of a distance from the polling place; instead, it commented that the 100-foot zone in the Tennessee statute did not present a “significant impingement” to one’s First Amendment rights.<sup>61</sup> There is some common sense in this conclusion, in that it does not take long to walk 100 feet, and that time spent walking to the ballot box might as well be “as free from interference as possible.”<sup>62</sup> Whether the zone was slightly closer or further to the polling site was only a small matter of degree and largely irrelevant to the fact that the statute was restrictive on its face.<sup>63</sup> However, the Court acknowledged that a maximum limit could theoretically exist, citing *Mills v. Alabama* as an example where a law suppressing political speech was clearly an unconstitutional burden on citizens’ rights to free speech.<sup>64</sup>

The effects of these two decisions continue to be felt today, as modern elections have reached a greater intensity never before seen, with increased campaign spending, a greater emphasis on “Get Out the Vote” efforts, and new forays into social media advertising.<sup>65</sup> In the final days of an election, it becomes difficult, if not impossible, to escape the effects of American campaigning.

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<sup>55</sup> *Burson*, 504 U.S. at 210.

<sup>56</sup> *Id.* at 206; *see infra* notes 127–47 and accompanying text.

<sup>57</sup> *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

<sup>58</sup> *Id.* at 208.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 206–07.

<sup>61</sup> *Id.* at 210.

<sup>62</sup> *Id.* However, long lines at some precincts and early voting locations may exceed the 100-foot boundary. *See* Arelis R. Hernández, *America in Line*, WASH. POST (Oct. 25, 2020), <https://www.washingtonpost.com/graphics/2020/elections/voting-lines-2020-election/>; David Litt, *Ohio’s quarter-mile early-voting lines? That’s what voter suppression looks like*, GUARDIAN (Oct. 15, 2020, 8:32 AM), <https://www.theguardian.com/commentisfree/2020/oct/15/ohio-us-election-voter-suppression>.

<sup>63</sup> *Burson v. Freeman*, 504 U.S. 191, 210 (1992).

<sup>64</sup> *Id.*

<sup>65</sup> *See generally* Albert, *supra* note 1; DONALD P. GREEN & ALAN S. GERBER, GET OUT THE VOTE: HOW TO INCREASE VOTER TURNOUT (2nd. ed. 2008); Lata Nott, *Political Advertising on Social Media Platforms*, AMERICAN BAR ASS’N (June 25, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-in-2020/political-advertising-on-social-media-platforms/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/).

## B. *Modern Election Laws and Practices*

Since 1992, laws have changed across many jurisdictions in multiple areas of election law. This section first focuses on how states have adjusted to *Burson* and how polling place buffer zones continue to be challenged in light of that decision. This section also takes note of the introduction and rapid application of digital technology, cable news networks, and social media since that time. States have been slow to modernize their election protocols and equipment.<sup>66</sup> Although the actual practice of voting may have just recently become more refined, states are still operating under decades-old laws.<sup>67</sup> Recent and future developments surrounding elections may prompt further changes to election silence so as to protect voters and election integrity against undue influence and fraud. Exit polls and news reporting can influence Election Day voters, direct mail and advertising can influence mail-in ballot voters, and internet ads and emails can, one day, influence online voters. If elections continue to modernize and evolve, then in order to continue protecting voters, election laws must adapt.

### 1. Polling Place Buffer Zone Laws

Given that the Supreme Court has yet to adopt a bright-line test or declare a maximum distance, states have had to decide what constitutes an appropriate restricted zone in light of the *Burson* decision. In 2004, the Sixth Circuit Court of Appeals determined that Kentucky's use of a 500-foot zone was too large, that "it prohibit[ed] speech over too much geography . . . ."<sup>68</sup> Eleven years later, when faced with a smaller 300-foot zone, the Sixth Circuit again ruled Kentucky's statute unconstitutional because the state failed to demonstrate how it was necessary to have a 300-foot zone as opposed to the standard 100 feet as approved by *Burson*.<sup>69</sup> Today, the state uses a 100-foot zone, enacted in July 2016.<sup>70</sup>

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<sup>66</sup> Eric Geller et al., *The scramble to secure America's voting machines*, POLITICO, <https://www.politico.com/interactives/2019/election-security-americas-voting-machines/> (May 26, 2021).

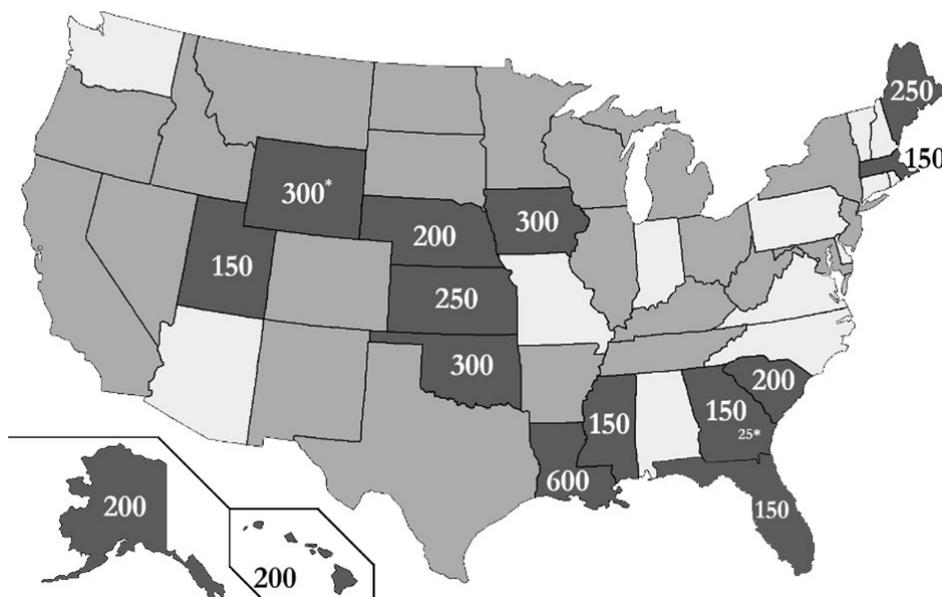
<sup>67</sup> See *id.*; see also Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. LAW & PUB. POL'Y 57, 101, 136 (2017).

<sup>68</sup> *Anderson v. Spear*, 356 F.3d 651, 666 (6th Cir. 2004).

<sup>69</sup> *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015).

<sup>70</sup> KY. REV. STAT. § 117.235.

**Figure 1: Campaign speech exclusion zones measured in feet.<sup>71</sup>**



\* Georgia also restricts speech within 25 feet of persons standing in line to vote.

\* Wyoming uses “100 yards” rather than the functional equivalent of 300 feet.

A majority of jurisdictions (marked in Fig. 1 as gray or light gray) now also use the *Burson*-approved 100 feet or less when determining where campaign speech can be permitted around the polling location itself.<sup>72</sup> It is important to reiterate that the *Burson* decision did not mandate a floor or a ceiling of how far from a polling place a state may restrict speech, but rather, it merely approved Tennessee’s use of a 100-foot zone as a standard.<sup>73</sup> As such, fourteen states (marked in dark gray) go beyond this standard, opting for zones of 150, 300, or even as high as 600 feet in Louisiana.<sup>74</sup>

Louisiana is an obvious outlier in this collection of exclusion zones, and this may be attributable to its French and Spanish-influenced mixed civil and common law system resulting from its colonial history.<sup>75</sup> Whatever the case may be as to the cause of their difference in zone distances, the 600-foot

<sup>71</sup> Adapted from: National Association of Secretaries of State, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place*, <https://www.nass.org/sites/default/files/surveys/2020-10/state-laws-polling-place-electioneering-Oct-2020-.pdf> (Oct. 2020).

<sup>72</sup> *Id.*; see *supra* Figure 1.

<sup>73</sup> *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

<sup>74</sup> See *supra* Figure 1.

<sup>75</sup> *French Law*, LA. STATE U. LAW LIBRARY, <https://libguides.law.lsu.edu/c.php?g=693022> (Aug. 11, 2021, 9:36 AM).

zone is here to stay. It was last significantly challenged in 1993 in the Court of Appeals for the Fifth Circuit, which upheld the zone on the basis that 600 feet was legally justifiable and necessary due to a valid compelling interest.<sup>76</sup> The Fifth Circuit considered *Burson v. Freeman*, which had been decided only a year earlier, and concluded that the 600-foot radius met the conception of “necessary” in *Burson* due to Louisiana’s prior attempts at smaller zones of exclusion.<sup>77</sup> There existed evidence of a necessity that previous legislative attempts had not yet met; thus, the increased distance was legitimate as a step toward meeting that necessity.<sup>78</sup> Clearly, that necessity has been met, for it has not been changed since.<sup>79</sup>

## 2. Exit Polls and News Reporting

The practice of gathering and publishing exit polls on Election Day is not a new one.<sup>80</sup> Exit polling does have its utility as a way of gauging public opinion for certain candidates and issues, as well as how voters are feeling on Election Day.<sup>81</sup> They also assist news networks and campaigns with projecting vote totals so they can call a race.<sup>82</sup> However, exit polls have been a source of tension due to the *Burson*-type polling place zone restrictions.<sup>83</sup> Numerous cases have come before the Supreme Court regarding the media’s access to voters in a fact-gathering exercise in exit polling.<sup>84</sup> Through many of these decisions, the Court has held true to its principles in “protect[ing] the ‘free flow’ of information and ideas to the public” and granted exit polls greater leeway.<sup>85</sup> Today, in states like Ohio and Texas, exit polling is permitted within the 100-foot boundaries around polling places.<sup>86</sup> In fact, only six states continue to prohibit exit polls within their respective distances by law.<sup>87</sup>

Gathering data for exit polls is an example of how the law can be constructed around a non-disruptive practice. Exit pollsters only ask questions of voters after they have already voted and generally do not impede

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<sup>76</sup> *Schirmer v. Edwards*, 2 F.3d 117, 124 (5th Cir. 1993); *Recall '92 v. Edwards*, 511 U.S. 1017 (1994) (cert. denied).

<sup>77</sup> *Schirmer*, 2 F.3d at 121–22.

<sup>78</sup> *Id.* at 122.

<sup>79</sup> LA. STAT. ANN. § 18:1462 (2013).

<sup>80</sup> *Explaining Exit Polls*, American Ass’n for Pub. Opinion Res., [https://www.aapor.org/AAPOR\\_Main/media/MainSiteFiles/Explaining-Exit-Polls\\_1.pdf](https://www.aapor.org/AAPOR_Main/media/MainSiteFiles/Explaining-Exit-Polls_1.pdf).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See generally* McDonald, *supra* note 3.

<sup>84</sup> *See generally id.*

<sup>85</sup> *Id.* at 250–51.

<sup>86</sup> Precinct Election Official Manual, OHIO SECRETARY OF STATE, 2-56, <https://www.ohiosos.gov/globalassets/elections/eoresources/peo-training/peotrainingmanual.pdf> (June 15, 2021); *Election Advisory No. 2018-11*, TEX. SEC’Y OF STATE (Feb. 16, 2018), <https://www.sos.state.tx.us/elections/laws/advisory/2018-11.shtml>.

<sup>87</sup> *Electioneering Prohibitions*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx>.

on the voting process inside the polling place.<sup>88</sup> However, exit polls can be disruptive once they are reported.<sup>89</sup> Polling organizations often do not release results until after the election has closed in the jurisdiction to avoid this influential effect.<sup>90</sup>

Though, exit polls released in earlier-closing states such as Florida and Pennsylvania may influence voters' decisions in later-closing states such as Nevada or Arizona.<sup>91</sup> Similarly, news reporting of vote counting results in earlier-closing states, or even projections of the winner of such states do influence voters.<sup>92</sup> If voters see that the race is tilting one way or the other, they may be less motivated to vote because they feel that their candidate is winning by enough not to need their vote, or that their candidate is losing by so much that their vote ultimately will not matter.<sup>93</sup> According to one study, the total vote may decrease anywhere from 1% to 5% due to voters deciding not to show up as a result of exit polls.<sup>94</sup> While the study noted that most researchers might not think such a decrease is significant enough to require legislative action, four states in the 2016 presidential election and three states in 2020 had a margin of less than 1%.<sup>95</sup>

### 3. Mail-in, Early, and Online Voting

Absentee ballots were developed to provide for individuals who could not make their way to a physical polling place for some good cause.<sup>96</sup> Absentee ballot rates were very low when they were introduced in the late 1860s, but they have picked up in recent election cycles.<sup>97</sup> But, as of the 2016 general election, absentee voting rates were still modest, with the national average just under 25%.<sup>98</sup> Twenty-seven states and the District of Columbia all reported that their absentee ballot usage was less than

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<sup>88</sup> AMERICAN ASS'N FOR PUB. OPINION RES., *supra* note 80.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Seymour Sudman, *Do Exit Polls Influence Voting Behavior?*, 50 PUB. OPINION Q. 331, 338 (1986).

<sup>92</sup> John E. Jackson, *Election Night Reporting and Voter Turnout*, 27 AM. J. POL. SCI. 615, 621–22, 627 (1983).

<sup>93</sup> See Sudman, *supra* note 91, at 332–33; see also Anthony M. Barlow, *Restricting Election Day Exit Polling: Freedom of Expression vs. the Right to Vote*, 58 U. CIN. L. REV. 1003, 1005–06, 1019 (1990).

<sup>94</sup> Sudman, *supra* note 91, at 338.

<sup>95</sup> *Id.* In 2016, the four states were Michigan, Pennsylvania, New Hampshire, and Wisconsin. See generally *Federal Elections 2016: Election Results*, FEDERAL ELECTION COMMISSION (Dec. 2017), <https://www.fec.gov/resources/cms-content/documents/federaelections2016.pdf>. In 2020, the three states were Arizona, Georgia, and Wisconsin. Elena Mejia & Geoffrey Skelley, *How The 2020 Election Changed The Electoral Map*, FIVETHIRTYEIGHT (Dec. 8, 2020, 6:00 AM), <https://projects.fivethirtyeight.com/2020-swing-states/>.

<sup>96</sup> Miles Parks, *Why is Voting by Mail (Suddenly) Controversial? Here's What You Need to Know*, NPR (June 4, 2020, 5:00 AM), <https://www.npr.org/2020/06/04/864899178/why-is-voting-by-mail-suddenly-controversial-heres-what-you-need-to-know>.

<sup>97</sup> *Id.*

<sup>98</sup> U.S. ELECTION ASSISTANCE COMM'N, THE ELECTION ADMIN. AND VOTING SURVEY: 2016 COMPREHENSIVE REPORT 8 (2017), [https://eac.gov/sites/default/files/eac\\_assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf).

10% of all votes cast.<sup>99</sup> Only seven states had an absentee ballot rate of more than half; notably, the rate was that high for three of them because they conducted their elections solely through mail-in votes.<sup>100</sup>

Mail-in voting periods may last as long as sixty days, such as in North Carolina, or as short as eighteen days, such as in Washington state.<sup>101</sup> Early voting periods last nearly as long, with Alabama permitting it for fifty-five days before an election.<sup>102</sup> Looking forward to the proposals and analysis, it seems prudent to mention that it would be quite improbable and improper to suggest that a period of election silence lasts for eighteen to sixty days before an election. However, there is evidence to support some regulation of campaign speech for a shorter period of time.<sup>103</sup> In the last fifty years, anywhere from a tenth to a quarter of the electorate made up their mind about who to vote for in the two weeks prior to the election.<sup>104</sup> In fact, exit polls in the 2016 presidential election revealed that around 8% of voters decided their vote in the *last few days* prior to the election.<sup>105</sup> Although these exit polls sampled ballot-box voters and not mail-in voters, it is not altogether unimaginable that a sizeable number of mail-in voters would also wait until the last minute, especially as the proportion of mail-in ballot voting grows.<sup>106</sup>

In 2020, with the onset of the new coronavirus, COVID-19, governments in the United States as well as internationally went into lockdown and quarantine, limiting access to both private and public spaces.<sup>107</sup>

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<sup>99</sup> *Id.* at 10.

<sup>100</sup> *Id.* at 9–10, 23–25; *Analysis of absentee/mail-in voting, 2016-2018*, BALLOTEDIA, [https://ballotpedia.org/Analysis\\_of\\_absentee/mail-in\\_voting\\_2016-2018](https://ballotpedia.org/Analysis_of_absentee/mail-in_voting_2016-2018) (last visited Feb. 4, 2022). Colorado, Washington, and Oregon were three states that had adopted an election system conducted entirely by absentee ballots, hence their high rate of mail-in votes. Olivia B. Waxman, *This Is How Early Voting Became a Thing*, TIME (Oct. 25, 2016), <https://time.com/4539862/early-voting-history-first-states/>.

<sup>101</sup> *When States Mail Out Absentee Ballots*, Nat'l Conf. of State Legislatures (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-7-when-states-mail-out-absentee-ballots.aspx>.

<sup>102</sup> *State Laws Governing Early Voting*, Nat'l Conf. of State Legislatures (Oct. 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

<sup>103</sup> See Brian Brox & Joseph Giammo, *Late Deciders in U.S. Presidential Elections*, 30 Am. Rev. Pol. 333, 338–46 (2009). See generally Janet Box-Steffensmeier et al., *The Long and Short of it: The Unpredictability of Late Deciding Voters*, 39 ELECTORAL STUDIES 181 (2015).

<sup>104</sup> Brox & Giammo, *supra* note 103, at 334. If those proportions are applied to the 2016 election, then anywhere from 14 million to 34 million voters may have made up their minds in the last two weeks before the election. See FEDERAL ELECTION COMM'N, *supra* note 95.

<sup>105</sup> *Election 2016: Exit Polls*, CNN POLITICS, <https://www.cnn.com/election/2016/results/exit-polls> (Nov. 23, 2016, 11:58 AM); *2016 National President Exit Poll*, FOX NEWS, <https://www.foxnews.com/politics/elections/2016/exit-polls> (last visited Feb. 4, 2022).

<sup>106</sup> See *Election 2016: Exit Polls*, *supra* note 105; see also Nathaniel Rakich, *More States Are Using Ballot Drop Boxes. Why Are They So Controversial?*, Fivethirtyeight (Oct. 5, 2020, 7:00 AM), <https://fivethirtyeight.com/features/more-states-are-using-ballot-drop-boxes-why-are-they-so-controversial/> (“[Drop boxes are] making it easier for voters to submit their ballot in the normal course of their day. And unlike election offices, drop boxes are often open 24 hours a day.”).

<sup>107</sup> Frank Jordans & Joseph Wilson, *Curfews and lockdowns multiply as virus advances rapidly*, PBS Newshour (Mar. 21, 2020, 12:49 PM), <https://www.pbs.org/newshour/health/curfews-and-lockdowns-multiply-as-virus-advances-rapidly>; Grace Hauck et al., *'Stay Home, Stay Healthy': These states have ordered residents to avoid nonessential travel amid coronavirus*, USA Today, <https://www.usatoday.com/>

State governments made decisions to delay elections in the thick of the primary season, hoping that the virus threat would have largely subsided to make it safe to vote again.<sup>108</sup> However, the virus approached a “second peak” by late June, prompting states to take a hard look at alternative options for the general election in November.<sup>109</sup> Some had already begun preparing by adopting policies to send all registered voters an application for an absentee ballot.<sup>110</sup> In the days leading up to Election Day, it was reported that mail-in ballots were used at a substantially higher rate in many states in the 2020 election as compared to 2016, directly due to the pandemic.<sup>111</sup> There is no indication as to whether mail-in voting will continue to be as substantial in subsequent elections, but some believe that voting by mail will grow even more quickly now that the country has been acquainted with the practice on such a wide scale.<sup>112</sup>

Other states are beginning to look to online voting as another alternative method of ensuring enfranchisement for the states’ vulnerable populations who cannot go out in the dangerous conditions posed by the virus at the time.<sup>113</sup> Online voting in the sphere of state-run official elections in the United States is indeed a new phenomenon, although it has existed in other forms. In Ohio, the Libertarian Party conducted their primary election via an online caucus, and the Green Party introduced online voting to complement one’s officially recorded vote using a non-partisan “issues only ballot” at the state election.<sup>114</sup> These small steps, although affecting

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story/news/nation/2020/03/21/coronavirus-lockdown-orders-shelter-place-stay-home-state-list/2891193001/ (Mar. 29, 2020, 5:59 PM).

<sup>108</sup> See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here’s a List*, N.Y. Times (Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>.

<sup>109</sup> *The Impact of COVID-19 on Federal Elections*, A.B.A. (June 24, 2020), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/june\\_20\\_wl/mail-in-voting-0620wl/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/june_20_wl/mail-in-voting-0620wl/); *COVID-19 Health And Safety Measures For Elections*, NAT’L. GOV. ASSOC. (Oct. 16, 2020), <https://www.nga.org/center/publications/election-health-safety-covid-19/>.

<sup>110</sup> Sharon Bernstein, *Ohio set to send all voters absentee ballot applications before presidential election*, REUTERS (June 15, 2020, 8:25 PM), <https://www.reuters.com/article/us-usa-election-ohio/ohio-set-to-send-all-voters-absentee-ballot-applications-before-presidential-election-idUSKBN23N00Q>; Adam Levy & Chandelis Duster, *Wisconsin approves measure to send absentee ballot applications to voters*, CNN POLITICS, <https://www.cnn.com/2020/05/28/politics/wisconsin-absentee-voting-applications/index.html> (May 28, 2020, 11:14 AM).

<sup>111</sup> *Mail-in ballot tracker: counting election votes in US swing states*, GUARDIAN (Nov. 4, 2020, 1:46 PM), <https://www.theguardian.com/us-news/2020/nov/04/mail-in-ballot-tracker-us-election-2020>.

<sup>112</sup> Russell Berman & Elaine Godfrey, *America’s Elections Won’t Be the Same After 2020*, ATLANTIC (Apr. 28, 2020), <https://www.theatlantic.com/politics/archive/2020/04/2020-election-vote-by-mail-ranked-choice-caucuses/610780/>.

<sup>113</sup> Eric Geller, *Coronavirus boosts push for online voting despite security risks*, POLITICO (May 1, 2020, 7:30 PM), <https://www.politico.com/news/2020/05/01/coronavirus-online-voting-229690>.

<sup>114</sup> Press Release, Libertarian Party of Ohio, *Libertarians Hold Online Presidential Caucus*, (Dec. 1, 2019), <https://lpo.org/libertarians-hold-online-presidential-caucus/>; *Ohio Green Party, 2020 Ohio Green Party Preliminary Caucus Results*, FACEBOOK (Feb. 29, 2020, 6:14 PM), <https://www.facebook.com/ohiogreenparty/photos/a.1481233172092825/2505374603012005/?type=3&theater>.

“relatively small slices of the electorate,” are sure to grow and expand into “the future of voting.”<sup>115</sup>

With these new developments come concerns of increased voter fraud and intimidation associated with an insecure ballot system, although there is still debate as to whether they are substantiated.<sup>116</sup> Online voting was implemented in the small Baltic country of Estonia in the early 2000s, and there have been serious criticisms from cybersecurity experts.<sup>117</sup> Although the technical details of cybersecurity are beyond the scope of this Comment, it is important to note that exploits can occur from the user-side of the process.<sup>118</sup> For example, a user’s computer can be attacked by malware due to clicking on links on emails and websites.<sup>119</sup>

Further complicating online voting is the presence of overwhelming access to the voters by campaigns and other interested parties. Social media is one such avenue of influence, as candidates, campaigns, organizations, and other “influencers” vie for attention.<sup>120</sup> If voters begin to vote online in the future, they will have quick access to social media as they begin to ponder their choices, making undue influence and intimidation a problem.<sup>121</sup> Such practices in social media even affect current voting practices, as disinformation campaigns affect turnout.<sup>122</sup> As Trump adviser and former New York City mayor Rudy Giuliani famously said, “[t]ruth isn’t truth.”<sup>123</sup> Of course, even the veracity of *that* statement is disputed, but it does uncover a disturbing problem surrounding social media: whether people trust what is being said on any given platform as the truth and whether they even *should*.

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<sup>115</sup> Miles Parks, *States Expand Internet Voting Experiments Amid Pandemic, Raising Security Fears*, NPR (Apr. 28, 2020, 5:00 AM), <https://www.npr.org/2020/04/28/844581667/states-expand-internet-voting-experiments-amid-pandemic-raising-security-fears>.

<sup>116</sup> Geller, *supra* note 113; Maggie Haberman et al., *Trump’s False Attacks on Voting by Mail Stir Broad Concern*, N.Y. Times, <https://www.nytimes.com/2020/06/24/us/politics/trump-vote-by-mail.html> (Aug. 3, 2020).

<sup>117</sup> See Drew Springall et al., *Security Analysis of the Estonian Internet Voting System* (2014), <https://doi.org/10.1145/2660267.2660315>; see also Billy Perrigo, *What the U.S. Can Learn About Electronic Voting From This Tiny Eastern European Nation*, TIME (Mar. 1, 2019, 11:28 AM), <https://time.com/5541876/estonia-elections-electronic-voting/>.

<sup>118</sup> Springall, *supra* note 117, at 8.

<sup>119</sup> *Id.*

<sup>120</sup> Elizabeth Culliford, *Paid social media influencers dip toes in U.S. 2020 election*, Reuters (Feb. 10, 2020, 9:06 PM), <https://www.reuters.com/article/us-usa-election-influencers/paid-social-media-influencers-dip-toes-in-u-s-2020-election-idUSKBN2042M2>.

<sup>121</sup> Ian Vandewalker, *Digital Disinformation and Vote Suppression*, Brennan Center FOR JUSTICE (Sept. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression>. Tangentially related is the use of “deepfakes,” computer-generated videos to simulate another person saying things that they had never said in an attempt to convince people of the veracity of the subject matter. There are concerns that, if deepfake videos become commonplace in election media, voters could be wrongly influenced in a way that interferes with the results of elections. See Edward Lee, *Can the U.S. Government Prohibit Deepfake Videos Intended to Deceive Voters?*, The Free Internet Project (Feb. 15, 2019), [https://thefreeinternetproject.org/blog/can-us-government-prohibit-deepfake-videos-intended-deceive-voters#disqus\\_thread](https://thefreeinternetproject.org/blog/can-us-government-prohibit-deepfake-videos-intended-deceive-voters#disqus_thread).

<sup>122</sup> Vandewalker, *supra* note 121.

<sup>123</sup> Rebecca Morin & David Cohen, *Giuliani: ‘Truth isn’t truth’*, POLITICO, <https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161> (Aug. 19, 2018, 6:16 PM) (internal citations omitted).

Recently, however, social media platforms have taken action to combat “fake news,” selectively censoring information that is widely known to be false and unsubstantiated.<sup>124</sup> Although there are no studies about who gets censored and who does not, as it is still a relatively new practice, it appears that more prominent political and public figures bear the brunt of such actions.<sup>125</sup>

Such regulation of the internet is bound to become a greater issue in the future, as elections continue to modernize, and engagement grows on social media and other websites. The following section details two different approaches to combat the negative effects of media reporting of exit polls and results: the increased use of mail-in ballots; and the internet’s influence on potential online voting practices in the future.

### C. *Proposed Changes to Election Law and Process*

Just as the Supreme Court in *Burson v. Freeman* then observed other democratic countries adopting the Australian model of secret ballots and similar reforms to election law, perhaps we may understand what our options are by observing what those countries are doing now.<sup>126</sup> This section will examine two modern democracies that arguably had the most influence on the American legal system during its colonial development: the United Kingdom and France. These two methods represent a targeted approach against improper influence on voters and a broader approach against any influence on voters during Election Day.

#### 1. United Kingdom’s Approach: Ban Media Reporting

Today, the United Kingdom restricts any reporting of information regarding voter attitudes after voting and “any forecast as to the result of the election which is (or might reasonably be taken to be) based on information so given [during exit polling].”<sup>127</sup> The United Kingdom has done this in order to curb the possible misleading effects and potential influence of exit polling on the voting public during Election Day.<sup>128</sup>

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<sup>124</sup> See Trevor Hunnicutt, *Twitter bans political ads; Facebook’s Zuckerberg defends them*, Reuters (Oct. 30, 2019, 4:28 PM), <https://www.reuters.com/article/us-twitter-ads/twitter-bans-political-ads-facebooks-zuckerberg-defends-them-idUSKBN1X92IK>; see also Peter Suci, *Twitter Limited the Sharing Of New York Post Story—Is It Social Media Censorship?*, Forbes (Oct. 15, 2020, 11:01 AM), <https://www.forbes.com/sites/petersuci/2020/10/15/twitter-limited-the-sharing-of-new-york-post-story--is-it-social-media-censorship/?sh=17676c6b18ec>.

<sup>125</sup> Kalev Leetaru, *Is Twitter Really Censoring Free Speech?*, FORBES (Jan. 12, 2018, 5:06 PM), <https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/?sh=3984d6df65f5>; *Can Twitter censor my tweets?*, FOX BUSINESS (May 28, 2020), <https://www.foxbusiness.com/politics/can-twitter-censor-my-tweets>.

<sup>126</sup> *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

<sup>127</sup> Representation of the People Act 1983, c. 2 § 66A(1)(a)–(b) (UK).

<sup>128</sup> SELECT COMMITTEE ON POLITICAL POLLING AND DIGITAL MEDIA, THE POLITICS OF POLLING, 2017–19, HL Paper 106, Chapter 5 220 (UK).

However, the House of Lords recognized that while it is advantageous to protect their voters during Election Day itself, it did not extend that same logic to a wider ban of polls across *multiple* days leading up to the election.<sup>129</sup> The United Kingdom also requires its media organizations to cease “[d]iscussion and analysis of election and referendum issues” when the polls open in the country.<sup>130</sup> This election silence continues until the end of polls, at which point they may begin analysis and reporting of exit polls.<sup>131</sup> However, there is also no restriction on political speech and reporting before the polling stations themselves open; thus, these rules are not affected by any mail-in balloting.<sup>132</sup> Campaigns themselves are permitted to continue electioneering all day in an effort to get out the vote.<sup>133</sup>

This approach exemplified by the United Kingdom has the effect of banning “speculating on TV, radio or online about the outcome of the election,” permitting voters to go about their day and make their choice as they see fit.<sup>134</sup> In the United States, there exist no such laws prohibiting media reporting of exit polling and results, but news organizations often restrain themselves from doing so until the polls close in a specific jurisdiction.<sup>135</sup> A Congressional Report from 2001 surmises that Congress “apparently could not ban media projections outright.”<sup>136</sup> Under this approach, Congress could restrict the time period in which those projections could be reported, ultimately allowing news organizations to make their projections after a specified time.

Though, there is criticism within the United Kingdom that such laws restricting media reporting do not go far enough, as other individuals on other platforms are not subject to election silence.<sup>137</sup> Voters are increasingly getting information from non-traditional sources, such as from social media commentary.<sup>138</sup> To address this, some have suggested that election silence should be abolished, or instead, that laws be updated to encompass all election speech online.<sup>139</sup>

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<sup>129</sup> *Id.* at 248.

<sup>130</sup> Office of Communications, The Office of Communications Broadcasting Code, 2019, at 35 (UK), [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/132073/Broadcast-Code-Full.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/132073/Broadcast-Code-Full.pdf).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Paige Morrow, *UK election 2019: We need to change the rules on poll day reporting*, Article 19 (Dec. 11, 2019), <https://www.article19.org/resources/uk-we-need-to-change-the-rules-on-election-day-reporting/>.

<sup>134</sup> Bianca Britton, *Why the UK has such restrictive reporting laws on election day*, CNN Business, <https://www.cnn.com/2019/12/11/media/uk-election-reporting-restrictions-intl-gbr-ge19/index.html> (Dec. 12, 2019, 4:56 PM).

<sup>135</sup> Dara Lind, *How exit polls work: when they're released, which states they cover, and what they mean*, VOX, <https://www.vox.com/policy-and-politics/2016/11/8/13563308/exit-polls-2016-time-election-results> (Nov. 9, 2016, 12:16 AM).

<sup>136</sup> CONG. RSCH. SERV., RS20762, ELECTION PROJECTIONS: FIRST AMENDMENT ISSUES (2001).

<sup>137</sup> Morrow, *supra* note 133.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

## 2. France's Approach: Ban All Speech

France is one such country that takes the latter approach, restricting all election speech across the board, across France, and its numerous territorial holdings around the globe.<sup>140</sup> From when the polls open in the French West Indies to when the polls close in metropolitan France the next day, a blanket ban on campaigning and reporting of election results is in effect.<sup>141</sup> A French government official explained the necessity of such imposing laws, stating that “[t]his is about ensuring that the last voter to arrive at a voting office has the same information as the first . . . .”<sup>142</sup>

However, it is difficult to enforce this law on over sixty-seven million French citizens.<sup>143</sup> As a consequence, “[t]he [French] Constitutional Council . . . declared it ‘preferable’ that individuals abstain from electoral propaganda during that period.”<sup>144</sup> “Preferable” is not a confident indicator of consistent enforcement of election silence, and citizens often use loopholes such as code words or foreign hashtags to evade penalties.<sup>145</sup>

It is hard to believe that such a broad and all-encompassing law could be feasibly enforced in the United States, much less survive constitutional scrutiny.<sup>146</sup> An “all or nothing” approach is not likely to produce results, and it may instead be better to target “a discrete subset of the population which society relies upon to gather and disseminate valuable information.”<sup>147</sup> Part III analyzes why the British and French models are insufficient and improper for American needs in light of our history and laws and offers a middle road to sufficiently address the problem of voter protection and election integrity in an evolving world.

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<sup>140</sup> *French election reporting restricted as voting starts overseas*, RFI (FR.) (June 5, 2017, 12:01 PM), <https://www.rfi.fr/en/france/20170506-french-election-reporting-restricted-voting-starts-overseas>.

<sup>141</sup> *Id.*; *French media rules prohibit election coverage over weekend*, France 24 (FR.), <https://www.france24.com/en/20170506-france-media-rules-prohibit-election-coverage-over-weekend-presidential-poll> (July 5, 2017, 8:42 AM). The statement from the CSA reads: “Starting from the night before polls open, it is illegal to publish or broadcast by all means of communication any message that may be categorised as electoral propaganda . . . .” *Id.*

<sup>142</sup> Scott Sayare, *French Media Question Election Reporting Rules*, N.Y. Times (Apr. 20, 2012), <https://www.nytimes.com/2012/04/21/world/europe/french-media-question-election-reporting-rules.html>.

<sup>143</sup> Demography – Average population of the year – France (including Mayotte since 2014), Institut National de la Statistique et des Études Économiques (Jan. 18, 2022), <https://www.insee.fr/en/statistiques/serie/001641584>.

<sup>144</sup> *French election reporting restricted as voting starts overseas*, *supra* note 140; see Caoilfhionn Gallagher QC & Jonathan Price, *Breaking the election silence: cross-border reporting of election day polls*, INFORRM (May 18, 2017), <https://inform.org/2017/05/18/breaking-the-election-silence-cross-border-reporting-of-election-day-polls-caoilfhionn-gallagher-qc-and-jonathan-price/>.

<sup>145</sup> *French election reporting restricted as voting starts overseas*, *supra* note 140; Sayare, *supra* note 142.

<sup>146</sup> McDonald, *supra* note 3, at 354–55.

<sup>147</sup> *Id.* at 354.

### III. ANALYSIS

In our modernizing world, it is clear that the direction for elections is heading toward universal mail-in and/or online voting, which pose some challenging problems in terms of voter protections and election security.<sup>148</sup> Just as the onset of vicious solicitation efforts in the early 19th century prompted the adoption of the Australian secret ballot system, and just as continued voter intimidation in the 20th century prompted the establishment of restricted zones around polling places, so too should the recent developments that threaten election integrity prompt action now.<sup>149</sup> Following the same evolutionary thread of election reform as set out by the Court in *Burson*, it becomes clear that our modern age holds new risks that must be addressed with progressive reforms.<sup>150</sup>

Part II addressed two potential approaches ranging from a more modest restriction of media reporting of results to an expansive prohibition on all speech relating to the election on Election Day. This part will explain why such approaches are inappropriate for the United States, and it will chart a middle-road proposal that adequately addresses the issue of voter protection and election security while also respecting the First Amendment protection of free speech. Rather than milquetoast regulations or extreme bans, a more reasonable approach consists of limiting not only media reporting but also commentary from public figures and influential persons. This would be a targeted effort to ensure that voters are not unduly influenced or intimidated on Election Day. Then it will show how the favored approach solves problems in both the traditional in-person voting context as well as in the evolving mail-in and online arenas.

#### A. *Too Small and Too Big: Flawed Propositions*

Restricting media reporting is a good first step in addressing the problem of undue influence on voters during Election Day. As noted in Part II, the United Kingdom's approach serves to protect voters by ensuring that speculation is limited and that voters can go to the polls confident that their votes matter.<sup>151</sup> Indeed, prohibiting media organizations from publishing exit polling or election results until the last polls have closed nationally would mean that results from the east would not influence voters in the western part of the country. Further, the absence of media commentary would allow voters to ponder their choices without being swayed by the news organizations on which Americans have come to depend.<sup>152</sup>

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<sup>148</sup> See *infra* notes 191–94 and accompanying text.

<sup>149</sup> See *supra* notes 19–57 and accompanying text.

<sup>150</sup> *Burson v. Freeman*, 504 U.S. 191, 200–06 (1992).

<sup>151</sup> See *supra* notes 127–39 and accompanying text.

<sup>152</sup> See generally Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565 (2017).

However, such a proposal falls short of addressing the many other sources of influence on voters that are not the news media. Voters are still susceptible to alternate sources of “news” and “facts” via social media and other websites. This limited approach also fails to affect voter influence and intimidation around the polling place. While voters may currently be protected within some arbitrary distance from the ballot box, there is still a significant amount of electioneering occurring elsewhere. The Supreme Court noted in *Burson* that a person should have the freedom to ponder on their choices while approaching the ballot.<sup>153</sup> The problem is that, when recognizing that a tenth to a quarter of voters choose their candidate within two weeks of the election, and 8% did so in the last few days of the 2016 presidential election, there may still yet be a significant population of voters deciding on the day of the election.<sup>154</sup>

These eleventh-hour voters wake up in the morning and have their morning coffee while reading the newspaper and watching cable television. On the way to the polls, voters are bombarded with bright billboards, loud radio ads, and overzealous volunteers with clipboards. All the while, their phones might be buzzing with emails or texts from campaigns imploring them to vote for a candidate. In our modern technological age, we are deluged with an astounding amount of information. One hundred feet, six hundred feet, or even one-thousand feet are not going to be enough to protect these voters from any of that. It is a relatively insignificant consolation that we can have at least 15 to 30 seconds of relative peace while we approach the ballots, depending on how fast one walks.<sup>155</sup>

Certainly, a heavy-handed approach would theoretically solve all of these problems at once. If the United States adopted the French model of prohibiting all election and campaign speech for the duration of Election Day, there would be very few, if any, sources of intimidation and influence on voters as they went to the polls. Nobody would be permitted to solicit votes, billboards and placards would be removed from view, and the airwaves would return to more commonplace advertising, just as if it were the day after Election Day. Even in the mail-in and online contexts, a complete ban could mean reduced direct campaign mail, emails, and advertising on websites. Without any measurable source of influence of any kind, it becomes difficult to see how election integrity could be compromised through voter intimidation.

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<sup>153</sup> *Burson*, 504 U.S. at 210.

<sup>154</sup> See *supra* note 105 and accompanying text.

<sup>155</sup> An average human walks at a speed of about 2.8 miles per hour (“mph”) (1.25 meters per second), but some walk slower at 2.3 mph (1.03 m/s), and others walk faster at 4.6 mph (2.07 m/s). Michaela Schimpl et al., *Association Between Walking Speed and Age in Healthy, Free-Living Individuals Using Mobile Accelerometry—a Cross-Sectional Study*, 6 PLOS ONE 1, 6 (Aug. 2011). This number assumes that no line forms at the polling place.

However, such an approach is fundamentally hostile to the First Amendment.<sup>156</sup> Political speech is one of the most highly regarded forms of speech in the United States.<sup>157</sup> “The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>158</sup> To infringe upon people’s right to speak about political issues in a democratic process would without question be contrary to the purpose of the First Amendment right to free speech. Even though the government may regulate speech in certain circumstances as compelling interests demand it, given current Supreme Court precedent, such expansive prohibitions seem impossibly unlikely.<sup>159</sup> It is hard to justify such sweeping restrictions as necessary to the compelling interests of protecting the electorate.

Further, as the French have experienced, enforcing this sort of law and prosecuting violations is not feasible.<sup>160</sup> Compliance is effectively voluntary—it can be best described as an honor system.<sup>161</sup> Given the United States’ fierce freedom of speech traditions, it is doubtful that Americans would stand for such a law that feels like Orwellian censorship.

So, what then is an appropriate level of regulation?

#### B. *Just Right: A Balanced Approach*

This middle-road proposal charts a path that does more than just restrict media reporting and is more refined than a blanket ban on political speech. It recognizes that the 100-foot zone accepted by *Burson* is no longer sufficient to protect voters on Election Day due to the new forms of voter outreach, influence, and even intimidation. This proposal goes back to the statute in *Mills v. Alabama* and restricts “electioneering” on Election Day, which gives the American electorate some leeway on political speech. This section will also demonstrate that these actions are necessary and measured approaches to address the compelling interests of voter intimidation and excessive influence.<sup>162</sup>

Electioneering is defined as taking “an active part in an election” and “the activity of trying to persuade people to vote for a particular political party.”<sup>163</sup> The statute in *Mills v. Alabama* proscribed “electioneering or []

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<sup>156</sup> See generally McDonald, *supra* note 3.

<sup>157</sup> See generally *id.*; David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 Harv. J. Sports & Ent. Law 1, 8–17 (2011).

<sup>158</sup> *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>159</sup> See *Burson v. Freeman*, 504 U.S. 191, 210 (1992); *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

<sup>160</sup> See *supra* notes 143–45 and accompanying text.

<sup>161</sup> See *supra* notes 143–45 and accompanying text.

<sup>162</sup> This proposal uses the same interests that the Supreme Court in *Burson* deemed to be compelling: the right to vote and the right to an election conducted with integrity. *Burson*, 504 U.S. at 198–99.

<sup>163</sup> *Electioneer*, MERRIAM-WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d ed. 1993); *Electioneering*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/>

solicit[ing] any votes,” indicating that the activity most likely to cause voter influence and intimidation is the direct and active communication to other individuals in a persuasive manner.<sup>164</sup> The action at issue in *Mills* was the publication of a newspaper editorial intended to persuade people to vote a certain way.<sup>165</sup>

Another component of identifying what constitutes electioneering is also the medium of communication or distribution. The Federal Election Commission (“FEC”) has defined “electioneering communication” as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office . . . .”<sup>166</sup> It also stipulates that such a communication reaches 50,000 or more people in the relevant jurisdiction of the candidates, which makes the distinction between popular communications and communications that have a lower impact.<sup>167</sup> However, their definition has exceptions that exempt news stories and commentary, among other things.<sup>168</sup> A more robust and less limiting definition of electioneering communications will be necessary to ensure uniform rules for the entire American public, and not just campaigns and special interest groups.

This proposal carries over the same definition of electioneering when it comes to the persuasive capacity of any given person’s message, and it applies the FEC’s requirements that an election communication is publicly distributed in some manner. Such communications can take place in a variety of ways: via verbal conversation, text or email messaging, television ads, billboards, and so on. To be clear, this proposal does not include the FEC’s other stipulations, such as identifying a candidate, taking place on the airwaves, reaching 50,000 people, or exceptions for the media. That way, this proposal can go further than the United Kingdom’s media-only approach, but not quite as far as the French model of total election silence.

Individuals will still be able to discuss things of political nature with one another in private settings, even if they are persuasive. For example, families eating breakfast at the table can make last-ditch efforts to convince one another to vote a certain way without fear of violating election silence. Friends and colleagues can send each other messages and emails, and those kinds of speech are not publicly distributed. Allowing this kind of speech is consistent with the principle that Americans should have an “interchange of ideas” in a participatory democracy.<sup>169</sup> Discussing politics and issues with

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electioneering (last visited Feb. 4, 2022). No entries for “electioneer” or its derivative forms appear in Black’s Law Dictionary.

<sup>164</sup> *Mills*, 384 U.S. at 216.

<sup>165</sup> *Id.* at 215.

<sup>166</sup> 52 U.S.C. § 30104(f)(3)(A).

<sup>167</sup> *Id.* § 30104(f)(3)(C).

<sup>168</sup> *Id.* § 30104(f)(3)(B).

<sup>169</sup> *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

one another is the very foundation of the American experiment and is not something to be abridged.<sup>170</sup>

In the public setting, however, things get more complicated. For example, people could talk about protecting their Second Amendment rights, permitting access to abortions, advocating for higher taxes on the wealthy, and so on. These are clearly partisan issues from which one can discern the speaker's political position and persuasive intent.<sup>171</sup> While not referring to a specific candidate or ballot issue, individuals can refer to right-leaning or left-leaning candidates on the ballot by their well-known policy positions. The Supreme Court in *Burson* approved the 100-foot zone because it would allow voters to be free from interference.<sup>172</sup> In the spirit of shielding voters from overzealous advocates on Election Day, such reference to issues *in a persuasive manner* must also be restricted. Simply having a conversation about climate change, conflicts in the Middle East, or agricultural policy should be permitted, provided that there is no intent to pressure someone to vote in favor or against the issue being discussed.

Making these distinctions between public and private communication and persuasive and non-persuasive speech is what makes this a middle-road approach.<sup>173</sup> The following sections discuss how the problems associated with voter influence and intimidation are ameliorated or solved by implementing this proposal.

### C. *Necessary and Narrowly Drawn to Protect In-Person Voters*

The Supreme Court struck down the election silence law in *Mills v. Alabama* with a condemnation of any effort to silence political speech.<sup>174</sup> The Court made no reference to compelling interests or other reasons why such a law might be necessary; instead, it held that “no test of reasonableness” could save such a law.<sup>175</sup> Over two and a half decades later, the Court would then apply such a test in *Burson v. Freeman* to restrictions of political speech, stating that such laws could survive strict scrutiny.<sup>176</sup> To do

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<sup>170</sup> Post, *supra* note 46, at 483.

<sup>171</sup> See Frank Newport & Andrew Dugan, Opinion, *Partisan Differences Growing on a Number of Issues*, Gallup (Aug. 3, 2017), <https://news.gallup.com/opinion/polling-matters/215210/partisan-differences-growing-number-issues.aspx>.

<sup>172</sup> *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

<sup>173</sup> It should be mentioned that such distinctions may be difficult to draw, and this Comment will not endeavor to create a bright-line rule beyond the generalized approach that has already been suggested. The Supreme Court is wrestling with these distinctions, and it will be up to the judiciary to determine what private and public means in this context, as well as persuasive and non-persuasive. See generally *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

<sup>174</sup> *Mills v. Alabama*, 384 U.S. 214, 220 (1966).

<sup>175</sup> *Id.*

<sup>176</sup> *Burson*, 504 U.S. at 199–200.

so, the prohibitions required by statute would have to be necessary and narrowly drawn to achieve the compelling interests asserted.<sup>177</sup>

The state of Tennessee in *Burson* alleged that it had two compelling interests, both of which are still applicable today: the “right to vote freely” and the right to an “election conducted with integrity and reliability.”<sup>178</sup> Nothing has changed in the last several decades from the legal standpoint to jeopardize the status of the most fundamental right conferred upon citizens of the United States.<sup>179</sup> When revisiting *Mills v. Alabama* in the modern context, applying the rationale of *Burson v. Freeman*, it becomes clear that such prohibitions expressed in this Comment’s proposal are indeed necessary. Further, it is also clear that they are drawn narrowly enough to achieve the desired effect.

The form of speech is one area in which the proposal needs to be narrowly drawn, which was one of the concerns that the Court had in *Burson*.<sup>180</sup> In limiting the election silence to only publicly disseminated persuasive speech, the proposal’s regulation is not overinclusive in that it captures other forms of political speech that do not affect voter integrity. Further, it is not underinclusive, as it without question regulates a wide range of speech-related to voter influence. The *Burson* Court determined that the 100-foot zone was not underinclusive because “the failure to regulate all speech . . . [does not render] the statute fatally underinclusive.”<sup>181</sup> Likewise, the clear omission of regulation from private and/or non-persuasive political speech does not mean that the proposal is flawed in that regard. Instead, the fact that such speech is excluded from regulation should do the proposal some credit in recognizing that some forms of speech are *less likely* to affect voters negatively.

Next, the length of time in which political speech is restricted is also necessary and narrowly drawn. The goal is to shield voters from influence and intimidation on Election Day as they go to the polls, and the proposal would only be active while the polls are open. From the moment that the first polls open to the moment that the last polls close in the jurisdiction(s) which the elected office represents, no public persuasive speech will be permitted. The proposal does not act to limit speech indefinitely; rather, it is restricted to only the times in which the polls are open—people are free to speak beforehand, and they are free to speak again afterward. These are necessary sacrifices to ensure that this country’s election processes and systems continue to be trusted. Voters must have the opportunity to ponder their

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 198–99.

<sup>179</sup> See generally Gill v. Whitford, 138 S. Ct. 1916 (2018) (voicing the Court’s affirmation for the right to vote as one of the most fundamental rights despite never reaching the core of the issue).

<sup>180</sup> *Burson*, 504 U.S. at 206–07, 210–11.

<sup>181</sup> *Id.* at 207.

choices during the day and be free from influence and intimidation from others.

In fact, the Supreme Court of the United States has spoken on the subject of ensuring that decisions made by individuals are informed ones.<sup>182</sup> In *Planned Parenthood v. Casey*, the Court permitted a law that helped “ensure that a woman’s decision to abort is a *well-considered* one . . . .”<sup>183</sup> It may seem disingenuous to compare abortion to voting, but the point is valid that the Supreme Court is concerned about important decisions being made by individuals. Abortion is a decision that can affect the potential life of a baby, and voting has been described as “a right at the heart of our democracy.”<sup>184</sup> It should not be so untoward to suggest that individuals should have a just as well-considered decision when they go to vote at the polls.

Lastly, it must be noted in this section that early voting is a form of in-person voting in which individuals can also be susceptible to influence and intimidation.<sup>185</sup> Early voting is similar to traditional election-day voting in that regard, but it is also different because it takes place over a broad span of time, sometimes as long as fifty-five days in some places.<sup>186</sup> Of course, extending the terms of this proposal over two months would be entirely impractical in enforcement, severely unconstitutional, and antithetical to the entire campaign process.<sup>187</sup> However, it may be that some of the aspects of the proposal *can* be extended in light of recent changes favoring the use of mail-in and early voting. For example, polling place buffer zones can be greatly increased to cover the long lines that often occur at early voting sites in order to achieve the effect of generalized election silence in a specific locale.<sup>188</sup> Additionally, states can follow the state of Georgia’s model in extending buffer zones to individuals in line even if they are outside of the polling place buffer zone itself.<sup>189</sup> Though, this Comment does not claim such measures as part of the proposal within, for they require more study in their own right.

#### D. *Applying the Constitutional Test to Mail-In and Online Voters*

Similarly, mail-in voting also takes a long time, and again, it is imprudent to expect that the proposal could apply to nearly two months’ worth

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<sup>182</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 969 (1992).

<sup>183</sup> *Id.* (emphasis added).

<sup>184</sup> *Burson*, 504 U.S. at 198.

<sup>185</sup> See *supra* notes 104–05 and accompanying text.

<sup>186</sup> *Early Voting In-Person Voting*, NAT’L CONF. OF STATE LEGISLATURES (June 11, 2021), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

<sup>187</sup> See McDonald, *supra* note 3, at 354; Gallagher & Price, *supra* note 144.

<sup>188</sup> See Hernández, *supra* note 62. Although the 2020 pandemic has made standing six feet apart necessary, drastically extending the length of lines, they remain much longer than the buffer zones in normal circumstances. *Litt*, *supra* note 62.

<sup>189</sup> See *supra* Figure 1.

of time before an election.<sup>190</sup> However, the restriction on electioneering communications could cover a span of a few days prior to Election Day to grant voters and their mailboxes some reprieve from the deluge of campaign mail.<sup>191</sup> Such extended measures could be necessary to ensure voters are getting the same fair treatment as those on Election Day. On the contrary, it is also possible that voters are more than capable of resisting undue influence over a longer span of time. Further study will also be necessary to come up with a clearer picture of how voter attitudes change in these situations and what measures would be narrowly tailored to address the negative consequences of mail-in voting if any. Additional scholarship should guide the solution to this temporal problem.

However, it is possible that Election Day mail-in voters will also see benefits from the proposal's restrictions on campaign-related speech. Although the concept of mail-in voting suggests that voters send their ballots to the Board of Elections via the United States Postal Service ("USPS"), there do exist drop boxes to which voters can submit their ballots.<sup>192</sup> This means that there is a possibility of voters deciding on Election Day just as any other in-person voter would, and they are simply using the mail-in/drop box option for the convenience of not having to wait in line during prescribed hours at a polling place.<sup>193</sup> Restricting election-day speech would confer benefits to these voters, as they can spend the day free from persuasive attempts to influence their votes and submit their mail-in ballot at their convenience.

If online voting becomes a reality in the United States, there will be serious consideration given to the role of cybersecurity and the influential power of social media and other forms of access to a voter's attention.<sup>194</sup> Implementing the proposal's restriction of Election Day speech may mean that there are fewer campaign messages in email inboxes or fewer advertisements on webpages, both of which could be used to grab someone's attention. The notable absence of such things on the internet means that voters can be confident that any links or messages are coming from government sources regarding the election. While such a system is still quite a way from becoming a reality, if the measures advocated by this proposal are implemented, voters could become accustomed to the new normal on

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<sup>190</sup> McDonald, *supra* note 3, at 354.

<sup>191</sup> Jacob Bogage, *USPS on-time performance dips again as millions prepare to mail 2020 ballots*, Wash. Post (Oct. 9, 2020), <https://www.washingtonpost.com/business/2020/10/09/usps-ballots-performance/>. As of October 9, 2020, with a month to go before the election, the USPS "had already delivered a record 417 million pieces of election mail—including ballot applications, voter information and 64 million ballots. That compares with 200 million during the entire 2016 election cycle." *Id.* For context, there were over 156 million registered voters in 2016. Erin Duffin, *Number of registered voters in the United States from 1996 to 2020*, STATISTICA (June 28, 2021), <https://www.statista.com/statistics/273743/number-of-registered-voters-in-the-united-states/>.

<sup>192</sup> Rakich, *supra* note 106.

<sup>193</sup> *See id.*

<sup>194</sup> *See generally supra* notes 117–19 and accompanying text.

Election Day and ease into the process more smoothly without fear of being led astray by overbearing or malicious actors.

The necessity of ensuring a stable election process in this way is clear, perhaps even clearer than is the case with traditional in-person voting due to the unprecedented level of access to the voter via the internet. Additionally, restrictions on public and persuasive election speech are narrowly tailored in this respect because the proximity of the voter and the ballot is closer than ever. While voters may have “15 seconds” of reprieve from the campaigns in the polling place under the current *Burson*-type laws, future online voters will have no such thing. Without election silence protections, voters could be reading misleading news articles, watching videos on partisan cable channels, and listening to political podcasts from their favorite influential figures mere moments before clicking the link to cast their ballot—all from their phone. Even if none of the measures in this Comment become reality in our current voting regimes, it will be absolutely imperative to extend some sort of *Burson*-type election silence to the internet if Americans one day have the option to vote online.

#### IV. CONCLUSION

It is worth mentioning that this proposal is not meant to be easily and immediately applied, but rather, different aspects of it can be implemented and built upon one another to reach the goal of Election Day silence.<sup>195</sup> The more comfortable the American public becomes with the ideas at play here, the more likely the broadest protections can be realized.<sup>196</sup> News organizations and social media outlets will face tough decisions on how to address their policies and the effects they have on the American electorate. As the internet and digital technology continue to have an outsize influence on voters, social media outlets like Twitter and Facebook are being scrutinized for their policies.<sup>197</sup> The federal government will have to take action to standardize election law to ensure that all voters in national elections face the same choices with the same information, free from improper influences.

The actions taken now will impact future outcomes. Addressing these problems soon will improve not only voter protections and election security but also the confidence that Americans will have in their democratic process. In a time where such confidence is being shaken, it is all the more important that the government take necessary actions to restore public trust.<sup>198</sup>

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<sup>195</sup> See generally MICHAEL T. HAYES, *THE LIMITS OF POLICY CHANGE: INCREMENTALISM, WORLDVIEW, AND THE RULE OF LAW* 7–21, 173–180 (2001); Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 81–86 (2011).

<sup>196</sup> See generally HAYES, *supra* note 195.

<sup>197</sup> See *supra* notes 124–25 and accompanying text.

<sup>198</sup> See generally John Wagner et al., *Pence declares Biden winner of the presidential election after Congress finally counts electoral votes*, WASH. POST (Jan. 7, 2021, 5:03 AM),

The more secure the United States is in its election process, the more prepared it will be to take on evolving election procedures such as universal mail-in and online voting.

Further, implementing these policies might have the added effect of calming the electorate before a winner is announced. As the 2020 general election drew to a close, there was a feeling of tension—as if a pall cast over the country as we waited with bated breath to find out who would be the next President and which party would be in control of Congress. The contentious battles leading up to Election Day certainly set the stage for our collective apprehension as to what would happen next.<sup>199</sup> Without the constant barrage of messaging and overtures from the campaigns and the frenzy of reporting and commentary from the media, the country could breathe deeply and exercise patience. Perhaps a brief pause will help the country collect itself and prepare to move forward.

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<https://www.washingtonpost.com/politics/2021/01/06/congress-electoral-college-vote-live-updates/>; William Cummings et al., *By the numbers: President Donald Trump's failed efforts to overturn the election*, USA TODAY NEWS, <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> (Jan. 6, 2021, 10:50 AM).

<sup>199</sup> The word “apprehension” seems like an appropriate representation of what many people felt on Election Day, and even afterward. Nobody knew if the results of the presidential election would spark civil unrest, and especially nobody knew how the Trump campaign and administration was going to respond to President-elect Biden’s victory. Thankfully, the transition proceeded relatively smoothly into 2021, despite the events of January 6th. See Calvin Woodward, *Biden inaugural: Abrupt pivot to civility in post-Trump era*, AP (Jan. 20, 2021), <https://apnews.com/article/joe-biden-inauguration-day-dc-ee79e2f1bf1a1b2e20180b3cc63e174a>; see also Lisa Mascaro et al., *Pro-Trump mob storms US Capitol in bid to overturn election*, AP (Jan. 6, 2021), <https://apnews.com/article/congress-confirm-joe-biden-78104aea082995bbd7412a6e6cd13818>. Still, it is worth our time to understand how to avoid inching so close to the precipice next time.