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A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics

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A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics

JASON ZENOR*

ABSTRACT

In the first presidential campaign following the controversial United States Supreme Court decision in Citizens United, much attention was given to the record amount of money spent on the election—close to \$3 billion. Ideally, more money spent on campaigning would permit more speech and add to the public discourse, and allowing more speech would encourage and permit bad speech to be countered with good speech. In 2012, however, claims arose that the candidates were being more negative than ever, including resorting to outright deception.

Many states have laws on the books that prohibit knowingly false campaign speech on material facts when there is a showing of actual malice, but the impact of these laws is unclear. In 2012, in the midst of the discussion surrounding the negative or untrue campaign speech, the United States Supreme Court quietly denied certiorari to a case that held one such law unconstitutional. That same month, the Court decided Alvarez v. United States, which held that the government could not punish a person for knowingly telling a lie without a showing of actual harm. Ultimately, it seems that the Supreme Court's actions are the death knell for the remaining false campaign speech statutes. Accordingly, this Article will argue that the Supreme Court needs to reconsider the protection for false speech. The Article forwards a new legal test that parallels the political speech doctrine with the commercial speech doctrine by giving less protection to knowingly false campaign speech.

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INTRODUCTION	42
I. THE REGULATION OF FALSE CAMPAIGN SPEECH: THE HARM TO THE POLITICAL PROCESS AND THE REACTION OF THE STATES	46
A. <i>The Harms of Negative Political Campaigns</i>	47
B. <i>The Law on False Campaign Speech</i>	49
II. THE ROOTS OF PROTECTION: FIRST AMENDMENT JURISPRUDENCE AND THE TREATMENT OF POLITICAL SPEECH AND FALSE SPEECH.....	53
A. <i>Political Speech</i>	54
B. <i>Unprotected False Speech</i>	57
C. <i>Protected False Speech: Alvarez</i>	60
III. THE RESOLUTION OF THE GROWING ISSUE: TREATING FALSE CAMPAIGN SPEECH LIKE FALSE ADVERTISING.....	63
A. <i>Defining the Level of Scrutiny</i>	64
B. <i>Drawing a Parallel to the Commercial Speech Doctrine</i>	66
C. <i>Protecting the Integrity of the Electoral Process</i>	67
D. <i>Implementing an Enforceable False Campaign Speech Statute</i>	69
CONCLUSION.....	71

INTRODUCTION

The 2012 election season—the first presidential campaign post-*Citizens United*¹—set new standards in American politics. The 2012 elections broke records for the amount of money spent on advertising.² There was also a never-ending amount of political punditry on cable news, as well as chatter on the Internet echo chambers.³ But more disconcerting

1. *Citizens United v. FEC*, 588 U.S. 310, 340 (2010).

2. David Lieberman, *Political Groups Spent Record \$3.37B on TV for 2012 Campaign: Analyst*, DEADLINE HOLLYWOOD (Nov. 30, 2012, 10:19 AM), <http://www.deadline.com/2012/11/political-advertising-tv-2012-campaign> [<http://perma.cc/VFR5-DQ39>]. Groups spent a record \$3.37 billion on the 2012 presidential campaign, a first since *Citizens United*. *Id.* This was up 35% from 2008. *Id.*

3. See, e.g., *Campaign 2012: Too Negative, Too Long, Dull*, PEW RES. CTR. (Jan. 18, 2012), <http://www.people-press.org/2012/01/18/campaign-2012-too-negative-too-long-dull> [<http://perma.cc/U4T2-YJGZ>].

were the claims that the candidates were being more negative than ever, including resorting to outright deception.⁴

During the 2012 presidential campaign, the candidates and their surrogates made many claims with what can arguably be described as a reckless disregard for the truth. For example, the Obama campaign ran an advertisement that made strong innuendoes that Mitt Romney was responsible for the death of a woman who had cancer because her husband lost his job and health insurance at a steel mill owned by the Romney-run Bain Capital.⁵ In reality, Romney left Bain Capital a few years prior to the woman's diagnosis, and she had actually lost her medical insurance from her own job.⁶ Likewise, Democratic Senate Majority Leader Harry Reid made unsubstantiated accusations that Mitt Romney had not paid taxes in ten years.⁷

President Obama was also the victim of lies and distortion. For instance, Paul Ryan suggested at the Republican National Convention that a General Motors factory in Wisconsin remained closed because Obama had failed to keep a campaign promise to bring recovery to areas such as Janesville, Wisconsin, where a General Motors factory was closed.⁸ The truth was that the plant closed before President Obama took office.⁹ A Romney Super PAC published claims that "Barack Hussein Obama will . . . force doctors to assist homosexuals in buying surrogate babies [and] . . . force courts to accept Islamic Sharia law in domestic disputes."¹⁰

4. See, e.g., *Study: Obama, Romney Wage Most Negative Race in Recent History*, ADVERT. AGE (Oct. 3, 2012), <http://adage.com/article/campaign-trail/study-obama-romney-wage-negative-race-recent-history/237565> [<http://perma.cc/2MS6-DEAW>].

5. Halimah Abdullah, *Campaign 2012: Smoke and Mirrors or Outright Lies*, CNN (Aug. 8, 2012, 1:37 PM), <http://www.cnn.com/2012/08/08/politics/campaign-distortions> [<http://perma.cc/TNJ5-4RZG>]. The advertisement was published by Priorities USA, an Obama Super PAC. *Id.* In the ad, the husband says: "When Mitt Romney closed the plant I lost my health care, and my family lost their health care . . ." *Id.*

6. *Id.*

7. *Id.*

8. See Lucy Madison, Paula Reid & Stephanie Condon, *Fact-Checking 6 Claims in Paul Ryan's Convention Speech*, CBS NEWS (Aug. 30, 2012, 6:13 PM), http://www.cbsnews.com/8301-250_162-57503683/fact-checking-6-claims-in-paul-ryans-convention-speech [<http://perma.cc/QMY4-USHH>].

9. *Id.*

10. *Barack Hussein Obama Will Move America to . . . , GOV'T IS NOT GOD*, <http://www.gingpac.org/wp-content/uploads/2012/08/GINGadFinal.pdf> [<http://perma.cc/DD9M-KZDL>] (last visited Mar. 21, 2016). This ad was placed in nineteen newspapers in three states. Becky Bowers, *Ad Claims Obama Will 'Force Doctors to Assist Homosexuals in Buying Surrogate Babies'*, *Politifact*, TAMPA BAY TIMES (Sept. 27, 2012, 5:16 PM), <http://www.politifact.com/truth-o-meter/statements/2012/sep/27/government-not->

In all, during the 2012 presidential election, Mitt Romney's claims were judged to be false 25% of the time,¹¹ and Barack Obama's comments were judged to be false 15% of the time.¹²

Despite these alarming numbers, the truth is that campaign lies are not new.¹³ During the 1800 presidential campaign, John Adams supporters claimed that if Thomas Jefferson won the presidency, "[Americans] would see our wives and daughters the victims of legal prostitution" and alleged that "murder, robbery, rape, adultery and incest [would] openly be taught and practiced."¹⁴ In 1884, opponents accused Grover Cleveland of fathering a child out of wedlock, and created the national slogan, "Ma, Ma, Where's My Pa?"¹⁵

More recently, in 1988, George H. W. Bush's campaign aired the infamous "Willie Horton" advertisement which implied that Dukakis was responsible for the furlough of a convicted murderer who committed rape while on release.¹⁶ The truth was that the furlough program had been signed into law during an earlier Republican administration.¹⁷ During the

god-pac/ad-claims-obama-will-force-doctors-assist-homosexu [http://perma.cc/36G3-2P3G].

11. *Mitt Romney's File*, *Politifact*, TAMPA BAY TIMES, <http://www.politifact.com/personalities/mitt-romney> [https://web.archive.org/web/20130615000000*/http://www.politifact.com/personalities/mitt-romney] (last visited Mar. 13, 2013). The site broke down his statements as follows: True 15%; Mostly True 16%; Half True 28%; Mostly False 16%; False 16%; and Pants on Fire [egregious lie] 9%. *Id.*

12. *Barack Obama's File*, *Politifact*, TAMPA BAY TIMES, <http://www.politifact.com/personalities/barack-obama> [https://web.archive.org/web/20130320170745/http://www.politifact.com/personalities/barack-obama] (last visited Mar. 20, 2013). This includes statements judged since 2008. The breakdown is as follows: True 22%; Mostly True 24%; Half True 27%; Mostly False 12%; False 14%; Pants on Fire [egregious lie] 1%. *Id.*

13. Rick Ungar, *The Dirtiest Presidential Campaign Ever? Not Even Close!*, FORBES (Aug. 20, 2012, 7:50 PM), <http://www.forbes.com/sites/rickungar/2012/08/20/the-dirtiest-presidential-campaign-ever-not-even-close> [https://perma.cc/WJ3D-26N7]; see also BRUCE L. FELKNOR, *DIRTY POLITICS* (1966) (recounting author's experiences regarding the ethics of political campaigns as executive director of the Fair Campaign Practices Committee).

14. Ungar, *supra* note 13.

15. Peter Wehner, *Some Historical Perspective on Negative Campaigning*, COMMENTARY (Oct. 29, 2010, 3:38 PM), <http://www.commentarymagazine.com/2010/10/29/some-historical-perspective-on-negative-campaigning> [https://perma.cc/299W-YAPN].

16. Roger Simon, *The GOP and Willie Horton: Together Again*, POLITICO (May 19, 2015, 5:12 AM), <http://www.politico.com/story/2015/05/jeb-bush-willie-horton-118061> [http://perma.cc/8DR2-EEA8].

17. Roger Simon, *How a Murderer and Rapist Became the Bush Campaign's Most Valuable Player*, BALT. SUN (Nov. 11, 1990), http://articles.baltimoresun.com/1990-11-11/features/1990315149_1_willie-horton-fourmier-michael-dukakis [http://perma.cc/3G3T-

2000 South Carolina Republican Primary, opposition to John McCain alleged that he was secretly gay, that his adopted daughter was actually his half-black, biological child who was born out of wedlock, and that his wife, Cindy McCain, was a drug addict.¹⁸ Likewise, in 2004, a group of former Vietnam POWs challenged the legitimacy of John Kerry's military commendations despite never having actually served with Kerry.¹⁹

In response to the perception of lies in politics, many states passed false campaign speech laws to punish anyone who tells lies of material fact in support of a candidate when it is done with actual malice.²⁰ Recently, however, these laws have been challenged and some courts have deemed them unconstitutional.²¹ In June 2012, the United States Supreme Court denied certiorari to a case out of the Eighth Circuit that had overturned a Minnesota false campaign speech statute.²² Additionally, in June 2014, the Court once again ignored the question of the constitutionality of false campaign speech statutes, instead leaving it for the lower courts to determine.²³

In 2012, the Court also decided *United States v. Alvarez*,²⁴ in which the Court struck down the Stolen Valor Act.²⁵ This statute was enacted and enforced to punish people who lied about having been awarded the

UZ98]. Bush advisor Lee Atwater said, "By the time we're finished, they're going to wonder whether Willie Horton is Dukakis' running mate." *Id.*; see also KERWIN SWINT, MUDSLINGERS: THE TWENTY-FIVE DIRTIEST POLITICAL CAMPAIGNS OF ALL TIME 153–58 (2008).

18. Jennifer Steinhauer, *Confronting Ghosts of 2000 in South Carolina*, N.Y. TIMES (Oct. 19, 2007), http://www.nytimes.com/2007/10/19/us/politics/19mccain.html?_r=0 [<http://perma.cc/4EXM-P2EM>].

19. See Kate Zernike, *Kerry Pressing Swift Boat Case Long After Loss*, N.Y. TIMES (May 28, 2006), <http://www.nytimes.com/2006/05/28/washington/28kerry.html?ex=1306468800&en=7158a80120f0ee5a&ei=5089> [<http://perma.cc/J7E7-N8VY>]. The POW group was called Swift Boat Veterans for Truth; the term "swiftboating" is now used to refer to when a left-leaning politician has been a victim of lies against him/her in a political campaign. *Swift-Boating Law & Legal Definition*, USLEGAL, <http://definitions.uslegal.com/s/swift-boating> [<http://perma.cc/VLQ3-MEP7>] (last visited Mar. 21, 2016).

20. See *infra* Part I-B.

21. See, e.g., 281 Care Comm. v. Arneson, 638 F.3d 621, 636 (8th Cir. 2011); Rickert v. Washington, 168 P.3d 826, 827 (Wash. 2007).

22. *Arneson*, 638 F.3d at 636 (holding that MINN. STAT. § 211B.06 (2014) is unconstitutional).

23. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014) (holding that there was an imminent threat of future prosecution sufficient to establish ripeness under Article III).

24. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

25. *Id.* at 2543 (holding the Stolen Valor Act, 18 U.S.C. § 704(b) (2012) unconstitutional).

Congressional Medal of Honor.²⁶ In striking down this law, the Court applied strict scrutiny to false speech of material fact²⁷ despite its prior holding that such speech had no particular value.²⁸

When one examines the precedent surrounding false speech and including *Citizens United v. Federal Election Commission*,²⁹ which gives almost absolute protection to political speech,³⁰ it seems clear that false campaign speech statutes are quickly becoming an endangered species. However, this Article will argue that these laws maintain an important and necessary function and that the United States Supreme Court needs to reconsider its precedent on false speech of material fact by placing more restrictions on such speech, particularly in contemporary politics where there is so little regulation.³¹

In Part I, this Article describes the adverse effects that negative campaigns have had on the political system, including causing widespread distrust and apathy. Part I-A examines these harms while Part I-B presents the laws enacted to prevent them. Part II outlines the legal precedent in areas of false speech, including political opinion, libel, and false advertising. Part II-A outlines the hierarchy of speech protection by first discussing the most protected form of speech: political speech. Part II-B examines the legal precedent surrounding forms of false speech, both protected and unprotected. Finally, in Part III this Article argues the United States Supreme Court needs to re-categorize false speech by subjecting it to only intermediate scrutiny review. This Article discusses the application of a test parallel to the commercial speech doctrine, treating false campaign speech like false advertising, and argues that enforceable false campaign speech laws would protect the integrity of the electoral process.

I. THE REGULATION OF FALSE CAMPAIGN SPEECH: THE HARM TO THE POLITICAL PROCESS AND THE REACTION OF THE STATES

Concern about the amount of lies in American politics is not new. In fact, states began passing false campaign speech laws during the Progressive era.³² Today, such statutes are in question as courts are

26. *Id.* at 2542.

27. *Id.* at 2543–44.

28. *Hustler v. Falwell*, 485 U.S. 46, 52 (1988).

29. *Citizens United v. FEC*, 588 U.S. 310 (2010).

30. *Id.* at 340 (“[I]t might be maintained that political speech simply cannot be banned or restricted as a categorical matter . . .”).

31. *See infra* Part I-B.

32. *See infra* note 49 and accompanying text.

considering them to be unconstitutional. But, false campaign speech may be having a greater impact on the electorate's voting decisions due to the sheer amount of money and exposure funneled into contemporary politics.

A. *The Harms of Negative Political Campaigns*

Critics argue that campaign distortion has destroyed the way the public perceives the political system.³³ False campaign speech has lowered the quality of political discourse as campaign strategists now have to focus on creating and responding to the overwhelming number of negative attack ads.³⁴ All of this leads to a frustrated electorate that has chosen to check out of the process, leaving the political game to those with the greatest monetary investment in the system.³⁵ Consequently, extreme partisan politicians use political lies to serve very narrow private interests. It appears that the majority of politicians is only concerned with winning campaigns and is rarely concerned with educating the electorate or finding the truth.

The distortion of political issues and policies has serious impact on the outcome of elections and the ultimate decision makers that are sworn into public office. One poll found that even before *Citizens United* there was “strong evidence that voters were substantially misinformed on many of the issues prominent in the election campaign, including the stimulus legislation, the healthcare reform law, TARP, the state of the economy, climate change, campaign contributions by the US Chamber of Commerce[,] and President Obama’s birthplace.”³⁶ Moreover, the influx of

33. *E.g.*, JOSEPH CUMMINS, ANYTHING FOR A VOTE: DIRTY TRICKS, CHEAP SHOTS, AND OCTOBER SURPRISES IN U.S. PRESIDENTIAL CAMPAIGNS (2007); RYAN HOLIDAY, TRUST ME, I'M LYING: CONFESSIONS OF A MEDIA MANIPULATOR (2012); KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992); RICHARD K. SCHER, THE MODERN POLITICAL CAMPAIGN: MUDSLINGING, BOMBAST, AND THE VITALITY OF AMERICAN POLITICS (1997); KERWIN SWINT, *supra* note 17.

34. *See* SHANTO IYENGAR & JENNIFER MCGRADY, MEDIA POLITICS 150, 168 (2007) (“The most compelling explanation of negative campaigning is that one attack invites a counterattack, thus setting in motion a spiral of negativity.”).

35. The voter turnout was only 57.5% for the 2012 presidential election; voter turnout was 62.3% in 2008, 60.4% in 2004, and 54.2% in 2000. Kevin Liptak, *Report Shows Turnout Lower Than 2008 and 2004*, CNN (Nov. 8, 2012, 4:39 PM), <http://politicalticker.blogs.cnn.com/2012/11/08/report-shows-turnout-lower-than-2008-and-2004> [<http://perma.cc/4C2Z-TQ54>]. Yet, a record \$3.37 billion was spent in the 2012 election, much of that by special interest groups free to do so because of *Citizens United*. Lieberman, *supra* note 2.

36. CLAY RAMSAY ET AL., WORLDPUBLICOPINION.ORG, MISINFORMATION AND THE 2010 ELECTION: A STUDY OF THE US ELECTORATE 4 (2010), http://www.worldpublicopinion.org/pipa/pdf/dec10/Misinformatio_Dec10_rpt.pdf [<http://perma.cc/7YTK-2JBT>]; *see also*

money involved in political campaigns after *Citizens United* has made it even more disheartening for the common citizen.³⁷ The explosion in advertising money spent by corporations and Super PACs has undermined the “free marketplace of ideas” argument that more speech is better.³⁸ The cacophony of special interest voices has made it difficult to discern the truth.³⁹ This rampant distortion and misinformation can lead to corrupted channels of communication and lower voter turnout, and thus an underrepresented electorate.⁴⁰ The direct harm to the political system is that if voters are misled, the results of the election do not truly reflect the will of the people.⁴¹ False campaign speech disrupts the citizenry’s ability to willfully choose its own direction.⁴²

Alexander Burns, *How Much Do Voters Know?*, POLITICO (Mar. 13, 2012, 2:12 PM), <http://www.politico.com/story/2012/03/are-voters-dumb-073947> [<http://perma.cc/BQJ2-39HF>].

37. Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 895–97 (2008) (discussing the problems caused by false campaign advertising). “Voter distrust [in political campaigns] has become so great that some in the advertising industry view it as a threat to their business.” *Id.* at 895 n.47.

38. See N.Y. Bd. of Elections v. Torres, 552 U.S. 196, 208 (2008) (“The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.”). One study found that *Citizens United* allowed corporations and Super PACs to account for 78% of the \$465 million of outside money spent during the 2012 campaign season. Adam Gabbatt, *Citizens United Accounts for 78% of 2012 Election Spending, Study Shows*, GUARDIAN (Sept. 24, 2012, 2:20 PM), <http://www.guardian.co.uk/world/2012/sep/24/super-pac-spending-2012-election> [<http://perma.cc/CV65-PF43>].

39. See RAMSAY ET AL., *supra* note 36.

40. Louis A. Day, *Political Advertising and the First Amendment*, in POLITICAL COMMUNICATION 39, 41 (Robert Mann & David D. Perlmutter eds., 2011). “[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.” *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

41. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) (“[Deception] may distort politics and undermine the proper functioning of our representative democracy. It may threaten corruption of our government and the effective functioning of our economy. No wonder our laws contain so many restrictions on false, deceptive, and misleading communications.”).

42. *E.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (“[L]ying, while not the most damaging offense to another’s moral right, is one of the clearest.”); see also William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2004) (“[I]f a campaign statement convinces voters that by voting for candidate A, they will elect someone who supports policy Z, when the truth is that candidate A opposes policy Z, the result of the election is distorted.”).

When it comes to the harms of false campaign speech, courts have consistently argued that the answer is more speech in the free marketplace of ideas.⁴³ The argument is that political deception will be caught by media watchdogs or political opponents with the self-incentive of survival.⁴⁴ But, the noise caused by false statements can cause the public to lose faith in the electoral process.⁴⁵ One poll found that this ubiquitous distortion in politics has led 70% of respondents to believe little or nothing of what they hear in political ads.⁴⁶ As one Republican media consultant analogized: “If . . . every carrier in the airline industry ran commercials about how many people were killed in competitors’ plane crashes—and the competition responded in kind—nobody would feel safe driving or flying anywhere. That’s not much different from what’s happening in politics today.”⁴⁷ In today’s hyper-mediated environment, which feeds people information that reinforces already-held beliefs, the effectiveness of any watchdogs or self-defense is waning.⁴⁸

B. The Law on False Campaign Speech

In response to the proliferation of deception in politics, some states passed laws barring false campaign speech.⁴⁹ Nineteen states have passed statutes prohibiting false campaign speech in some form.⁵⁰ These statutes

43. See *Citizens United v. FEC*, 558 U.S. 310, 354 (2010); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

44. See *Rickert v. Wash. Pub. Disclosure Comm’n*, 168 P.3d 826, 829 (Wash. 2007).

45. See *Marshall*, *supra* note 42, at 295.

46. Susan Page, *Nasty Ads Close Out a Mud-Caked Campaign*, USA TODAY (Nov. 2, 2006, 11:55 PM), http://usatoday30.usatoday.com/news/washington/2006-11-02-negative-ads_x.htm [<http://perma.cc/K4NN-LAA4>].

47. Goldman, *supra* note 37, at 896 (quoting ED ROLLINS WITH TOM DEFRAK, *BARE KNUCKLES & BACK ROOMS: MY LIFE IN AMERICAN POLITICS* 350 (1996)).

48. Ashley Muddiman et al., *Media Fragmentation, Attribute Agenda Setting, and Political Opinions About Iraq*, 58 J. BROADCASTING & ELECTRONIC MEDIA 215, 215 (2014) (describing empirical research finding that those who only watched one cable news network had opinions reflecting that network’s political view).

49. See *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1273–79 (1975) (citing cases upholding state laws against false campaign speech where the court held that these laws are directed at the protection of the political process and not the individual’s reputation).

50. ALASKA STAT. § 15.13.095 (2012); COLO. REV. STAT. § 1-13-109 (2015); FLA. STAT. § 104.271 (2015); 10 ILL. COMP. STAT. 5/29-4 (2014); LA. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ch. 56, § 42 (2014); MINN. STAT. § 211B.06 (2014); MISS. CODE ANN. § 23-15-875 (2015); N.C. GEN. STAT. § 163-274(a)(7)–(8) (2015); N.D. CENT. CODE § 16.1-10-04 (2015); OHIO REV. CODE ANN. § 3517.21–.22 (LexisNexis 2013); OR. REV. STAT. § 260.532 (2013); S.D. CODIFIED LAWS § 12-13-16 (2004); TENN. CODE ANN. § 2-19-142 (2014); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); VA. CODE ANN.

vary in the type of speech they restrict; some prohibit any false speech regarding another candidate,⁵¹ while others restrict comments regarding a candidate's moral integrity.⁵² Some statutes follow the actual malice standard from the tort of libel and place restrictions on knowingly false speech.⁵³ Likewise, some restrict false speech in certain fora such as political advertisements,⁵⁴ while others restrict false speech during telephone polling,⁵⁵ or at a polling place.⁵⁶

The constitutionality of these laws has been challenged in courts throughout the last two decades. First, in 1998, a Washington state law was deemed unconstitutional.⁵⁷ The statute punished the sponsor of any political advertisement that contained false speech regarding material fact if the false speech was published with "actual malice."⁵⁸ The Washington Supreme Court stated that the law erroneously "presupposes [that] the State possesses an independent right to determine truth and falsity in political

§ 24.2-1005.1(A) (2011); WASH. REV. CODE § 42.17A.335 (2014); W. VA. CODE § 3-8-11 (2013); WIS. STAT. § 12.05 (2011).

51. *E.g.*, COLO. REV. STAT. § 1-13-109 (2015); LA. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ch. 56, § 42 (2014); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2013); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); W. VA. CODE § 3-8-11(c) (2013); WIS. STAT. § 12.05 (2004).

52. *E.g.*, MISS. CODE ANN. § 23-15-875 (2015).

53. *E.g.*, ALASKA STAT. § 15.13.095(a) (2012); COLO. REV. STAT. § 1-13-109(2)(a) (2015); LA. STAT. ANN. § 18:1463 (2008); MINN. STAT. § 211B.06 (2014); N.C. GEN. STAT. § 163-274(a)(7)–(8) (2015); N.D. CENT. CODE § 16.1-10-04 (2015); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2013); OR. REV. STAT. § 260.532 (2013). Some statutes that allowed liability on a standard less than actual malice have been struck down or amended to include an actual malice standard. *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (addressing the constitutionality of Canons of the Georgia Code of Judicial Conduct and JQC rule regulating statements by judicial candidates); *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122–23 (D. Haw. 2001) (examining provisions of the statutory Code of Fair Campaign Practices); *Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207, 218–19 (Ala. 2001) (examining the Federal Constitution of Alabama Canon of Judicial Ethics); *In re Chmura*, 608 N.W.2d 31, 43–44 (Mich. 2000) (addressing the constitutionality of Canon 7(B)(1)(d) of the Code of Judicial Conduct); *State v. Jude*, 554 N.W.2d 750, 753–54 (Minn. Ct. App. 1996). *See also* MASS. GEN. LAWS ch. 56, § 42 (2014); MISS. CODE ANN. § 23-15-875 (2015); S.D. CODIFIED LAWS § 12-13-16 (2004); TENN. CODE ANN. § 2-19-142 (2014); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); W. VA. CODE § 3-8-11(c) (2013); WIS. STAT. § 12.05 (2011).

54. *E.g.*, MINN. STAT. § 211B.06 (2014); N.D. CENT. CODE § 16.1-10-04 (2015); OR. REV. STAT. § 260.532(1) (2013); TENN. CODE ANN. § 2-19-142 (2014).

55. ALASKA STAT. § 15.13.095 (2012).

56. *E.g.*, MINN. STAT. § 211B.11 (2014).

57. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 695–99 (Wash. 1998).

58. *Id.* at 693.

debate.”⁵⁹ The court held that the law was unconstitutional because it was a content-based regulation that did not survive strict scrutiny, because the government had no compelling state interest in prohibiting such speech.⁶⁰

The state of Washington subsequently amended the statute so that it only prohibited political advertisements that contained false speech about a particular candidate for public office.⁶¹ The amended law was again challenged, and in 2007 the Washington Supreme Court held the statute was unconstitutional because it did not survive strict scrutiny.⁶² The court held that a state’s compelling interest in protecting the integrity of elections was not asserted in this case.⁶³ Nonetheless, even if the state interest had been asserted, this law did not serve the state’s interest because it targeted all false speech, not just defamatory speech.⁶⁴ The court also held that the law was overbroad because it did not punish lies about oneself or other statements that hurt the integrity of the election.⁶⁵ The dissent argued that the court’s decision was an “invitation to lie with impunity.”⁶⁶

Minnesota had a similar false campaign speech statute that was challenged. The Minnesota law prohibited political advertisements or campaign materials that disseminated false speech promulgated with actual malice.⁶⁷ The state of Minnesota added the actual malice standard in 1996 after a previous version of the law was deemed overbroad because it only required that the defendant “kn[ew] or ha[d] reason to believe [the statement] [wa]s false.”⁶⁸ The addition of the actual malice standard was not sufficient, however, as the Eighth Circuit held that false campaign speech was not outside of First Amendment protection.⁶⁹ The Minnesota

59. *Id.* at 695.

60. *Id.* at 699. The court stated that the false campaign speech law was “patronizing and paternalistic.” *Id.* at 698 (footnote omitted).

61. *See* Rickert v. Washington, 168 P.3d 826, 827 (Wash. 2007).

62. *Id.* at 831.

63. *Id.* “More importantly, in light of the heightened protections for political speech afforded by the First Amendment, there simply cannot be any legitimate, let alone compelling, interest in permitting government censors to vet and penalize political speech about issues *or* individual candidates.” *Id.* at 829–30.

64. *Id.* at 831.

65. *Id.*

66. *Id.* at 833 (Madsen, J., dissenting). “It is little wonder that so many view political campaigns with distrust and cynicism.” *Id.*

67. MINN. STAT. § 211B.06(a) (2014) (“A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”).

68. *State v. Jude*, 554 N.W.2d 750, 753–54 (Minn. Ct. App. 1996).

69. *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011).

Court of Appeals held that false campaign speech does not implicate the same interest as libel, which is justified by the falsity and the *injury to a private person*.⁷⁰ The court added that political speech deserved the most protection, and thus held that the law failed to pass constitutional muster because it did not survive strict scrutiny.⁷¹

After the United States Supreme Court denied certiorari in 2012, the state of Minnesota challenged the Eighth Circuit's holding and asked the court to apply intermediate scrutiny.⁷² The Eighth Circuit again applied strict scrutiny and deemed the Minnesota statute unconstitutional, holding that it "is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal."⁷³

Finally, Ohio's law prohibiting false campaign speech was recently challenged.⁷⁴ The Ohio law made it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."⁷⁵ The law also penalized making "a false statement concerning the voting record of a candidate or public official."⁷⁶ A pro-life advocacy group named Susan B. Anthony List planned to erect a billboard advertisement against Representative Steven Driehaus, a Democrat from Ohio, who was running for reelection.⁷⁷ The billboard read, "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."⁷⁸ The statement was in reference to Driehaus's vote in favor of the Affordable Care Act.⁷⁹ Upon hearing reports of the group's plan to erect the billboard, Driehaus filed a complaint with the Ohio Election Commission claiming that the advertisement was factually

70. *Id.* at 634. "The importance of private interests to the foundations of defamation-law principles prevents us from *assuming* its applicability to knowingly false political speech. A government entity cannot bring a libel or defamation action." *Id.* (emphasis added).

71. *Id.* at 636 (holding that a state may regulate false speech "when it satisfies the First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.").

72. 281 Care Comm. v. Arneson, 766 F.3d 774, 782 (8th Cir. 2014).

73. *Id.* at 785.

74. Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014).

75. OHIO REV. CODE ANN. § 3517.21(B)(10) (LexisNexis 2013).

76. OHIO REV. CODE ANN. § 3517.21(B)(9) (LexisNexis 2013).

77. *Susan B. Anthony List*, 45 F. Supp. 3d at 772.

78. *Id.*

79. *Id.*

false and violated Ohio's false campaign speech statute.⁸⁰ The Ohio Election Commission ruled there was probable cause to believe that Susan B. Anthony List had violated the statute.⁸¹

In response, Susan B. Anthony List challenged the constitutionality of the law in court.⁸² The lower court rejected the challenge stating that the issue was not ripe and the Sixth Circuit affirmed.⁸³ Susan B. Anthony List appealed the decision to the United States Supreme Court, which remanded the case, holding that the group had "alleged a sufficiently imminent injury for purposes of Article III."⁸⁴ Much like the other cases, the Southern District of Ohio held in September 2014 that the Ohio law prohibiting false campaign speech was unconstitutional because it did not survive strict scrutiny.⁸⁵

II. THE ROOTS OF PROTECTION: FIRST AMENDMENT JURISPRUDENCE AND THE TREATMENT OF POLITICAL SPEECH AND FALSE SPEECH

The freedom of speech is a fundamental right.⁸⁶ Ordinarily, the government cannot infringe upon a fundamental right unless there is a compelling state interest and the restriction is narrowly tailored to serve that interest.⁸⁷ There are, however, some categories of speech that are not protected,⁸⁸ including obscenity,⁸⁹ fighting words,⁹⁰ and incitement.⁹¹ These are categories of speech "of such slight social value as a step to truth

80. *Id.*

81. *Id.*

82. *Id.*

83. *Susan B. Anthony List v. Driehaus*, 525 F. App'x 415, 416 (6th Cir. 2013).

84. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014).

85. *Susan B. Anthony List*, 45 F. Supp. 3d at 769 (citing *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014)).

86. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.").

87. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661–62 (1994) (holding that the must-carry provision of the Cable Television Consumer Protection and Competition Act of 1992 would only have to survive intermediate scrutiny).

88. "[N]ot all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

89. *Miller v. California*, 413 U.S. 15, 23 (1973); *see also New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is unprotected by the First Amendment).

90. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (creating the fighting words doctrine).

91. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁹² In order to understand the positioning of false campaign speech on the spectrum of First Amendment protections, it is necessary to first examine the protections given to both political speech and false speech, each in their own right.

A. Political Speech

The First Amendment has its fullest application to campaign speech.⁹³ As the U.S. Supreme Court has stated, “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.”⁹⁴ Consequently, public officials will often be victims of “vehement, caustic, and sometimes unpleasantly sharp attacks.”⁹⁵ Much of political speech is opinion, and under American jurisprudence, “there is no such thing as a false idea.”⁹⁶

In *Brown v. Hartlage*,⁹⁷ a candidate for a county commissioner’s office in Kentucky sued the winning candidate for his campaign promise to lower the commissioners’ salaries if he was elected.⁹⁸ The suit claimed that his opponent violated Kentucky’s Corrupt Practices Act.⁹⁹ Though the U.S. Supreme Court agreed that states do “have a legitimate interest in preserving the integrity of their electoral processes,”¹⁰⁰ it held that rules against political ideas had to survive strict scrutiny.¹⁰¹ The Court stated:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose

92. *Chaplinsky*, 315 U.S. at 572.

93. See *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

94. *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

95. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

96. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

97. *Brown v. Hartlage*, 456 U.S. 45 (1982)

98. *Id.* at 48. “We abhor the commissioners’ outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers \$36,000 during our first term of office, by \$3,000 each year.” *Id.* But when Brown learned that this promise possibly violated Kentucky’s Corrupt Practices Act, he retracted the statement. *Id.* at 48–49.

99. “Candidates prohibited from making expenditure, loan, promise, agreement or contract as to action when elected, in consideration for vote.” KY. REV. STAT. ANN. § 121.055 (LexisNexis 2004).

100. *Hartlage*, 456 U.S. at 52.

101. *Id.* at 54.

of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.¹⁰²

The Court held that some promises made to voters are not outside the protection of the First Amendment.¹⁰³ Though some promises can be prohibited,¹⁰⁴ most promises are “indispensable to in a democracy,”¹⁰⁵ and promote accountability in electoral politics.¹⁰⁶ The Court stated that the government cannot prohibit political speech on the grounds that “voters might make an ill-advised choice.”¹⁰⁷

In an attempt to prevent such ill-advised choices, Congress passed sweeping legislation in 2002 to try to remedy the distortions caused by the staggering amounts of money spent in campaigns.¹⁰⁸ The Bipartisan Campaign Reform Act (BCRA) placed many restrictions on campaigns, including limits on soft money and when it could be used for advertising.¹⁰⁹ Specifically, it banned the use of soft money for issue advertising that refers to specific candidates.¹¹⁰ The Act was challenged almost immediately and the U.S. Supreme Court upheld the law as constitutional in *McConnell v. FEC*.¹¹¹ However, in *FEC v. Wisconsin Right to Life*,¹¹²

102. *Id.* at 52–53 (quoting *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966)).

103. *Id.* at 55. If upheld the candidate’s victory would have been nullified because of his violation of the Corrupt Practices Act. *Id.* at 61.

104. This would be “private” promises made to individuals that rise to the level of *quid pro quo*. Prohibition of this type of corruption has been continually upheld. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 348 (2010) (recognizing the government’s compelling interest in defending against corruption in elections).

105. *Hartlage*, 456 U.S. at 55 (quoting *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

106. “[M]aintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.” *Stromberg v. California*, 283 U.S. 359, 369 (1931).

107. *Hartlage*, 456 U.S. at 60. The court once again said that the marketplace of ideas is the best remedy: “we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

108. *See McConnell v. FEC*, 540 U.S. 93, 115–32 (2003) (outlining the history of campaign finance reform).

109. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. The act was also known as the McCain-Feingold Act. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

110. *McConnell*, 540 U.S. at 134.

111. *See id.*

112. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

the Court overturned the provisions which placed prohibitions on mentioning candidates in issue advertising,¹¹³ holding that the BCRA could still prohibit soft money used for direct calls to vote for specific candidates.¹¹⁴

During the 2008 presidential primary season, Citizens United, a conservative nonprofit organization wanted to broadcast a critical documentary it made about Democratic primary candidate, Hillary Clinton.¹¹⁵ The BCRA, however, prohibited such “electioneering communications” within thirty days of a primary.¹¹⁶ Citizens United challenged the application of the law to its documentary, arguing that the film was not an electioneering communication because it did not call for a vote against the candidate.¹¹⁷

In a 5-4 decision, the U.S. Supreme Court went beyond Citizens United’s argument and held that the sections of the BCRA which restricted corporate campaign spending were unconstitutional.¹¹⁸ The Court ruled that restrictions on political spending by corporations violated the First Amendment and the corporations’ right to engage in political speech.¹¹⁹

113. *Id.* at 477. “At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and ‘the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy.’” *Id.*

114. *Id.* at 482.

115. The name of the movie was *Hillary: The Movie*. See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

116. *Id.* at 321.

117. *Id.* at 322–23.

118. It also overturned *McConnell* and *Austin v. Michigan Chamber of Commerce*. James Bopp & Richard Coleson, *Citizens United v. Federal Election Commission: “Precisely What WRTL Sought to Avoid,”* CATO SUP. CT. REV. 29, 29 (2009–2010). The dissent argued that corporations do not have a right to political speech. See *Citizens United*, 558 U.S. at 393–94.

119. *Citizens United*, 558 U.S. at 339–40. The Court has since decided a few more cases dealing with campaign speech. In *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), the Court held, in a 5-4 decision, that an Arizona law which required the state to give matching funds to underfunded candidates was unconstitutional. The Court said that the state’s interest in a “level playing field” did not justify the law. *Id.* at 2812. Justice Roberts, writing for the court, said, “in a democracy, campaigning for office is not a game. It is a critically important form of speech . . . the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.” *Id.* at 2826. The dissent, written by Justice Kagan, with whom Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined, argued that the core purpose of the First Amendment is to “foster a healthy, vibrant political system full of robust discussion and debate.” *Id.* at 2830. The dissent also argued that the law promoted these values by “enhancing the ‘opportunity for free political discussion to the end that government may be

Justice Kennedy's majority opinion stated that the government's interest in limiting corruption in politics did not justify limiting political speech by corporations and other organizations.¹²⁰ The Court added that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."¹²¹

B. *Unprotected False Speech*

False speech, though not one of the enumerated categories of unprotected speech, has raised questions about the scope of the First Amendment's protections. The U.S. Supreme Court has never held that false speech is *per se* unprotected,¹²² but it has stated that "[f]alse statements of fact are particularly valueless."¹²³ As a result, several categories of false speech have been denied constitutional protection.¹²⁴ False speech is not held to the same level as true threats or obscenity in the eyes of the law.¹²⁵ A tension exists, however, when some types of false speech are particularly suspect.

One example of false speech that is not protected is demonstrated through state fraud laws, which deny protection to fraudulent statements so long as the proof required allows for "breathing room" for protected speech.¹²⁶ In *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, the Court upheld a state fraud law.¹²⁷ In *Madigan*, telemarketers had made fundraising calls claiming that a significant amount of each dollar donated would be used for charitable purposes.¹²⁸ The claims made were

responsive to the will of the people." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).

120. *See Citizens United*, 558 U.S. at 341.

121. *Id.* at 350.

122. *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

123. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

124. *See Alvarez*, 132 S. Ct. at 2544. Categories of speech that are not protected include: "advocacy intended, and likely, to incite imminent lawless action . . . obscenity . . . defamation . . . speech integral to criminal conduct . . . so-called 'fighting words,' . . . child pornography . . . fraud . . . true threats . . . and speech presenting some grave and imminent threat the government has the power to prevent." *Id.* (internal citations omitted).

125. *See id.* at 2545–47.

126. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

127. *Id.* at 606.

128. The fundraiser was for Vietnam veterans. *Id.* at 607.

knowingly false.¹²⁹ The lower court dismissed the case on First Amendment grounds, but the U.S. Supreme Court held that the First Amendment did not bar prosecution for fraudulent claims.¹³⁰ The Court stated that “when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.”¹³¹ But the court warned that the government had to show exacting proof of fraud to allow for “breathing room” for protected speech:

False statement[s] alone do[] not subject a fundraiser to fraud liability. As restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.¹³²

Other examples of unprotected false speech are exemplified by the torts of defamation and false light, in which speech can be punished so long as the plaintiff can show that the speaker spoke with knowledge as to the statement’s falsity.¹³³ Libel, or defamatory speech that injures a person’s reputation, has long been recognized as a category of unprotected speech.¹³⁴ When a public plaintiff sues for libel based on a statement of public concern, they are considered a public person plaintiff and bear the burden of proving actual malice.¹³⁵ In fact, a public person plaintiff must prove the statement was made with actual malice.¹³⁶ In *New York Times v. Sullivan*, the U.S. Supreme Court defined actual malice as a defamatory statement that is made “with knowledge that it was false or with reckless

129. The fundraisers knew that only 15 cents of every dollar would be used for charitable organizations. *Id.* at 609.

130. *Id.* at 624.

131. *Id.* at 606, 612 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that the “intentional lie” is “no essential part of any exposition of ideas”)).

132. *Madigan*, 538 U.S. at 620.

133. The interests protected in privacy cases punishes the falsity of the matter, whereas libel punishes for the injury caused to the plaintiff’s reputation. *See Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967).

134. *See New York Times, Co. v. Sullivan*, 376 U.S. 254, 268 (1964). A plaintiff suing for defamation has to prove four elements: false and defamatory statement, publication, fault, and harm. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977). Because this paper is focused on political speech, it is only concerned with public person plaintiffs, who must prove the statement was made with actual malice. *Sullivan*, 376 U.S. at 279–80.

135. *Id.*

136. *Id.*

disregard of whether it was false or not.”¹³⁷ The Court later said there was “reckless disregard for the truth” when the defendant had serious doubt as to the veracity of the statement.¹³⁸

In *Sullivan*, the Court expanded free speech protection by creating an exception within a category of unprotected speech, in order to avoid chilling protected speech.¹³⁹ The Court recognized that there will sometimes be incorrect statements made during free debate, thus some false speech needs to be protected in order to give “breathing space” to the freedoms of expression.¹⁴⁰ However, some speech, such as knowingly false speech, will be prohibited as long as there is this “breathing space” in the law.¹⁴¹

Opinion is a common law defense to libel. The Court expanded this defense in *Gertz v. Robert Welch, Inc.*, when it stated “there is no such thing as a false idea.”¹⁴² But in *Milkovich v. Lorain Journal Co.*, the Court held that opinion is not a separate constitutional defense.¹⁴³ The Court reasoned that pursuant to *Philadelphia Newspapers, Inc. v. Hepps*, the plaintiff must prove the falsity of speech on matters of public concern.¹⁴⁴ Since opinions cannot be proven true or false, they can never be charged as libel.¹⁴⁵

137. *Id.* at 280.

138. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

139. *See Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring). “[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.” *Id.* at 302 (Goldberg, J., concurring) (quoting WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 41 (1958)).

140. *Id.* at 271–72.

141. In libel law, this breathing space is the “actual malice” standard. *Id.* at 279–80.

142. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Id.* at 339–40.

143. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990). Most states do provide a separate protection for opinion under the common law. GENELLE BELMAS & WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 138 (2012).

144. *See Milkovich*, 497 U.S. at 19 (citing *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986)).

145. Chief Justice Rehnquist gave an example of the difference: “[U]nlike the statement, ‘In my opinion Mayor Jones is a liar,’ the statement, ‘In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,’ would not be actionable.” *Milkovich*, 497 U.S. at 20. Of course, in this example, Chief Justice Rehnquist did not say what would happen if Mayor Jones did not accept the teaching of Marx and Lenin and this comment was made during the Red Scare when such a claim would have been libel *per se*. An oft-quoted test for opinion came from the federal courts. In *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984), the court held that one must look at: (1) the

There are other instances where false speech has been denied protection despite not being enumerated as *per se* unconstitutional. For instance, there is a federal statute which makes it a crime to lie about being a federal officer.¹⁴⁶ Likewise, the American court system has a long history of enforcing perjury laws.¹⁴⁷ Despite the lack of social value of false speech, there are many instances in which false speech is tolerated.

C. Protected False Speech: *Alvarez*

In *United States v. Alvarez*, a defendant was charged under the Stolen Valor Act for falsely claiming he was a recipient of the Congressional Medal of Honor.¹⁴⁸ The Stolen Valor Act made it a federal crime to lie about having received the medal.¹⁴⁹ In a 6-3 decision, the U.S. Supreme Court overturned Alvarez's conviction and held that the Act was unconstitutional.¹⁵⁰

The plurality of the Court held that false speech is not outside of the First Amendment.¹⁵¹ Though the Supreme Court has often said that false speech has no value, it has only said so in the context of cases involving a

specific language of the disputed statement; (2) the verifiability of the statement; (3) the literary context in which the statement was made; and (4) the broader social context of the statement.

146. See *United States v. Lepowitch*, 318 U.S. 702 (1943) (upholding the constitutionality of 18 U.S.C. § 76).

147. See *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012). "These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable [to false speech laws]." *Id.*

148. *Id.* at 2542.

149. 18 U.S.C. § 704 (2012). The statute reads in part:

(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.

(c) Enhanced Penalty For Offenses Involving Congressional Medal Of Honor.—

(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

Id.

150. See *Alvarez*, 132 S. Ct. at 2543. "Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute." *Id.*

151. *Id.* at 2544–45.

“legally cognizable harm associated with [the] false [speech].”¹⁵² In other contexts, speech prohibitions aimed at false speech would be considered content-based regulations, and thus would be required to survive strict scrutiny.¹⁵³ In *Alvarez*, the Court agreed that the government had a compelling state interest in protecting the integrity of the Congressional Medal of Honor,¹⁵⁴ but it held that the restriction was not narrowly tailored to serve that interest.¹⁵⁵

Additionally, the Court found no proof that the public perception of the medal was affected.¹⁵⁶ The Court said that “[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”¹⁵⁷ Finally, the Court returned to the marketplace of ideas metaphor and stated that “[t]he remedy for speech that is false is speech that is true.”¹⁵⁸ The plurality suggested that false speech is protected so long as it is not defamatory and no direct harm comes from the lies.¹⁵⁹

152. *Id.* at 2545. “Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few ‘historic and traditional categories [of expression] long familiar to the bar.’” *Id.* at 2544. These categories include “incitement . . . ; obscenity . . . ; defamation . . . ; speech integral to criminal conduct . . . ; fighting words . . . ; child pornography . . . ; fraud . . . ; and true treats. . . [.]” *Id.* (internal citations omitted).

153. *Id.* at 2543–44.

154. *Id.* at 2548–49. The Court stated:

[T]he lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Id. at 2549.

155. *Id.* at 2549.

156. *See id.* at 2550.

157. *Id.* The Court stated that an internet database that listed all Medal of Honor recipients would be a less restrictive alternative. *Id.* at 2551.

158. *Id.* at 2550.

159. The Court added:

Were [we] to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Id. at 2547–48.

In a concurring opinion, Justice Breyer, joined by Justice Kagan, wrote that intermediate scrutiny should be applied to false speech.¹⁶⁰ Justice Breyer stated that this level of scrutiny is needed when a speech prohibition warrants neither automatic disapproval, nor automatic approval.¹⁶¹ Justice Breyer argued that false speech concerning “philosophy, religion, history, the social sciences, [or] the arts”¹⁶² should receive the highest order of protection, but, in this case the speech was not about any of these categories. Instead Alvarez’s speech constituted “false statements about easily verifiable facts.”¹⁶³ Justice Breyer admitted that the Court had a history of overturning laws that have a chilling effect, but argued that the *mens rea* requirement of false speech allows for breathing space.¹⁶⁴ Under this theory, the concurrence still would have overturned the law under intermediate scrutiny because there was no proof of harm and the law allowed the government to choose who it would prosecute.¹⁶⁵

In the *Alvarez* dissent, Justice Alito argued that “false statements of fact merit no First Amendment protection in their own right.”¹⁶⁶ Justice Alito argued that in the context of speech where there may be some value, the Court has allowed for “breathing space” with legal tests like actual

160. *Id.* at 2552; see *Bd. of Tr. v. Fox*, 492 U.S. 469, 480 (1989) (requiring a “reasonable fit” between rule and the interest being served); see also *In re R.M.J.*, 455 U.S. 191, 203 (1982) (“[I]nterference with speech must be in proportion to the [substantial governmental] interest served.”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

161. *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring). Justice Breyer argued:

False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.

Id. at 2553.

162. *Id.* at 2552.

163. *Id.*

164. *Id.* at 2553. Note, Justice Breyer did mention two false campaign speech cases—*United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86 (2d Cir. 1997) and *Treasurer of the Comm. To Elect Gerald D. Lostracco v. Fox*, 389 N.W.2d 446 (Mich. App. 1986)—and stated that: “Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie.” *Alvarez*, 132 S. Ct. at 2556.

165. *Id.* “Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.” *Id.* at 2553.

166. *Id.* at 2562 (Scalia, J., dissenting).

malice;¹⁶⁷ here, he argued, there was no fear that a law might chill protected speech when it only prohibits a person from knowingly and purposely telling a lie.¹⁶⁸

III. THE RESOLUTION OF THE GROWING ISSUE: TREATING FALSE CAMPAIGN SPEECH LIKE FALSE ADVERTISING

The free market place of ideas is an oft-cited metaphor to represent our national free-speech jurisprudence.¹⁶⁹ The metaphor prescribes that the remedy to “bad” speech is more “good” speech.¹⁷⁰ But when it comes to false speech, “[it] interfere[s] with the truth-seeking function of the marketplace of ideas, and [it] cause[s] damage . . . that cannot easily be repaired by counterspeech, however persuasive or effective.”¹⁷¹ And unfortunately, the “truth rarely catches up with a lie.”¹⁷² The current precedent on false speech and political speech has turned the First Amendment “into a shield for the ‘unscrupulous . . . and skillful’ liar to use knowingly false statements as an ‘effective political tool’ in election campaigns.”¹⁷³ Thus, false speech, including speech within the political arena, should not receive the highest level of speech protection.¹⁷⁴

167. *Id.* at 2563–64.

168. *Id.* at 2564.

169. *See, e.g.,* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

170. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .” *Id.*

171. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 344 n.9 (1974)).

172. *Gertz*, 418 U.S. at 344 n.9.

173. *Rickert v. Washington*, 168 P.3d 826, 833 (Wash. 2007) (Madsen, J., dissenting) (citing *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)). The *Garrison* case is quoted as follows:

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration.

Id.

174. *See infra* Part III-A.

A. *Defining the Level of Scrutiny*

The United States Supreme Court has refused to create new categories of speech as its precedents “cannot be taken as establishing a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment.”¹⁷⁵ Accordingly, in *Alvarez*, the Court held that false speech would not be deemed an unprotected category of speech.¹⁷⁶ Despite this, false speech should not enjoy the same protection as other political speech. In *Garrison v. Louisiana*,¹⁷⁷ the Court held that criticisms of public officials were relevant and worthy of protection,¹⁷⁸ but the Court’s reasoning should not be read to encompass intentional lies about a person,¹⁷⁹ even in the political realm.

In *Sullivan*, the Court allowed for some false speech to be protected in order to preserve “uninhibited, robust, and wide-open” debate.¹⁸⁰ In creating the actual malice standard, however, the Court did not protect knowingly false political speech: “[f]or the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”¹⁸¹ Intentional lies deviate from the fundamental principle of “uninhibited, robust, and wide-open debate” in the public realm¹⁸² as it creates political apathy and distrust.¹⁸³

175. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (refusing to categorize animal crush films as a category of unprotected speech). The Court has acknowledged that perhaps there exist “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed . . . in our case law.” *Id.*

176. *Id.* at 2547. “[T]he Court must be presented with ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription . . .’” *Id.* (quoting *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (applying strict scrutiny to a California law that banned the sale of violent video games to minors).

177. *Garrison v. Louisiana*, 379 U.S. 64 (1964) (overturning the Louisiana criminal libel statute because it punished true statements and had no actual malice fault standard).

178. *Id.* at 76–77. “Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.” *Id.* at 73.

179. “[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.” *Id.* at 74.

180. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

181. *Garrison*, 379 U.S. at 75.

182. *Sullivan*, 376 U.S. at 270.

183. *See supra* Part II.

Moreover, just because “speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.”¹⁸⁴ *Citizens United* suggested that “it might be maintained that political speech simply cannot be banned or restricted as a categorical matter.”¹⁸⁵ This should not be the case, however, as plenty of categories of speech including obscenity, incitement, and fighting words can be punished even within the realm of politics.¹⁸⁶ Furthermore, *Citizens United* is a stop on prior restraint of speech,¹⁸⁷ but the principle of *Citizens United* does not bar a post-publication punishment.¹⁸⁸ For example, explicit quid pro quo can be punished where a politician gives kickbacks to a corporation for the money it contributed to his campaign.¹⁸⁹

If courts extended the libel analogy for false campaign speech, they would find that when politicians knowingly lie during a campaign, it is not the functional equivalent of neutral reportage or making a mistake in reporting hot news.¹⁹⁰ Rather, false speech of this sort is more similarly akin to a reckless disregard for the truth; it is politicians using bad sources, not checking information, or ignoring the obvious truth.¹⁹¹ As Justice Alito’s dissent argued in *Alvarez*, “[t]he statute reaches only knowingly false statements about hard facts directly within a speaker’s personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.”¹⁹²

By reducing the standard to which false campaign speech is held from strict scrutiny to intermediate, politicians and candidates are held

184. *Garrison*, 379 U.S. at 75.

185. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citations omitted).

186. *See supra* notes 88–91 and accompanying text.

187. *Citizens United*, 558 U.S. at 337 (overturning law that restricted political speech thirty days prior to a political primary and thirty days prior to a general election).

188. *Id.*; *see* Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 410 (2010–2011). (“[T]he Court laid out its basic position—campaign regulation that infringes upon substantial First Amendment rights is impermissible unless the governmental interest is preventing explicit quid pro quo.”).

189. *See, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010) (upholding federal criminal prosecution of bribery and kickback schemes involving public officials); *see also* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that a judge who received a large campaign contribution from litigant should have recused himself).

190. *See* *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 132 (1967) (consolidated with *Associated Press v. Walker*) (holding that “hot news” is less scrutinized when determining whether a journalist had “reckless disregard for the truth”).

191. *Id.* “In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.* at 158.

192. *United States v. Alvarez*, 132 S. Ct. 2537, 2556–57 (2012) (Alito, J., dissenting).

accountable for the information they disseminate, both regarding their own platforms and those of their opponents. While political speech enjoys the utmost protection, and rightfully so in order to encourage an informed democratic electorate, this protection should not be abused by permitting false political and campaign speech to tarnish the esteem and deference given to the First Amendment.

B. Drawing a Parallel to the Commercial Speech Doctrine

When examining how to analyze false campaign speech, courts should look at the precedent for commercial speech, particularly false advertising.¹⁹³ In stark contrast to political speech, commercial speech receives the least protection because of the harms that it may cause.¹⁹⁴ Accordingly, under the *Central Hudson* test, commercial speech that is false is never protected.¹⁹⁵ As the Court held, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it”¹⁹⁶ All other “truthful” commercial speech must survive an intermediate level of scrutiny.¹⁹⁷

The same distinction should be made with false campaign speech, with the consideration of the importance of political speech.¹⁹⁸ Many argue that any restriction on political opinions or ideas should receive strict

193. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (holding that in order for speech to be protected “it at least must concern lawful activity and not be misleading”).

194. See Tom Hentoff, Note, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1485 (1991). Hentoff observes that:

The Supreme Court has recognized at least four types of harm that commercial speech, which is defined as speech that does “no more than propose, a commercial transaction,” can cause. The first two harms, deception and the consummation of illegal transactions, cause commercial speech to receive no protection; the last two, the creation of a distraction that threatens safety and the consummation of a legal transaction of which the government disapproves

Id. (citations omitted).

195. *Cent. Hudson*, 447 U.S. at 566.

196. *Id.* at 563.

197. See *id.*

198. See *supra* Part II-B. “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

scrutiny, a higher standard than truthful commercial speech.¹⁹⁹ Arguably, the majority of political speech is considered opinion because it cannot be proven true or false.²⁰⁰ Thus, political opinion should be outside the purview of any false campaign speech statute, similar to the puffery defense in advertising law²⁰¹ and the opinion defense in libel.²⁰²

This said, false campaign speech of material fact should only receive intermediate scrutiny.²⁰³ Note that this is a stricter standard than false commercial speech which is not granted *any* protection, but less than the strict scrutiny level that political speech in the form of an opinion would receive.²⁰⁴ Thus, the government would only need to show an important state interest in restricting speech, the rule substantially serves that interest, and the restriction is not more extensive than necessary.²⁰⁵

C. *Protecting the Integrity of the Electoral Process*

If false speech is not to be an unprotected category, false campaign speech should certainly not be a fundamental right deserving strict scrutiny because of the harms that it causes to the political system.²⁰⁶ False speech in campaigns has particularly adverse consequences on the integrity of the election process.²⁰⁷ Deception in the political system “may decrease the

199. “[T]here is no such thing as a false idea.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Id.* at 339–40 (citation omitted).

200. Moreover, “where a statement is supported by some basis in fact, courts [can find] insufficient evidence of actual malice even if the statement is ultimately found to be untrue.” *Serv. Emps. Int’l Union Dist. 1199 v. Ohio Elections Comm’n*, 822 N.E.2d 424, 431–32 (Ohio Ct. App. 2004) (citations omitted).

201. *See* FTC Policy Statement on Deception, Letter from James C. Miller, III, Chairman, FTC, to Representative John D. Dingell (Oct. 14, 1983), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> [<https://perma.cc/X2QT-8B66?type=image>].

202. An opinion is one that cannot be proven true or false. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990).

203. “Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.” *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

204. *See infra* note 233–37 and accompanying text.

205. *See United States v. O’Brien*, 391 U.S. 367, 377 (1968).

206. “The state interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995).

207. *See supra* Part I-A.

average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process."²⁰⁸ Furthermore, "[a] state may impose restrictions that promote the integrity of primary elections."²⁰⁹ Similarly, safeguarding the public's confidence in that process is just as compelling.²¹⁰

In many areas of free speech jurisprudence, the Court has applied intermediate scrutiny.²¹¹ In doing so, the Court has analyzed whether there is a "fit between statutory ends and means" by "examin[ing] speech-related harms, justifications, and potential alternatives."²¹² This type of examination is used when a speech infringement "warrants neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review)."²¹³

The U.S. Supreme Court has held that the government "has a compelling interest in protecting voters from confusion and undue influence."²¹⁴ The Court has recognized that political campaigns are often filled with lies and the system incentivizes lying because "[t]he principal activity of a candidate in our political system . . . consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him."²¹⁵ The

208. *Citizens United v. FEC*, 558 U.S. 310, 472 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing how inundation of corporate speech has hurt the political system).

209. *EU v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)) (overturning ban on primary endorsements).

210. *See Buckley v. Valeo*, 424 U.S. 1, 27 (1976). "Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (quoting *United States v. Int'l Union United Auto.*, 352 U.S. 567, 575 (1957)) (holding that corporations had the right to free speech).

211. *E.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring).

212. *Id.* at 2540, 2551. Justice Breyer explained intermediate scrutiny as the following:

[The Court] has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

Id. at 2551.

213. *Id.* at 2552.

214. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (citations omitted).

215. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

Court has also said that “the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”²¹⁶

D. Implementing an Enforceable False Campaign Speech Statute

The question may remain: why have an additional law that is enforced by the government when there is a tort that can be brought against a candidate who knowingly libels another candidate? The argument for a separate statute is that libel is a tort law claim that is brought by an individual to protect his or her own reputation.²¹⁷ Libel suits brought by public officials are next to impossible to win; thus they are rarely pursued.²¹⁸ Moreover, the time and cost are often prohibitive;²¹⁹ any relief would not be until well after the election is over;²²⁰ and it is often difficult to prove personal damages.²²¹

False campaign speech laws, however, are enforced by the government not to protect the target’s reputation but rather the public’s compelling interest of having sound elections,²²² similar to how perjury is used to protect the public’s interest in the integrity of the judicial system.²²³ Any violation of a false campaign speech law should be prosecuted by an independent, nonpartisan government agency.²²⁴ The agency would have the burden of proving by clear and convincing evidence that “the

216. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

217. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

218. *See Sarah Staveley-O’Carroll*, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?* 4 N.Y.U. J.L. & LIBERTY 252 (2009) (discussing how American plaintiffs have forum shopped for more plaintiff-friendly jurisdictions).

219. Litigants in a libel case “incur substantial costs. Even when no awards are actually paid, material costs most obviously include the legal fees paid, the value of the time committed, and skyrocketing insurance premiums.” Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 420 (1990–1991) (footnote omitted) (discussing the costs to libel defendants).

220. *See id.* at 420–21 n.9 (discussing the costs associated with the time it takes to try libel cases).

221. Evan Richman, Note, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667, 677 (1998).

222. *See Developments, supra* note 49 (citing the cases upholding state laws against false campaign speech holding that these laws are directed at the protection of the political process and not the individual’s reputation).

223. *See United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012).

224. *See Goldman, supra* note 37, at 891.

challenged statement was false, material, and negligently made.”²²⁵ Penalties for violation should at the very least require the defendant to place a retraction of the statement.²²⁶ In accordance with the judicial system, all decisions would be reviewable by a court of law.²²⁷

It is also necessary that any false campaign speech statute be no more extensive than necessary. False campaign speech laws should be applicable to any person or group that is involved in a campaign.²²⁸ Such laws should pertain to statements of fact which are verifiable and made with actual malice.²²⁹ The U.S. Supreme Court has previously found that actual malice is an acceptable standard that allows for “breathing space” and does not have a chilling effect on protected speech.²³⁰ Thus, if the Court allows for the actual malice standard to be the test for false campaign speech of material fact, then sufficient “breathing room” is given for protected speech.²³¹ Ultimately, with this statutory standard of fault, politicians will continue to promote themselves because the burden of proof for the government is three-fold: (1) the speech has to be a statement of fact (which most political ideas are not); (2) the statement was false; and (3) it was published with actual malice.²³²

225. *Id.* at 915. The standard false campaign speech law is classified as a misdemeanor. *See, e.g.*, MINN. STAT. § 211B.06(a) (2014).

226. This retraction should be of equal time and on similar media as the original statement was posted. Colin B. White, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 UCLA J.L. & TECH. 1, 53 (2009).

227. This was an issue in both *Rickert v. Washington*, 168 P.3d 826, 827 (Wash. 2007) and *281 Care Comm. v. Arenson*, 638 F.3d 621 (2011), *cert. denied*, 133 S. Ct. 61 (2012). *See Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 514 (1984) (holding that, pursuant to the actual malice review standard, “[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity”).

228. *See* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 74 (2013).

229. This could include false statements about where to vote, when to vote, false claims of endorsement, false statements about holding elected office, or other verifiable positions. *Id.* at 70 (citing Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, THE VOLOKH CONSPIRACY (June 28, 2012, 5:19 PM), <http://volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/> [<http://perma.cc/D7DA-B9PX>]).

230. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (citation omitted). “Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.” *Id.*; *see also supra* note 159.

231. Goldman, *supra* note 37, at 904. However, the actual malice standard takes the power away from the statute as it is very difficult to prove.

232. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14–16 (1990).

An enforceable false campaign speech statute would not have a chilling effect on protected speech.²³³ First, it is difficult to classify most political speech as material facts, so most political speech would not be targeted by this statute. Also, as with many of the current statutes, the government must prove by clear and convincing evidence that the candidate knew that the statement was false.²³⁴ Moreover, candidates have great incentive to win and will continue to promote themselves, just like advertisers still promote themselves despite the lower level of protection under *Central Hudson*.²³⁵ Currently, it is in the best interest of politicians to deceive in order to win,²³⁶ as the law stands now, politicians not only have the motive to lie, they also have impunity to do so.²³⁷

CONCLUSION

Scholars almost universally agree that the primary purpose of the First Amendment was “to protect the free discussion of governmental affairs.”²³⁸ It is this principle which underlies the argument that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”²³⁹ Considering the decisions in *Alvarez* and *Citizens United*, the U.S. Supreme Court would need to fundamentally

233. See Staci Lieffring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1075 (2012–2013) (outlining the different legal remedies that could be available to the government while allowing the law to be more extensive than necessary).

234. This would be the exacting standards the Court would require for constitutionality. See Hasen, *supra* note 228, at 69. Some scholars have argued that since actual malice is so difficult to prove, false campaign speech laws should only use negligence as the fault standard. But after *Alvarez* and *Citizens United*, it would be impossible to move the Court that far. See, e.g., Goldman, *supra* note 37.

235. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). The perceived durability of false and misleading commercial speech is one reason it can be regulated without a showing of actual malice. See *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994); *Bates v. State Bar*, 433 U.S. 350, 383–84 (1977).

236. “The principal activity of a candidate in our political system . . . consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

237. See *Rickert v. Washington*, 168 P.3d 826, 833 (Wash. 2007) (Madsen, J., dissenting). “It is little wonder that so many view political campaigns with distrust and cynicism.” *Id.*

238. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

239. *Id.* at 15 (quoting *Monitor*, 401 U.S. at 272).

change its jurisprudence in order to include false, non-defamatory political speech as a category unprotected by the First Amendment.²⁴⁰

Despite this, the right to vote is a fundamental right and that right should include the ability to vote in legitimate elections uncorrupted by deliberate deception. Moreover, this right must be balanced with other rights, just like courts balance the right to a fair trial or the right to privacy with the right to free speech.²⁴¹ Courts must also balance the right to a fair election with the right to free speech.²⁴² Accordingly, prohibitions on false campaign speech on material fact should be re-categorized as only receiving intermediate scrutiny.²⁴³ Under this classification, the government certainly has an important state interest in the integrity of the political process,²⁴⁴ as well as the power to reduce the harms caused by such lies.²⁴⁵ This interest is substantially served by such rules and is no more extensive than necessary in light of the actual malice requirement.²⁴⁶

Unfortunately, the current precedent that protects false campaign speech has effectively “turn[ed] political campaigns into contests of the best stratagems of lies and deceit.”²⁴⁷ By giving such broad protection to intentional lies in politics, the Court has ignored a long history of precedent which recognizes that the First Amendment does not protect false factual statements that cause harm and serve no legitimate interest.²⁴⁸ False campaign speech is a blemish that the American political system has permitted to continue to exist. Now, with more money spent on elections and campaigns than ever before, it is essential that false campaign speech be declared intolerable and be prohibited from tainting the electorate who consume it.

240. *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Citizens United v. FEC*, 558 U.S. 310 (2010); *see supra* Part III. The recent decisions of the Court suggest that it may never declare another category of unprotected speech. *See Alvarez*, 132 S. Ct. at 2537.

241. *See supra* note 212 and accompanying text.

242. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992).

243. *See supra* Part II-A.

244. *See Burson*, 504 U.S. at 198.

245. *Id.* at 198–99.

246. *See supra* Part II-B.

247. *Rickert v. Washington*, 168 P.3d 826, 833 (Wash. 2007) (Madsen, J., dissenting).

248. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2557 (2012) (Alito, J., dissenting).