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Temporal Buffer Zones: The Constitutional Case for Regulating Political Speech Immediately Prior to Elections

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The First Amendment forbids most limits on political speech, but it permits buffer zones around polling stations on Election Day. This exception to the deregulatory thrust of election speech doctrine is striking, and strikingly under-theorized. In what follows, we excavate the core principle that underpins the buffer zone exception—decisional solemnity—and we argue that, properly understood, the same principle justifies the use of temporal buffer zones: stricter-than-normal regulations on certain types of political speech in the immediate vicinity of an election. Voting, we argue, is an act different in kind from the deliberation that precedes it. Accordingly, governmental efforts to ensure the sanctity of voting can survive exacting First Amendment scrutiny in a manner that similar efforts to quell or influence expression throughout the campaign process cannot. For all the case law (and scholarship) arguing that campaigning should be insulated from legal control, there is an under-appreciated interest in subjecting voting—as distinct from campaigning—to legal controls that help to guarantee its solemnity. Physical buffer zones are paradigmatic. Temporal buffer zones are a natural extension.

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INTRODUCTION

The viability of democracy, as a political form, depends on two discrete processes: a relatively long (and often agonizing) period of deliberation, and a relatively brief moment of decision—voting. In principle, if not always in practice, the two are complementary; deliberation occasions decisions, and decisions express the fruits of deliberation. But the two are categorically different, and the constitutional law of elections ought to reflect that difference. In what follows, we argue that it already does.

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In 1992, the Supreme Court held that electoral buffer zones—restrictions on political speech near polling places—were constitutionally warranted in light of the governmental interest in enforcing the solemnity of voting as an act.[1] In 2018, it doubled-down on this holding, writing that

> some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.[2]

Our argument in what follows is very straightforward: the same logic, centered on the solemnity of "choosing, not campaigning," also warrants restrictions on certain kinds of political speech in the immediate *temporal* vicinity of an election. The same considerations that make the space around elections sacrosanct make the time around them likewise.

1. Burson v. Freeman, 504 U.S. 191, 199 (1992) ("This Court has concluded that a State has a compelling interest [sufficient to satisfy strict scrutiny] in protecting voters from confusion and undue influence.").

2. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1887 (2018) (citation omitted); *see also id*. at 1886 (noting that in *Burson v. Freeman* the Court upheld a Tennessee law imposing a 100–foot zone around polling place entrances, and that, in finding that the law withstood even strict scrutiny, the *Burson* plurality—whose analysis was endorsed by Justice Scalia's concurrence—"emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past.").

This claim, we hasten to clarify at the outset, is not built on any notion of an "electoral exception" to First Amendment doctrine.[3] Nor is it unique to public regulation,[4] though that is certainly our main object of inquiry here. Rather, the argument is that limits on political speech in the vicinity of elections merit special constitutional solicitation. Because the period immediately surrounding an election involves a transition from deliberating to deciding—campaigning to voting—it should be treated differently than other aspects of elections and electoral speech.

In general, the First Amendment sharply limits the government's ability to constrain political speech.[5] But this generalization does not apply in the

3. *Cf.* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1804 (1998-1999) (introducing the electoral exception).

4. To take but one prominent example of non-public regulation, in the lead up to the 2020 presidential election, Facebook announced an effort to clamp down on voter confusion by prohibiting new political ads in the two weeks prior to Election Day. *See* Jeff Horwitz, *Facebook to Limit Political Ads Week Before Election, Label Premature Calls*, WALL ST. J. (Sept. 3, 2020, 3:58 PM ET), https://www.wsj.com/articles/facebook-to-limit-political-ads-week-before-election-label-premature-calls-11599130800. [https://perma.cc/5F3X-97MC]; *see also Twitter Blocks 70,000 QAnon Accounts After U.S. Capitol Riot,* APNEWS.COM (Jan. 12, 2021), https://apnews.com/article/twitter-blocks-70k-qanon-accounts-171a5c9062be1c293169d764d3d0d9c8 [https://perma.cc/Y9N5-FUS2] (Twitter taking similar action); Kevin Roose, *New Rules for YouTube Will Prohibit QAnon Posts*, N.Y. TIMES*,* Oct. 16, 2020, at B1 (same for YouTube); Mike Isaac & Kate Conger, *Facebook Bans Trump To Term's End*, N.Y. TIMES, Jan. 8, 2021, at B1 (Facebook banning President Donald Trump); Lia Eustachewich, *YouTube Blocks Rudy Giuliani from Profiting Off Videos*, N.Y. POST (Jan. 27, 2021, 9:16 AM ET), https://nypost.com/2021/01/27/youtube-blocks-rudy-giuliani-from-profiting-off-videos [https://perma.cc/98N8-9GWK] (YouTube taking action against Rudy Giuliani); Kelly Tyko, *MyPillow Twitter Account Permanently Suspended Following Trump Ally CEO Mike Lindell's Ban from Platform*, USA TODAY (Feb. 1, 2021, 7:46 PM ET), https://www.usatoday.com/story/tech/2021/02/01/mypillow-twitter-account-suspended-ban-evasion-mike-lindell-trump/4348778001 [https://perma.cc/9L56-CUAV] (Twitter suspending the account of an ally of President Trump).

5. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (finding that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"); Buckley v. Valeo*,* 424 U.S. 1, 15 (1976) (referring to the "[d]iscussion of public issues and debate on the qualification of candidates" as one of the "most fundamental First Amendment activities").

immediate vicinity of an election. The Court has made quite clear that restrictions of political speech in polling places, despite involving content-based distinctions, pass muster. In a world where social media has dissolved whatever boundaries there once were between space and time, political speech immediately before an election should yield to equivalent constraints.

Of course, as with all regulations that run up against First Amendment values, significant limits remain. Like the spatial buffer zones at issue in *Burson v. Freeman* and *Minnesota Voters Alliance v. Mansky*, temporal buffer zones would have to satisfy strict scrutiny. This means, at a minimum, that the scope and duration of temporal buffer zones would need to track the state's interests in counteracting voter confusion, ensuring solemnity at the polls, and defending the integrity of the electoral process. Traditional media organizations would also need to be exempted—perhaps categorically, perhaps more contextually—from the effects of temporal buffer zones. As we discuss below, however, we believe these limitations could be readily satisfied in practice; and in the event that a regulation went too far, courts would have ample opportunity to push back.

Ultimately, we aim simply to show that temporal buffer zones are constitutional *in principle*, so they should not be taken off the regulatory table. Whether any specific temporal buffer zone should survive strict scrutiny, let alone represent sound policy, is a contextual question. In practice, temporal buffer zones are likely to be narrow in both scope and content. Our point is simply that such zones, despite involving content-based restrictions on political speech, are not forbidden by category. On the contrary: if well-tailored, they can promote democratic values of the profoundest order.

We begin in Part I by providing a brief primer on the role of buffer zones in election administration. In Part II, we articulate our central analytical move from space to time. In particular, we note that, in practice, spatial buffer zones are really temporal buffer zones in disguise. In Part III, we set out some practical guideposts and address potential criticisms related to the parameters and scope of content regulation and the tricky question of media exemptions. We conclude by amplifying the Supreme Court's romanticism about the role that elections play in democracy. Far from criticizing the Court's aspirations, or perhaps its naivete, we instead argue that courts should take this core of romanticism more seriously by protecting the "island of calm" that is necessary to contemplate peacefully, and thus responsibly, the weighty act of voting.

PART I: A BRIEF PRIMER ON (SPATIAL) BUFFER ZONES

The Tennessee statute under challenge in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position" within 100 feet of a polling station.[6] Because the law distinguished, on its face, between political and non-political speech, it met with strict scrutiny[7]—requiring the state to show both that the law "serve[d] a compelling state interest and [was] narrowly drawn to achieve that end."[8] Accordingly, Tennessee argued that its law was necessary to protect (1) "the right of its citizens to vote freely for the candidates of their choice," and (2) the twin ideals of electoral "integrity and reliability."[9]

No one disputed the value of these goals—what, in a democracy, could be more important? Rather, the constitutional fight focused on whether the statute at issue was necessary to *vindicate* them. The challengers thought not. They argued, in essence, that the same goals could be secured by outlawing voter intimidation and interference directly, and that barring speech—though possibly effective—was painting with too broad, and too constitutionally problematic, a brush.[10]

The Court was "not persuaded."[11] Although voter intimidation and inference laws are plainly important, Justice Blackmun wrote, they "fall

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6. *Burson*, 504 U.S. at 193.

7. *Id.* at 197.

8. *Id.* at 198.

9. *Id.* at 198-99; *see also* Reynolds v. Sims, 377 U.S. 533, 555 (1964) (recognizing that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society"); Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (noting that the Court has "upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

10. Brief of Respondent at 23, *Burson*, 504 U.S. 191 (No. 90-1056) (arguing that the 100-foot buffer zone is "underinclusive and that there are other statutes sufficient to correct the problems associated with solicitations outside polling places. If these other statutes are adequate to take care of problems associated with speech permitted by [the buffer zone statute] if such speech creates interference with the electoral process, then they are surely adequate to remedy any problems associated with solicitation of votes or the display or distribution of campaign materials which similarly interfere with the electoral process.").

11. *Burson*, 504 U.S. at 206.

short of serving [the] State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections."[12] Electoral mischief can take many forms, and in particular, Blackmun worried about the "confusion and undue influence" that might result from "less than blatant acts."[13] So it extended Tennessee latitude—latitude to maintain a precautionary stance toward voter confusion, putting a proverbial fence around the Torah.[14]

And then, for more than 25 years, the Court was silent. *Burson* stood as good law, and buffer zones persisted—albeit as an object of continual constitutional challenge.[15] In 2018, the Court weighed in again: this time reviewing a Minnesota law that regulated the clothing and paraphernalia that voters may wear to the polling station and holding the statute unconstitutional.[16] In so holding, however, the Court made clear that the infirmity of the Minnesota statute was that it kneecapped the expressive

12. *Id.* at 206-07 (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976)).

13. *Id.* at 199, 207. For example, in *Citizens for Police Accountability Political Committee v. Browning*, the Eleventh Circuit found that the "commotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process—even deterring potential voters from coming to the polls—as other kinds of political canvassing or political action around the polls." 572 F.3d 1213, 1219 (11th Cir. 2009). Similarly, in *Rideout v. Gardner*, the First Circuit considered whether or not ballot selfies might constitute similar mischief, though the court ultimately concluded that these photos did not pose such a risk precisely because there was very little risk of causing confusion or intimidation at the physical voting location. 838 F.3d 65, 73 (1st Cir. 2016).

14. *See, e.g.*, Rabbi David E. Ostrich, *Making Fences Around the Torah*, BRIT SHALOM STATE COLL. (Nov. 20, 2017), https://www.britshalomstatecollege.org/torah-commentaries/2017/11/20/making-fences-around-the-torah [https://perma.cc/D7WF-6S7B] ("Just as a fence around a yard or house protects it, many of the Rabbinic innovations were designed to protect the commandments in the Torah. These developments were not seen as additions or subtractions . . . but rather as aids in maintaining the integrity of the mitzvot." (internal citations omitted)).

15. *See, e.g.*, Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993) (upholding 600-foot "campaign-free zone"); Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004) (striking down 500-foot prohibition on electioneering near polling places); Russell v. Lundergan-Grimes, 784 F.3d 1037 (6th Cir. 2015) (striking down 300-foot buffer zone); Calchera v. Procarione, 805 F. Supp. 716 (E.D. Wis. 1992) (striking down 500-foot buffer zone).

16. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018).

autonomy of individual voters,[17] *not* its attempt to vindicate the interests at issue in *Burson*. In fact, those interests enjoyed pride of place in the Court's opinion. After acknowledging—and endorsing—the centrality of "fraud, . . . intimidation, [and] confusion" to the *Burson* Court's analysis, Chief Justice Roberts (in *Mansky*) waxed aspirational about the "island of calm" that ought to define the immediate vicinity of an election,[18] writing that "[c]asting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning."[19]

Since *Burson*, the lower courts have had ample opportunity to fill in the dimensions of this "island of calm" with greater precision and have consistently protected the solemnity of the act of voting.[20] Though lower courts have reached differing conclusions on the merits of extending *Burson*—both literally to encompass larger protected areas[21] and

17. *Id.* (noting that "the State must draw a reasonable line" between the interests articulated in *Burson* and voters' freedom of speech); *see also id.* at 1891 (finding issue with the statute granting discretion to electoral judges to determine what apparel is "political," writing that it is "'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation'" (internal citation omitted)).

18. *Id.* at 1886, 1887.

19. *Id.* at 1887.

20. *See, e.g.*, Citizens for Police Accountability Pol. Comm. v. Browning, 572 F.3d 1213, 1220–21 (11th Cir. 2009) (protecting a "zone of order around the polls"); Russell v. Lundergan-Grimes, 784 F.3d 1037, 1051 (6th Cir. 2015); Marlin v. D.C. Bd. of Elections & Ethics, 236 F.3d 716, 720 (D.C. Cir. 2001) (recognizing the District's interest in preserving an "orderly and peaceful voting environment").

21. *Compare* Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993) (upholding 600-foot "campaign-free zone" around polling locations), *with* Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004) (striking down 500-foot prohibition on all electioneering near polling places), *and Russell*, 784 F.3d 1037 (striking down 300 foot no electioneering zone around all polling places).

metaphorically to include prohibitions on ballot selfies,[22] exit polling,[23] and polling place solicitation[24]—all have continued to recognize and build upon the principle that states have an interest in elevating the actual act of voting above the chaos and confusion of regular political discourse and electioneering.[25]

The remarkable thing about *Burson* is not the principles that underlie it. After all, few (we hope) would disagree about the importance of electoral integrity or about the dangers of voter confusion. The remarkable thing is its doctrinal upshot: that these interests suffice to overcome strict scrutiny. In the last thirty years, content-based restrictions on political speech, apart from *Burson*, have achieved that milestone in only three settings.[26] The first

22. *Compare* Silberberg v. Bd. of Elections of N.Y., 216 F. Supp. 3d 411 (S.D.N.Y. 2016) (upholding New York State's longstanding prohibition on displaying marked ballots), *and* Oettle v. Guthrie, 2020 IL App (5th) 190306 (Ill. App. Ct. 2020), *with* Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016) (striking down a New Hampshire statute prohibiting photographing marked ballots).

23. *Compare Browning*, 572 F.3d 1213 (upholding statute prohibiting exit polling within 100 feet of polling place), *with* Am. Broad. Co. v. Blackwell, 479 F. Supp. 2d 719 (S.D. Ohio 2006) (striking down prohibition on exit interviews within 100-feet of polling location).

24. United Food & Com. Workers Loc. 1099 v. City of Sydney, 364 F.3d 738 (6th Cir. 2004) (holding that state can prohibit solicitation of signatures within 100 feet of polling places); N.J. Press Ass'n v. Guadagno, No. 12-06353 (JAP), 2012 WL 5498019 (D.N.J. Nov. 13, 2012) (upholding statute prohibiting press solicitation of interviews and polling activity within 100 feet of polling place on election day).

25. Thus, we view cases such as *Anderson*, 356 F.3d 651, striking down statutes designed to protect voters from all electioneering on election day, as consistent with the view that *Burson* requires a clear boundary between the normal speech environmental and the "island of calm" within which voters cast their actual ballots.

26. We acknowledge that both campaign contribution limits and campaign finance disclosure have also survived exacting scrutiny, though in both cases the Court pointed to elements of these regulations that do not directly implicate political speech. In the case of contribution limits the Court held that "[a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves *little direct restraint on his political communication*, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the

is child pornography.[27] The second is material support for terrorism.[28] The third is campaign speech in the context of judicial rather than legislative office.[29] We discuss this last setting, and the analogy to *Burson* it invites (between judges and voters) more fully in the next section. But the first two settings are also notable, indeed arresting, for how *different* they are from *Burson*. Staunching child pornography and quelling terrorism are among the most fundamental functions our government serves.[30] That these hallowed goals show up, doctrinally, alongside the regulation of elections speaks volumes. It suggests that the Court sees such regulation—rightly, in our view—as paramount to the basic function of American government.

PART II: TEMPORAL BUFFER ZONES

The buffer zones at issue in *Burson* were necessary "to serve the [state] interest in protecting the right to vote freely and effectively."[31] The Court endorsed a 100-foot perimeter as adequate to protect this right because it recognized the state's interest that the "last 15 seconds before citizens enter

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voters, the transformation of contributions into political debate involves speech by someone other than the contributor." Buckley v. Valeo, 424 U.S. 1, 21 (1976) (emphasis added). Campaign finance disclosure rules have been held to implicate First Amendment rights to privacy and association, not political speech. *Id.* at 64 ("Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."). Even more, disclosure laws trigger an analysis that falls short of strict scrutiny, requiring only "that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. (citations omitted).

27. New York v. Ferber, 458 U.S. 747 (1982).

28. Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).

29. Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015).

30. *Ferber*, 458 U.S. at 756-57 ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (quoting Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 (1982))); *Holder*, 561 U.S. at 28 ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.").

31. 504 U.S. 191, 208 (1992).

the polling place should be their own, as free from interference as possible."[32]

Significantly, the concern in *Burson* was, at some level, *already* temporal. A 100-foot physical buffer was deemed to be an acceptable proxy for the temporal respite necessary to protect the act of voting from the commotion and turmoil of political campaigns. That the Court's original endorsement of buffer zones represented a conceptual shift from time to space bolsters our core conceptual shift from space back to time. As a practical matter, physical buffer zones are instantiations of temporal buffer zones—the difference between a 100-foot buffer zone and a 100-yard buffer zone is the amount of time provided for a voter to approach the polls absent political commotion, harassment, or intimidation. In fact, buffer zones that are explicitly temporal in nature have since been adopted including (as we discuss below) in the Bipartisan Campaign Reform Act (BCRA) of 2002.[33]

But what of the profound constitutional values on the other side of the ledger? If discussing public issues and debating the merits of candidates is the nucleus of the First Amendment, why should courts tolerate even a very temporary hiatus—whether temporal or spatial—of the campaigns that facilitate these activities? To be sure, states have an interest in running orderly and peaceful elections and every individual has the right to be free from harassment and intimidation. Crucially, however, the Court in *Burson* recognized that harassment and intimidation were only part of the story; and laws merely prohibiting intimidation and disturbing the peace were, accordingly, not adequate to vindicate the full gamut of state interests at play.[34]

Instead, the *Burson* Court recognized something special about the act of voting and the need to protect that right unequivocally. Pointing to the historical record, the Court championed the adoption of the secret ballot, which transformed elections, so they are "now as peaceful as our Sabbaths."[35] In *Mansky*, Chief Justice Roberts distinguished the act of voting more explicitly. Referring to polling places as "a special enclave"[36] and an

32. *Id.* at 210.

33. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

34. *See supra* notes 11-14.

35. *Burson*, 504 U.S. at 204.

36. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1886 n.9. (2018).

"island of calm in which voters can peacefully contemplate their choices"[37] Roberts distinguished the role of citizen qua deliberator and citizen qua decider:

> Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning.[38]

In other words, according to the Chief Justice, at some point during an election cycle citizens must take off their discussion-and-debate hat and put on their voting hat. This latter act is a solemn one and the distinction that Roberts draws between these roles calls to mind Roberts' distinction in *Williams-Yulee v. Florida Bar* between judges and politicians. "[T]he role of judges differs from the role of politicians" in part because judges make decisions independently, "with nothing to influence or control him but God and his conscience."[39] Like judges, voters operate in a sacred space, distinct from the deliberation between speakers and listeners who engage in First Amendment activity for much of the election cycle. To be clear, the Court does not distinguish between voting and campaigning since a single individual will engage in both activities. The distinction is between the *role* of voter and the *role* of campaigner, much as Roberts distinguished between the *role* of judges and politicians.

This role distinction was sufficiently important that, when it came to distinguishing judges from politicians, the Court held that First Amendment protections appropriate for the latter should "have little bearing on the [former]."[40] And likewise, the Court reasoned in *Burson* that the role of voting is so sacrosanct that it "force[s] us to reconcile our commitment to free speech with our commitment to other constitutional rights."[41] More specifically, it argued that buffer zones "present[] . . . a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy."[42]

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37. *Id*. at 1887 (quoting Brief for Respondents).

38. *Id*.

39. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446-47 (2015) (quoting Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830)).

40. *Id.*

41. 504 U.S. 191, 198 (1992).

42. *Id.*

Just as the Court in *Burson* recognized that physical buffer zones should be limited,[43] we recognize that temporal buffer zones must likewise be limited. Indeed, our analogy of time and space might mask important differences, such as the fact that space is inherently limited and thus temporal restrictions may invite abuse in a way that spatial restrictions do not. These are exactly the kinds of concerns we would expect to get worked out—and that courts plainly have the competency to address—in litigation. Part of the point of strict scrutiny is, after all, to facilitate the incremental clarification of constitutional boundaries. But it is certainly possible to identify guiding principles, such as (1) that temporal buffer zones should be limited to settings where counter-speech is not a feasible cure to the problem of mis- and disinformation,[44] and (2) that modes of political speech regulated by temporal buffer zones should bear a specific connection to the dangers of voter confusion and the corresponding value of electoral solemnity.

These limits gesture toward a broader countervailing principle, frequently touted in First Amendment law: the idea that the cure for bad speech is more speech.[45] Superficially, temporal buffer zones might seem to violate this principle; the point, after all, is to nip certain kinds of "bad speech" in the bud. In a deeper sense, however, temporal buffer zones are congruent with this principle because they recognize that the "counter-speech" approach is, by its nature, dynamic: its efficacy depends on having enough time for counter-speech to unfurl. And while it is difficult to say exactly when the relevant boundary sets in, the idea that *some* buffer zone is necessary verges on self-evident. For instance, we all know from decision-making in our everyday lives that at some point—sometimes earlier in the deliberation process and sometimes much later—it becomes untenable to rely on counter-speech as a safeguard of quality. Rather, we simply need to decide. Different viewpoints must be collated, and of course, to the extent

43. *Id.* at 209-11.

44. *See supra* note 4 and accompanying text.

45. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 727 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

practicable, all possible views should be accounted for. But more speech will not help.[46] Deliberation yields to meditation—and eventually, to decision.

In the electoral context, this process—from input to deliberation to meditation to decision—is nothing short of sacred. It marks the decisional moment of voting as distinct from the long and often agonizing process of campaigning and deliberation that proceeds it. As the Supreme Court held in *Timmons v. Twin Cities Area New Party*, "ballots serve primarily to elect candidates, not as forums for political expression."[47] To transition from being a participant-spectator to being a voter—to step into the decisional role—is to cross the threshold from potential to actual. This explains why we speak, colloquially, of the "buck stopping" with decision-makers;[48] why it feels different for courts to issue advisory opinions rather than typical holdings;[49] and why public opinion polls, however rigorous, seem distinct—in a very deep sense—from actual electoral results. It matters to have skin in the game; it disciplines the decision-making process. When we have to actually decide what to do—when we know the results will be real, momentous, and lasting—a different mindset reigns. Or at any rate, it should.[50]

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46. *Cf.* FED R. EVID. 403 (limiting the admission of otherwise-relevant evidence that risks "confusing the issues" or "misleading the jury," in order to safeguard the integrity of the process of reaching a verdict).

47. 520 U.S. 351, 363 (1997) (upholding a state law banning fusion candidates).

48. President Harry S. Truman, Farewell Address (Jan. 15, 1953) ("The greatest part of the President's job is to make decisions—big ones and small ones, dozens of them almost every day. The papers may circulate around the Government for a while but they finally reach this desk. And then, there's no place else for them to go. The President—whoever he is—has to decide. He can't pass the buck to anybody. No one else can do the deciding for him. That's his job.").

49. Flast v. Cohen, 392 U.S. 83, 96-97 (1962) ("[T]he rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.'" (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961))).

50. *See, e.g.*, *Black Mirror: The Waldo Moment* (Channel 4 (London) television broadcast Feb. 25, 2014) (offering a fictionalized—though only lightly—take on what can happen when elections become a source of vandalism rather than solemnity).

One piece of evidence in support of this view, drawn from existing law, is the so-called "*Purcell* principle," which holds that courts should generally refrain from interfering with electoral procedures—especially dramatic *changes* in electoral procedures—right before an election. The *Purcell* principle is controversial, and for good reason: it counsels judicial restraint even in the face of plausibly unconstitutional electoral practices.[51] For that reason, we are not necessarily endorsing the rule. We mean simply to call attention to its foundations: the *Purcell* Court worried explicitly about the risk of "voter confusion" that can result from "[c]ourt orders affecting elections," a risk that "[increases] [a]s an election draws closer."[52] But about this much we agree: the closer it is to an actual election, the more pronounced concerns about electoral chaos and voter confusion become—and the more important it becomes for otherwise-rigid constitutional limits temporarily to yield. And once again, the principle is straightforward and commonsensical. It is simply *different* to make decisions under conditions of temporal strain and confusion than it is to make decisions in calm.[53]

The idea that voting requires a different sort of analysis (and different legal accommodation) than deliberation is, at some level, quite intuitive. Indeed, the very fact that we *have* elections—rather than relying on highly robust polling data or other indicia of the deliberative process—already confirms the point. It would seem wrong in principle, not just a slippery slope in practice, to eschew the decisional moment, because doing so would imagine deliberation as sufficient to determine the answer to fundamental questions of moral value and political identity. Resolving such questions is not simply a matter of canvassing views to ascertain statistical traction[54] or

51. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 441-43 (2016).

52. Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam). For a recent application of the *Purcell* principle, see *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring), which notes that the *Purcell* principle "reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled."

53. *See, e.g.*, Raysor v. DeSantis, 140 S. Ct. 2600, 2600 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay) (writing that an Eleventh Circuit stay of a preliminary injunction that had been in place for "nearly a year," just days before an election, creates the risk of confusion and voter chill that *Purcell* warned against).

54. *See* PAUL KAHN, MAKING THE CASE 173-79 (2016) (exploring the limitations of statistical approaches to questions of value).

cataloguing reasons to determine which, in the abstract, prevail.[55] It is a matter of choosing between incommensurable goods.[56]

This view is not always dominant in contemporary democratic theory. On the whole, the thrust of such theory is overwhelmingly procedural: fixated on deliberation and sidelining the moment of decision as an afterthought.[57] And the theorists have a point. Deliberation is important and often suboptimal; it merits serious attention and reform. But deliberation cannot be the whole story, and there is a tendency in contemporary democratic theory toward *discomfort* with voting, as though the decision, when it finally comes, is little more than a closure of possibility, a collapse of discursive space. Although we reserve a full critique of this tendency—in proper political-theory terms—for future work, it is certainly among the concerns that motivates our constitutional argument.

So much for political theory. The practical question, from here, is how to calibrate the parameters of "calm" that voting—in its grandest form—necessitates. Where do the government's interests in counteracting voter confusion and ensuring electoral integrity kick in? And, just as importantly, at what point do they run out?

PART III: SOME PRACTICAL GUIDEPOSTS

A constitutional defense of buffer zones requires more than just appealing to a general intuition about the importance of protective boundaries. In other words, temporal buffer zones should not be exempt from traditional First Amendment scrutiny. Voting is an exceptional act—the superego of democracy that moralizes and tames the id of free-for-all political campaigns—but this exceptionalism does not justify First Amendment immunity or even partial immunity.[58] In practice, because

55. *See* MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS 290-317 (1985) (tracing the Aristotelian origins of this view).

56. *See generally* JOSEPH RAZ, ENGAGING REASON (2002) (exploring the relationship among value, reason, and will); ANTHONY KRONMAN, THE LOST LAWYER (1994) (describing the deterioration of the ideal of the lawyer, including the commitment to good judgment).

57. *See* Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L REV. 115, 173-77 (2014) (exploring the relentlessly procedural turn in contemporary democratic theory).

58. *C.f.* Schauer & Pildes, *supra* note 3, at 1805 ("If electoral exceptionalism prevails, courts evaluating restrictions on speech that is part of the process of

electoral buffer zones are content-based, they should be subject to strict scrutiny and should be narrowly-tailored to safeguard the integrity of elections and protect against voter confusion. Like all tailoring analyses, courts look at the totality of circumstances to evaluate whether a law is underinclusive or overinclusive. Because the boundaries of all buffer zones—physical or temporal—are somewhat arbitrary, the argument goes, they are all under- and/or overinclusive and thus facially unconstitutional. That, however, was precisely the argument advanced by the government in *Burson*—and squarely rejected by the Court. Put simply, the fact that spatial buffer zones are fated to be under- and over-inclusive is *not* grounds to designate them per se unconstitutional. *Burson* did not ignore the under- and over-inclusivity problem; it blessed spatial buffer zones anyway. Boiled down, our point is simply that the same should hold true of temporal buffer zones.

If we are right, the implication is hardly that all temporal buffer zones are fair game. Rather, the implication is that temporal buffer zones, like their spatial counterparts, are *facially* valid; as-applied challenges to their constitutionality would still be warranted,[59] and the government would still have to satisfy the narrow-tailoring requirement of strict scrutiny. As elsewhere in First Amendment law, courts would presumably take an all-things-considered approach to that question. So, while it is impossible to conclusively say which variables will drive the answer in a particular context, three considerations—content parameters, scope constraints, and media exemptions—are likely to play an important role.

1. Content Parameters

We begin with what we hope is an obvious observation: buffer zones should not quell (or regulate) *all* political speech, regardless of content or effect. Rather, because the purpose of buffer zones is primarily to prevent voter confusion, only those political activities that can reasonably lead to voter confusion should be subject to regulation in a buffer zone.

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nominating and electing candidates would employ a different standard from what we might otherwise characterize as the normal, or baseline, degree of First Amendment scrutiny.").

59. *See* Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009) (noting a general preference for as-applied challenges across a number of dimensions in election law).

Mindful of this principle, courts have endorsed physical buffer zones that limit the distribution of campaign materials, solicitation of votes, and shouting or other intimidating behavior. Temporal buffer zones might be justified if they limit the distribution of *misleading* or *dishonest* political ads, or if they require disclosure of such. And the temporality of a regulation may interact with other aspects of regulation as well. For example, a naked ban on electoral misinformation may only be justified immediately prior to an election, whereas a ban on knowing or willful distribution of misinformation may be justified for a longer period of time.[60]

Consider the following two temporally bound regulations: first, a state law that prohibits individual campaign contributions exceeding $5,000 in the final twenty-one days of a political campaign,[61] and second, a federal law that subjects all electioneering communications in federal elections to disclaimer and disclosure requirements thirty days before a primary election and sixty days before a general election.[62] The state law that caps contribution limits in the final weeks of a campaign may not be justified because contributions made late in the election cycle are unlikely by themselves to cause voter confusion.[63] On the other hand, the federal law (Bipartisan Campaign Reform Act (BCRA) of 2002) that requires political ads to declare their sponsor ("this ad was paid for by . . . ") and disclose their donors speaks directly to the government's interest in providing clarity to

60. We note that this principle runs counter to prior cases that have evaluated state laws that prohibited false political speech during an entire election cycle, in other words, with no consideration of temporality. For example, compare *In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000), which upheld Michigan's Judicial Code of Conduct and interpreted its speech-limiting provision such that judicial candidates "should not knowingly, or with reckless disregard, use or participate in the use of *any form of public communication* that is false" (emphasis added), with *Rickert v. State*, 168 P.3d 826, 827 (Wash. 2007), which struck down a state law prohibiting the sponsorship, with actual malice, of any political advertisement containing a false statement about a candidate for public office.

61. *See, e.g.*, WASH. REV. CODE § 42.17A.420 (2019) (limiting contribution limits in the final twenty-one days of an election).

62. *See supra* note 33.

63. Because contribution limits serve the compelling state interest in preventing corruption and the appearance of corruption, *see* Buckley v. Valeo, 424 U.S. 1, 21 (1976), it is possible that the law might survive a First Amendment challenge if the state provided evidence that contributions made late in an election cycle are more pivotal to a campaign and thus more likely to corrupt a candidate.

voters about the choices that they face. The thirty- and sixty-day windows are, like the 100-foot buffer zone in *Burson*, not arbitrary even though they lack surgical precision.[64]

2. Scope Constraints

The shift from space to time is not merely metaphysical. Like the physical buffer zones in *Burson*, temporal buffer zones should be large enough to achieve their aims effectively and avoid serious under-inclusivity, yet small enough to avoid becoming too over-inclusive or vague. In practice, temporal boundaries will depend on the content of the targeted regulation. The various questions that define the "scope" issue—How long do temporal buffer zones last? What speech falls within their ambit? What restrictions do they impose?—are interrelated. Campaign finance is notoriously fluid, and regulations that aim to limit campaign activity often merely push that activity into new channels.[65] Therefore, effective regulation should respond to various dimensions at the same time.[66]

We have faith that courts are well-equipped to manage the dynamic regulatory nature of temporal buffer zones. Indeed, the U.S. Supreme Court recently stayed a lower-court order that would have altered electoral districts four months before a state's primary election.[67] Recognizing a special concern about regulation "in the period close to an election," Justice Kavanaugh explained how courts should evaluate the content of these regulations differently depending on their temporal proximity to an election:

64. The Supreme Court upheld various provisions of the Bipartisan Campaign Reform Act (BCRA) but did not address the constitutionality of these temporal buffer zones. *See* McConnell v. FEC, 540 U.S. 93 (2003).

65. *See* Pamela S. Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999) ("Money, like water will seek its own level. The price of apparent containment may be uncontrolled damage elsewhere.").

66. *See, e.g.*, Douglas M. Spencer, *Corporations as Conduits: A Cautionary Note About Regulating Hypotheticals*, 47 STETSON L. REV. 225, 252-54 (2018) (arguing that as the "what" of campaign finance—contributions, issue advertisements, independent expenditures—become difficult to define, regulation of the "who" of campaign finance—corporations, unions, foreigners, nonprofits—becomes more important, and vice versa).

67. *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

> How close to an election is too close may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects. Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement.[68]

To illustrate what this general principle might look like in practice, compare the thirty- and sixty-day buffer zone described above with the one-week buffer zone recently announced by Facebook.[69] Facebook's buffer zone is shorter than BCRA in part because its limits on political speech (banning all new political ads) are far more significant than the limits in BCRA. If Facebook merely mirrored BCRA's disclaimer and disclosure requirements, we might still expect its buffer zone to be smaller due to the ease, relative to TV, with which digital ads can be produced and distributed. Broadcast and cable ads that reach at least 50,000 eyes, on the other hand, are not a trivial undertaking. Developing a (counter) message, producing content, and scheduling ad buys requires time. In short, the substance and scope of a buffer zone's regulation ought to be intimately tied to its size. Other evidence may prove quite useful to this inquiry, including social-science research on how fast and far counter-speech moves through the information environment and cognitive-science research on the process and timing of opinion formation among the electorate.

Finally, we note the significant impact of COVID-19 on the voting landscape post-2020. Although our argument in no way turns on the idiosyncratic conditions produced by COVID-19, it does become more urgent in their light. The simple reality is that many voters did not see a polling station during the 2020 election cycle, despite record voter turnout. Nearly half of all voters voted by mail.[70] If anything, however, this new voting environment, which could very well become the new normal, makes the temporal extension of *Burson* and *Mansky* more urgent. For an "island of calm" to surround the voting process, it must reach the broader political speech environments that mediate our lives—not just polling stations.[71]

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68. *Id.* at 881 & n.1 (noting *Purcell*) .

69. *See supra* note 4.

70. *See Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/ [https://perma.cc/MJ23-YSFA] (reporting that 46% of voters voted by absentee or mail-in ballot).

71. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1894 (Sotomayor, J., dissenting).

Eroding the boundary between deliberation and decision-making is likely to have lasting consequences, not merely of a pragmatic nature and not necessarily for the better.

3. Media Exemptions

Beyond the general scope constraints outlined in the last section, there is one type of constraint that calls for more specific attention: exemptions for media organizations. Put simply, temporal buffer zones should not preclude the publication of election-related political commentary. There may be room for the *regulation* of such commentary—for example, in the form of disclosure requirements,[72] volume limits,[73] or restrictions on when and how political candidates may use media organizations as an alternate channel of campaign speech. But unlike campaign ads, which could, in principle, be forbidden outright within a well-tailored temporal buffer zone, media expression requires greater accommodation.

The animating theme of this accommodation is freedom of the press. Despite its vaunted status, however, that constitutional precept has spawned little doctrine—making its contours somewhat difficult to judge. But a few core principles are clear. The first is that a law or regulation that otherwise serves an important election-related interest may still violate the First Amendment if it fails to sufficiently accommodate media organizations.[74] The second is that the government may not restrain the publication of specific stories or viewpoints it wishes to muzzle.[75] The third, and most relevant to our proposal, is that the government has limited ability to constrain election-related speech by media corporations in the immediate vicinity of an election.[76]

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72. Federal law currently exempts media organizations from any disclosure and disclaimer requirements related to political campaigns. *See* 52 U.S.C. § 30104(f)(3)(B)(i).

73. A volume limit is distinct from a "right to reply" provision that would require equal space for candidates to respond to critical media coverage. As the Supreme Court held in *Miami v. Tornillo*, compelling the media to publish "that which reason tells them should not be published is unconstitutional." 418 U.S. 241, 256 (1974) (internal citations omitted).

74. *See, e.g.*, Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 429, 429-46 (2013).

75. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

76. *See* Mills v. Alabama, 384 U.S. 214, 220 (1966).

This last principle comes from *Mills v. Alabama*, a 1966 case invalidating a state statute that criminalized the publication of op-eds on Election Day. Alabama defended the statute on electoral-integrity grounds, arguing that banning such op-eds was necessary to preempt eleventh-hour voter confusion. The idea was that newspapers have an incentive to run misleading hit-pieces on Election Day, because doing so would leave candidates with no meaningful opportunity to reply. The Court disagreed. In its view, the state's argument suffered the "fatal flaw" of proving too much: even assuming the state interest on offer is compelling, Justice Black reasoned, the challenged statute "leaves people free to hurl their campaign charges up to the last minute of the day *before* election . . . [making it] wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.'"[77] In other words, the statue did not actually solve the eleventh-hour problem. It merely pushed the proverbial hour back one day.

As it relates to our proposal, there are stronger and weaker ways to understand the principles in *Mills*. The strongest construction would simply be that temporal buffer zones must exempt media organizations categorically—full stop.[78] After all, the argument might go, *Mills* effectively involved a one-day buffer zone; and if *that* is too long, what hope is there for anything more capacious? On the flip side, the weakest construction of the principle would be that media organizations may not be singled out, as they were in *Mills*, for disfavored treatment vis-à-vis other avenues of campaign speech—but that as long as parity exists, the regulation of media organizations is fair game. (And there are, of course, imaginable positions in-between.)

One thing, however, that *Mills* plainly *cannot* be read to establish is that no temporal buffer zones of any kind are permitted. The reason for that is simple: *Burson*. Not surprisingly, the challengers in *Burson* leaned heavily on *Mills*, arguing that even the small patina of breathing room provided by a 100-foot buffer zone ran afoul of the latter's "last-minute" analysis.[79] But the *Burson* Court explicitly disagreed. It refused to pursue the logic of *Mills* to this extreme, instead cabining *Mills* as distinct because of its media

77. *Id*. (emphasis added) (quoting State v. Mills, 176 So. 2d 884, 890 (Ala. 1965)).

78. This is essentially the view of the dissenters in *Burson*.

79. Brief of Respondent at 24, Burson v. Freeman, 504 U.S. 191 (1992) (No. 90-1056) (noting that a 100-foot buffer zone "is as cogent as saying that the Birmingham newspaper editor in *Mills v. Alabama* had 364 days out of every year to write editorials urging people to vote one way or another in a public election and therefore had no basis for complaining about missing election day.").

valence,[80] and articulating a full-throated defense of spatial buffer zones. The same posture toward *Mills* applies with equal vigor to temporal buffer zones—and *Mills* serves, in some measure, to limit their application to the media.

CONCLUSION: THE LOST CAUSE OF ELECTORAL ROMANTICISM?

Electoral cynicism is not hard to come by today. For many, the sentiment no doubt follows reflexively from the broader culture of cynicism that pervades our politics. It now verges on orthodoxy that political campaigns are fated to be sordid, dispiriting affairs—dragging on, sapping our time and attention, exacerbating polarization rather than counteracting it.[81]

Nor are scholars and judges helping. In 2014, one of the nation's most preeminent election-law scholars famously rallied to the cause of *more* electoral cynicism, not less.[82] And the animating sensibility of the Supreme Court's campaign-speech and campaign-finance jurisprudence—a broadly deregulatory effort—is that politics just *is* unruly, making efforts to rein it in quixotic at best, oppressive at worst.[83] Indeed, even *Williams-Yulee*, a rare instance of a campaign regulation that survived strict scrutiny, was built on the premise that the judiciary differs from the political branches exactly insofar as politics is a kind of grand *quid pro quo* exchange. Politicians

80. *Burson*, 504 U.S. at 210 (distinguishing the regulation of newspaper editorials in *Mills* from the "State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there," which was an issue "carefully left open in *Mills*").

81. *See*, *e.g.*, Bertrall L. Ross II & Douglas M. Spencer, *Voter Data, Democratic Inequality, and the Risk of Political Violence*, 107 CORNELL L. REV. 101, 147-48 (forthcoming 2022) (describing how data-driven and social media-focused modern campaigning exacerbates partisan polarization).

82. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government,* 124 YALE L.J. 804 (2014).

83. For example, in holding that a matching-funds provision for elections unconstitutionally burdened the speech of privately financed candidates, the Court in *Arizona Free Enterprise Club's Freedom PAC v. Bennett* highlighted examples in the record where "independent expenditure groups decid[ed] not to speak in opposition to a candidate." 564 U.S. 721, 744 (2011); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 789, 792 (2002) (O'Connor, J., concurring) ("[C]ontested elections generally entail campaigning. . . . If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

promise certain outcomes, and in response, their supporters pledge votes—and dollars.[84]

So where does all this leave *Burson* and *Mansky*? To say they buck the cynical trend is, if anything, an understatement; in these cases, and these cases alone, the Court was willing to wax romantic about elections and the central role that the act of voting plays in a democracy. At some level, our argument is simply a plea to take this core of romanticism seriously. The notion that elections should represent an "island of calm," set apart from the onslaught of the foregoing campaign, is not mere rhetoric. On the contrary, it expresses one of the deepest aspirations of our legal order. First Amendment law—and ultimately, the entirety of our political culture—ought to take note.

84. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446-48 (2015); *see also* Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand, & Darren Modzelewski, *The Appearance and the Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 8 J. L. ANALYSIS 375 (2016) (examining this phenomenon empirically).