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"Nasty as They Wanna Be"

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“Nasty as They Wanna Be”\(^1\) Politics: Clean Campaigning and the First Amendment

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I. Introduction

“Our lipstick beats their dipstick!”\(^2\) “Heels On, Gloves Off”\(^3\) “No Match=No Vote.”\(^4\) The 2008 presidential election year was memorable for its historic significance. Gender and racial barriers collapsed, giving minorities “real” access to the highest seats of government for the first time. Based on this historic election, it was inevitable that race and gender would be fodder for political ads, slogans and speeches. In addition to hotly contested domestic and foreign issues, experience and character, campaign speech added race, gender, age, and even accusations of “terrorist ties”\(^5\) to the political discourse.

The 2006 mid-term elections and its slew of negative campaign ads prompted one newspaper reporter to advise voters “just hold your nose” and vote.\(^6\) While not so memorable, the 2006 mid-term elections had its share of nasty, misleading ads. Media

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\(^2\) This sign was one of many used by McCain/Palin supporters on campaign signs at a political rally featuring Governor Palin in the Villages, FL, September 21, 2008, available at http://forums.dpreview.com/forums/readflat.asp?forum=1034&thread=29492707.

\(^3\) Media’s reference to Governor Palin’s attacks on Senator Obama – linking him to domestic terrorists. See Kristin Chapman, Heels On, Gloves Off, WORLDMAG.COM (October 6, 2008), available at http://online.worldmag.com/2008/10/06/heels-on-gloves-off/.

\(^4\) Used to characterize the nature of the 2008 primary and election, referring to voters voting along race and gender lines; slogan used to criticize the McCain campaign for choosing Governor Palin in order to win the “women vote.” See Damien Cave, In Florida’s Economic Pain, Obama Gains Ground, N.Y. TIMES, Oct. 3, 2008. See also FLA. STAT. § 97.053(6) (2007) (Florida’s controversial voter registration law regarding the forms of ID required to register.) Cf. Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (S. Ct. upheld Voter ID Act, requiring voters to show government issued ID at the polls over arguments that the voter ID requirements put an unequal burden on those individuals most likely to vote for the Democratic candidates).

\(^5\) See Ayers, infra note 16.

reports of Senator Jim Webb’s “XXX-rated writing” and demands that he withdraw from the Senate race, based on sexually explicit passages he wrote in a novel years before, made headline news.\(^7\) Webb’s supporters responded by pointing to racy novels written by Republicans, including Lynne Cheney’s 1981 novel “Sisters” about a lesbian love affair.\(^8\) Pennsylvania Democrats reminded voters that President Bush signed a bill for “National Character Counts Week” days before campaigning for Republican Rep. Don Sherwood, who admitted to having an affair.\(^9\) A New York candidate for Congress was accused of using taxpayers’ money to call a phone-sex line, when, in reality, an aide misdialed the number which had the same last seven digits as the Department of Criminal Justice Services.\(^10\)

In the hotly contested New York Governor’s race, Elliot Spitzer accused his opponent of dirty politics. Referring to his opponent’s campaign, then candidate Elliot Spitzer said the following: “Every day there’s been another press release which has personal vitriol - - 80 percent of them have nothing but venom directed toward me, toward my family.”\(^11\) While candidate Spitzer decried the personal, vitriolic attacks, he was elected Governor of New York.\(^12\) Ultimately, it was not the negative campaigning that caused the downfall of Governor Spitzer; but, Spitzer himself, who was forced to resign after media reported on his involvement with prostitution.\(^13\)

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\(^8\) Id.

\(^9\) Id.

\(^10\) Id.

\(^11\) Patrick Healy, Onstage, and Off, Sole Debate for Spitzer and Suozzi is Fiery, N.Y. TIMES (July 26, 2006), 2006 WLNR 12858673.

\(^12\) Danny Hakim, Switching to Fast Forward With Eliot Spitzer, N.Y. TIMES, November 8, 2006.

\(^13\) Danny Hakim & William Rashbaum, Spitzer is Linked to Prostitution Ring, N.Y. TIMES, March 10, 2008.
As Americans embrace or grudgingly accept their 44th President, citizens and pundits alike will reflect on the 2008 election season. In the aftermath of a hotly-contested primary and election year, commentators will review and rate the campaign season based on the nature of the information that the candidates, parties, and electioneering groups disseminated. Americans have listened, watched, read and blogged about the candidates, their issues and their character.

Elections always raise the specter of concern about the content of the election debate. Discussion will focus on whether candidates and their supporters attempted to persuade the electorate with positive information about the issues, the candidates’ qualifications and their experience or did they attempt to persuade by negative campaigning and mud-slinging. Does the tenor of the debate matter to voters? If so, what, if anything, should be done to control the content of campaigning to ensure some degree of electoral integrity?

Contrary to the conventional view that the nature of campaigning has decayed over time, mud-slinging has always played a role in American politics. However, since the advent of 24-hour information access through television and internet, the effects of mud-slinging and negative campaigning may have greater impact than ever before. A ninety second ad by John McCain emphasizing the ties between the Democratic presidential candidate, Barak Obama, to domestic terrorism takes on an unintended

14 ________ elected as the 44th President on November 4, 2008 (hopefully, there will not be a repeat of the 2000 elections).
meaning when repeated in millions of living rooms over and over again and, each time, accompanied by commentary or “spin.”

The ability of 21st century media to transform little ripples of negative campaigning into large tidal waves has created concern that the integrity of the electoral process is compromised by the pervasive and exaggerated mud-slinging. In response, state and municipal legislators have enacted “Fair Campaign Acts.” Many of these Acts contain a statement of fair campaign practices in which candidates for electoral office promise to conduct their campaigns without “the use of vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on candidates and his or her personal or family life.” Other campaign statutes prohibit political advertising containing false statements of material fact about a candidate for public office. Many of these efforts to “cleanse” the campaign debate are voluntary and provide neither an enforcement mechanism nor a private cause of action.

Even if these Campaign Codes are non-enforceable, free speech advocates argue that clean campaign pledges chill political speech and violate the First Amendment. Proponents of clean campaign pledges and political advertising statutes voice concerns that negative advertising pollutes the electoral process and distracts attention from the issues by over-simplification through sound-bites and catch phrases. Further, negative

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campaign advertisements can distort the truth; and if disseminated close to Election Day, there remains no time for rebuttal or clarification.\textsuperscript{22} According to the proponents, these limits on campaign speech are necessary to preserve the integrity of the electoral process.\textsuperscript{23}

While the goal of ensuring that candidates and their campaigns focus on issues rather than misinformation and character assassination is laudable, it is dangerous to suppress one First Amendment right in the hopes of supporting another important right, namely, voting and its corollary, electoral integrity.\textsuperscript{24} It is without question that the regulation of negative campaign speech implicates First Amendment rights. At the core of the First Amendment is the conception that political discussion must be uninhibited in order for a representative democracy to exist.\textsuperscript{25} “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 . . . [which] includes discussion of candidates.”\textsuperscript{26} Since restrictions on campaign speech regulate the content of core First Amendment protected speech, the statutes must

\textsuperscript{22} Gore Newspapers Co. v. Shevin, 397 F. Supp. 1253 (S.D. Fla. 1975), \textit{aff’d}, 550 F.2d 1057 (5th Cir. 1977); Lantana v. Pelczynski, 303 So. 2d 326 (Fla. 1974); \textit{see generally}, Ferguson, \textit{supra} note 20, at 476–77 (discussing these cases that invalidated attempt to restrict negative campaign advertising too close to Election Day, leaving no time for an opponent to respond).


\textsuperscript{24} \textit{Cf.} Burson v. Freeman, 504 U.S. 191 (1992) (upholding restriction of solicitation of votes and the dissemination of campaign material within 100 feet of a polling place. Even though this restriction involves core political speech, is content-based, and bars speech in a quintessential public forum (polling place), the restriction survived strict scrutiny).


have limited reach or survive the highest scrutiny in order to justify limitations on this prized right to engage in robust political discussion.

This article will analyze these legislative attempts to “clean up” or “gentrify” the campaign debate. While the majority of court decisions addressing these restrictions on campaign speech have found them unenforceable, local municipalities and states continue to legislate in this area and claims for violations of such restrictions continue to be raised. Restrictions on campaign speech are presumptively unconstitutional. Freedom of speech has its “fullest and most urgent application” in political campaigns. The state interest “to foster an informed electorate” does not outweigh the primacy of political speech.

Campaign speech statutes restrict negative campaign advertising and false campaign statements. Intended to “sanitize” public discourse, legislating in this area is dangerous to First Amendment freedom of speech. History has taught us that decisions

27 Since 1942, the Supreme Court has recognized a category of “low” value speech, such as defamation and fighting words; restrictions on speech within these categories raise little First Amendment concerns. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), superseded by statute as stated in Fallin v. City of Huntsville, 865 So. 2d 473 (Ala. Crim. App. 2003).

28 Strict scrutiny is applied to content-based regulation of political speech – (content-based restrictions are subject to strict scrutiny in evaluating the legitimacy of the governmental restriction on speech). See Police Dep’t v. Mosley, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); Carey v. Brown, 447 U.S. 455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980); Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n., 460 U.S. 37, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

29 Rickert v. Pub. Disclosure Comm’n, 119 P.3d 379, 384–85, n.5 (2005); See generally Ferguson, supra note 20 at 485; Id. at n.194–196 (twenty states have adopted laws prohibiting certain false statements regarding candidates.

30 E.g., Bao v. Miami Dade County, No. 07-42948-CA (Cir. Ct. Miami-Dade County, Fla.) (losing candidate for the position of County Commissioner challenged section 2-11.1.1.(D) (1) of the Code of Miami-Dade County after receiving a censure from the Commission on Ethics and Public Trust for making false and misleading campaign statements in violation of the Code; a motion to dismiss is pending in Circuit Court and the case may go to mediation. Miami-Dade County argues that the Petitioner lacks standing to bring an as applied challenge because he voluntarily signed the Clean Campaign Pledge, thus waiving his First Amendment rights). (Telephone conversation with Miami-Dade Attorney Gerald Sanchez, October 3, 2008)).


about the form and content of public discussion is best left to individuals and not subject to government restraints. From the early days of seditious libel laws through the current debate on campaign finance reform, evolving legal issues questioned the propriety of government to suppress political speech because of its power to persuade or its negative impact on the audience. From this history, the emerging and continuing principle governing speech restrictions on matters of public affairs is that the people should decide, not the government, on the veracity of political speech.

*New York Times v. Sullivan* put an end to seditious libel laws and “constitutionalized” the right of Americans to have wide latitude in discussing political affairs and criticizing public officials. Erroneous statements are tolerated, even expected,

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33 The Espionage Act of 1917 criminalized, in part, to “make or convey false reports or false statements” when the country was at war. *See Schenck v. United States*, 249 U.S. 47 (1919) (upheld conviction of violating section 3 of the Espionage Act, conspiracy to obstruct the recruiting and enlistment service by circulating documents critical of the war effort to enlisted men); *Frohwerk v. United States*, 249 U.S. 204 (1919).

34 See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003) (Joint opinion upheld BCRA’s soft money restrictions on spending applying less exacting scrutiny – not strict scrutiny) (Thomas, J., dissenting) (“[T]he Court today upholds what can only be described as the most significant abridgement of the freedoms of speech and association since the Civil War.”); *FEC v. Wis. Right to Life, Inc.* , 127 S. Ct. 2652 (2007) (applying strict scrutiny, held BCRA, section 203, unconstitutional as applied to Wisconsin Right to Life’s television political ads, deciding that they were issue ads and not subject to the provision’s electioneering prohibitions – ads expressly advocating the election or defeat of a candidate for federal office paid for by corporation or labor union treasury funds and aired within 30 days of a primary election) (Scalia, J., concurring) (criticizing the majority’s reasoning for finding the provision unconstitutional as applied, rather than overruling the McConnell’s ruling that upheld this provision of BCRA, claiming the present ruling is vague and compels the speaker to risk felony prosecution for engaging in political discourse).


36 *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 638 (Kennedy, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (public offense is not sufficient to justify limits on protected speech; thus, a restriction on direct mail solicitation after an accident is not justified because some members of the public may be offended).

37 *McConnell*, 540 U.S. 93 at 258 (Scalia, J., concurring in part and dissenting in part) (“The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.”).


39 *Id.* at 276. (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”).
so that public debate may flourish. Although political speech does not receive absolute protection, this paper supports a “purist” view that campaign speech must be free of government restraints. Often characterized as hyperbole and overstatement, campaign speech is meant to persuade and, as such, tends toward “exaggeration, vilification . . . and even to false statement.” It is best left to the voter to determine, how and if, negative campaigning and false statements will impact his or her decision-making at the polls.

This paper will address the underlying premise and constitutional implications of government restrictions on negative campaign speech. Legislative schemes to regulate campaign speech are varied; and their attending enforcement mechanisms range from no enforcement to criminal charges. As such, this paper will not be a survey of legislation regulating campaign speech. Instead, the paper will question the legal and social implications when government attempts to limit the content and tenor of public discourse in political campaigns.

Part II of this article will address the purpose and nature of “voluntary” campaign pledges. Part III will discuss statutes that restrict negative campaign advertisements and false statements. These statutes have stronger enforcement measures, such as fines and criminal charges. Part IV will consider the public’s perspective on negative campaigning. Part V will focus on the First Amendment implications, concluding that non-voluntary clean campaign pledges and negative advertising statutes are per se invalid. These limitations on campaign speech are redundant of other valid restrictions on false defamatory statements and represent government paternalism to shield citizens

\[40\] Id. at 279.
\[41\] Excluding from the definition of campaign speech those categories of speech that “are no essential part of any exposition of ideas,” the “low value” categories of unprotected speech defined by Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) and later cases.
from speech deemed offensive and overly persuasive to the electorate. Perhaps negative campaigning says more about the speaker’s character than about the message conveyed. Moreover, an optimistic view of the American populace is that voters are eminently capable of distilling the wheat from the chaff.  

II. Fair Campaign Practices Acts: “Voluntary” Clean Campaign Pledges

A. Rationale for regulation of negative campaigning

It is undisputed that mud-slinging and negative campaigning has always played a role in American elections. For example, Thomas Jefferson was portrayed as an “atheist, guilty of drunkenness, gambling, impotence, and adultery.” Andrew Jackson was painted as “a wild man of the frontier, a bloodthirsty, trigger-happy knave and brawler.”

Despite the historical consistencies and, perhaps, an improvement in the characterization and sophistication of the attacks, proponents argue that technology and campaign expenditures call for more legislative control.

The rationale for more legislative control is premised on the assumption that voters are misled by negative campaigning. It is hypothesized that candidates appeal to voter emotions and that elections are won and lost based on deceptive negative advertisements and misinformation on important campaign issues. Further, proponents contend that mud-slinging and negative advertising lowers respect for politicians and dissuades citizens from seeking public office.

43 Washington ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691, 701 (Wash. 1998) (Durham, C.J., concurring) (upon finding a statute that punished making false statements against a candidate applying a reasonableness standard, the concurrence criticized the statute as being paternalistic).
44 Goldman, supra note 15, at 894.
45 Id. (quoting BRUCE L. FELKNER, DIRTY POLITICS 22 (1966)).
46 The general rule is that while government limitations on campaign contributions are consistent with the First Amendment, regulations limiting campaign expenditures are not. See generally Buckley v. Valeo, 424 U.S. 1 (1976); McConnell v. FEC, 540 U.S. 93 (2003); Randall v. Sorrell, 126 S. Ct. 2479, 2492 (2006). This article will not address government regulation of campaign finances, except as a comparison to campaign speech restrictions. See infra Part V.
While there may be some anecdotal evidence that last minute negative advertisements have swung close elections, only recently, and in limited demographic areas, has there been any evidence offered to support the view that voters are overly influenced by negative campaigning. However, survey research shows the opposite. In fact, an informal poll asking Americans what they thought of negative campaigning revealed that respondents were not overly bothered by the negativity. They accepted the negative campaigning as part of elections and even considered it entertaining.

B. “Voluntary” Clean Campaign Pledges

In the broadest sense, a clean campaign pledge is a non-enforceable public promise by a candidate who is running for public office to adhere to basic principles of “decency, honesty, and fair play.” Specifically, the pledge includes a promise to refrain from using “campaign material of any sort that misrepresents, distorts, or otherwise falsifies the facts” or “character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidate or his personal or family life.”

In California, for example, when a candidate declares an intention to run for public office, election officials give each candidate a copy of the Code of Fair Campaign Practices that he or she may sign. When disseminating the Code to a candidate, the

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51 10 ILL. COMP. STAT. 5/29B-10 (2007).

52 Id.

53 CAL. ELEC. CODE § 20440 (Deering 2008).
election officials are required to inform him or her that “subscription to the code is voluntary.” Other examples of clean campaign pledges are those proposed by private civic organizations, such as the Citizens for Fair Campaign Practices in Pinellas County, Florida. While there are no official consequences for failure to subscribe to these clean campaign pledges, public pressure through media exposure makes the “voluntariness” of these pledges illusory.

A truly voluntary clean campaign pledge is one made by a candidate or his campaign because of a personal or tactical decision to refrain from negative campaigning. For example, when referring to negative campaigning, Cindy McCain stated, “There’s many, many, many more things to this job than just being president. You are an example. You have to -- you have to be better than that.”

C. Enforcement of Clean Campaign Pledges

Although there have been some attempts to enforce these “voluntary” clean campaign pledges in the courts, these lawsuits have been unsuccessful. In Gietzen v Feleciano, the court refused to recognize a cause of action for damages based on a breach of a candidate’s campaign pledge. The losing candidate in a state senate race, Mr. Gietzen, sued his opponent, Senator Feleciano, for mailing a letter referencing Plaintiff’s marital

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54 Id.
55 This is a private organization of concerned citizens formed in 1993. Membership is open to all registered voters. Dade County, Florida, has a Fair Practices Committee, which limits its scope to candidates and campaigning that use ethnic appeals. See generally Ferguson, supra note 20 at 481–83.
57 Gietzen v. Feleciano, 964 P.2d 699 (Kan. App. 2d 1998). Mr. Gietzen also sued for libel. The court granted the defendant’s motion for summary judgment on the libel claim because Mr. Gietzen did not controvert the facts stated in the letter. Id. at 700. The Kansa Appellate Court refused to consider Mr. Gietzen’s claims of breach of contract, fraud, or misrepresentation. Although raised in the trial court, Mr. Gietzen did not assert these claims on appeal. Id. at 701. See also Schaeffer v. Williams, 15 Cal. App. 4th 1243 (Cal. 4th App. 1993) (holding that the signing of a voluntary campaign pledge neither creates a contract nor a cause of action for breach of the campaign promise).
problems days before the election.\textsuperscript{58} The letter cautioned voters that Mr. Gietzen’s concern for family values was a “political lie,” in light of the Plaintiff’s history of spousal abuse.\textsuperscript{59} In signing the campaign pledge, Senator Feleciano promised to refrain from “the use of vilification . . . scurrilous attacks on any candidate and his or her personal or family life.”\textsuperscript{60} While assuming that the Senator’s letter was a technical violation of his fair campaign pledge, the court refused to “read into” the Campaign Finance Act a provision creating a cause of action in damages against one who violates the statement of fair campaign practices.\textsuperscript{61} Instead, the legislature empowered the Kansas Commission on Governmental Standards and Conduct to receive and investigate complaints such as Mr. Gietzen’s.\textsuperscript{62}

Similar to the Fair Campaign Act in \textit{Gietzen}, many states have created a commission to address complaints related to unfair campaign practices. In \textit{Ancheta v. Watada},\textsuperscript{63} the plaintiff challenged the constitutionality of Hawaii’s Code of Fair Campaign Practices (“Code”) upon receiving an administrative censure by the Campaign Spending Commission for violating provisions of the Code. While campaigning for the state senate, Mr. Ancheta mailed a campaign flier to voters that depicted his opponent, the incumbent state senator, as a politician who personally benefited from special interests.\textsuperscript{64} The Commission found that since Mr. Ancheta signed the Code, he promised

\textsuperscript{58} \textit{Gietzen}, 964 P.2d at 700. The letter referred to Mr. Gietzen’s political discussion of family values as a “political lie.” In the letter, the defendant urged the voters that his opponent could not be trusted based on a past charge of spousal abuse, resulting in probation and a pending divorce from his second wife.
\textsuperscript{59} \textit{Id.} at 700.
\textsuperscript{60} \textit{Id.} at 701.
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Ancheta v. Watada}, 135 F. Supp. 2d 1114 (D. Haw. 2001).
\textsuperscript{64} \textit{Id.} at 1116.
to refrain from the “use of any campaign material relating to any candidate’s election which misrepresents, distorts, or otherwise falsifies facts regarding the candidate.”65

Bypassing a challenge of the Commission’s determination through administrative channels, Mr. Ancheta filed suit in federal court claiming that enforcement of the Code violated his First Amendment rights.66 Further, Mr. Ancheta brought a facial challenge, claiming that the Code was overbroad.67 The Commission argued that by voluntarily signing the Code, Mr. Ancheta waived his First Amendment rights.68

Rejecting the waiver argument, the court concluded that the decision to sign the Code posed a “Hobson’s” choice for the candidate.69 By posting the names of candidates who did and did not sign the Code, the Commission gave Mr. Ancheta the choice of signing or being exposed as a candidate who does not adhere to “principles of decency, honesty and fair play.”70 Thus, the court concluded that Plaintiff had no real choice; “the putative waiver of Plaintiff’s rights was not made voluntarily” and did not bar Mr. Ancheta’s First Amendment claim.71

In considering the First Amendment issues, the court compared the Code’s speech restrictions to defamatory statements as defined by the actual malice standard articulated

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65 *Id.* at 1117 (provision 2 of the Code prohibits misrepresentation, distortion and falsification of facts related to an opponent). The campaign flier at issue stated that his opponent’s law firm received $1 million from special interest groups while the incumbent candidate, Mr. Iswase, served as Chair of the Senate Planning, Land and Water Use Committee. The Commission found that the mailer violated both provisions 2 and 3 of the Code of Fair Campaign Practices. Provision 3 of the Code provides that a candidate refrain from the “use of personal vilification, character defamation, or any other form of scurrilous personal attacks on any candidate or his family.” *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.* at 1126 (referring to an obstacle posed in Homer’s Odyssey, the court said that a choice between signing the Code and being exposed as a candidate that did not adhere to principles of decency, honesty and fair play presented no choice at all).
70 *Id.*
71 *Id.*
in *New York Times v. Sullivan*. Finding that the Code did not limit its reach to defamatory statements made with actual malice under a clear and convincing evidence standard of proof, the court applied strict scrutiny analysis.

When speech is restricted because of its content or subject matter, government bears the burden of proof to demonstrate that the challenged restrictions are narrowly tailored and necessary to meet a compelling state interest. Relying on a Ninth Circuit Court of Appeals case, the court in *Ancheta*, held that the state’s interest in preventing disincentives from public service is not a compelling state interest. The Code serves to “sanitize” the public’s political discourse. The First Amendment protects against “a state’s attempt to exclude disfavored speech in order to promote speech the state deems valuable.”

Lastly, the court considered Plaintiff’s overbreadth claim. Reiterating its conclusion that the Code prohibits more than defamation against public candidates as defined by *New York Times*, the court stated that the Code’s restrictions have the potential to reach even truthful speech made by candidates. When a speech restriction sweeps into its prohibition a substantial amount of protected speech, the restriction is facially overbroad and does not meet the constitutional guarantees of freedom of speech.

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72 *Id.* at 1123 (discussing the limitations that *New York Times* places on the state law of defamation as applied to public officials).
73 *Id.*
74 *Id.* at 1122–23 (citing Boos v. Barry, 485 U.S. 312, 321 (1988) (strict scrutiny analysis requires that a speech restriction is narrowly drawn and is necessary to serve a compelling state interest) and First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (government has the burden to satisfy the strict scrutiny analysis)).
75 *Id.* at 1123 (relying on Lind v. Grimmer, 30 F.3d 1115, 1119 (9th Cir. 1994) (holding that the prohibition against publishing complaints against candidates did not serve the compelling state interest in “preventing candidates from running for public office and in preventing false charges against a candidate from infesting the electoral process:” the state could publish information explaining that a filed complaint may have no merit)).
76 *Id.* (citing *Lind*, 30 F.3d at 1119–20) (“It is not the function of government to promote speech it deems more valuable and to suppress speech it deems less valuable.”).
77 *Id.* at 1124.
Statutes that are substantially overbroad have a “chilling effect” on protected speech.78 “Because First Amendment freedoms need breathing space to survive,” Codes that restrict campaign speech must be narrowly drawn to reach only unprotected speech.79

As illustrated by the Gietzen and Ancheta cases discussed above, a seemingly “innocuous” campaign pledge can have consequences of constitutional proportions. Many courts reviewing clean campaign statutes reflect, in dicta, that the challenged restrictions would pass constitutional muster if their reach was limited to the New York Times defamation standard.80

Contrary to those cases condoning campaign speech restrictions within the limits of New York Times defamation, this author contends that even those campaign speech restrictions violate the First Amendment. After defining the more strident restriction on campaign speech imposed by negative campaign advertising statutes, Parts III and V will discuss the different interests served by defamation law and campaign speech restrictions. Codes that restrict campaign speech without balancing the competing interest in protecting reputational injury, strike at the heart of the First Amendment.

III. Deceptive Campaign Speech: Non-voluntary Negative Campaign Advertising Acts

A. Prohibited Election Practices – Criminal Sanctions and Administrative Fines

79 Gooding v. Wilson, 405 U.S. 518 (1972) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (statutes restricting speech “must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected speech.”))
80 See, e.g., Ancheta v. Watada, 135 F. Supp. 2d 1114, 1122 (D. Haw. 2001) (a finding that the Code regulated speech beyond the limited scope of New York Times necessitated an analysis under strict scrutiny, providing, by negative implication, that a narrow regulation of defamatory speech unprotected under the New York Times standard would be valid); Pestrak v. Ohio Elections Comm’n, 926 F.2d 573, 577 (6th Cir. 1991) (upholding fair campaign practices code which is limited to campaign speech known to be false and not protected by New York Times); Vasaco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (NY statute overbroad because it is not limited to proscribing speech within the narrow class of defamation of public officials meeting the New York Times standard), aff’d, 423 U.S. 1041 (1976).
Unlike the voluntary pledges in the codes previously discussed, many state statutes affecting campaign speech do not purport to be voluntary promises made by a candidate for elected office. These statutes impose criminal penalties or administrative fines. For example, Wisconsin prohibits any person who knowingly makes or publishes “a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.”\textsuperscript{81} In addition to punishing a person for directly making false representations, he or she can be sanctioned for false representations made by others.\textsuperscript{82} Persons violating Wisconsin’s prohibition against false representations affecting elections are subject to fines up to $1,000 and/or imprisonment not to exceed six months.\textsuperscript{83}

Similar to Wisconsin, at least 17 other states have enacted election laws that subject persons to misdemeanor charges for making, publishing or causing others to make or publish false campaign statements intending to injure or defeat a candidate.\textsuperscript{84} Most of these statutes incorporate the language from \textit{New York Times}, requiring that the false statements are intentionally made or made with actual malice (knowingly false or with reckless disregard for truth or falsity).\textsuperscript{85} Some of the statutes include knowingly made false statements which are designed to elect a candidate. For example, Massachusetts includes in its statutory scheme any false statement “which is designed or

\begin{footnotes}
\item[81] WIS. STAT. § 12.05 (2007).
\item[82] \textit{Id.} “No person may knowingly make or publish, or \textit{cause to} be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.” (emphasis added).
\item[83] § 12.60(b) (2007).
\item[85] \textit{E.g.}, MINN. STAT. § 211b.06 (2004); N.C. GEN. STAT. § 163.274(8) (2005).
\end{footnotes}
tends to aid” a candidate.\textsuperscript{86} Like Massachusetts, Minnesota statutes reach false statements intended to elect a candidate or to promote a ballot question.\textsuperscript{87}

Perhaps in response to judicial criticism that a campaign speech statute was not narrowly tailored because it punished only falsehoods levied against an opponent,\textsuperscript{88} state statutory schemes have included language to remedy this defect. The statutory language that defines the prohibited false statements, as those that “affect voting at an election”\textsuperscript{89} or that “aid or injure”\textsuperscript{90} a candidate or ballot question, reach all false statements whether they were intended to aid the speaker or harm an opponent.

Not all negative campaign advertising statutes impose criminal penalties. Like the Codes of Fair Campaign Practices discussed above, in some states, the legislatures have devised administrative procedures for enforcement of their false advertising statutes. Washington State, for example, created a Public Disclosure Commission to investigate and enforce its election law provision pertaining to false campaign speech.\textsuperscript{91} The Commission has authority to impose fines against violators of the election law prohibiting specified campaign speech.\textsuperscript{92}

Although state legislatures have exercised care to draft legislation to withstand constitutional challenge, such attempts have not been successful. Despite inclusion of

\textsuperscript{86} MASS. ANN. LAWS ch. 56, § 42 (2005).
\textsuperscript{87} MINN. STAT. § 211b.06 (2004).
\textsuperscript{88} Rickert, 119 P.3d at 380 (determining that the false campaign advertising statute did not promote the state’s asserted interest in promoting integrity and honesty in the election because the statute punished “malicious falsehoods about candidates by their opponents, permit[ting] the candidates to proclaim falsehoods about themselves without penalty.”)
\textsuperscript{89} WIS. STAT. § 12.05 (2007).
\textsuperscript{90} MASS. ANN. LAWS ch. 56, § 42 (2005).
\textsuperscript{91} WASH. REV. STAT. § 42.17.530 (1)(a) (2007). A number of statutes impose fines administratively, e.g., WIS. STAT. § 12.05 (2007), while others impose fines and imprisonment by making the violation a crime (misdemeanor), e.g., MASS. ANN. LAWS ch. 56, § 42 (2005) (a knowing violation is punishable by a fine of not more than $1,000 or imprisonment for not more than six months.) At least in those statutes that impose a criminal penalty, the actual malice standard of \textit{New York Times} has been incorporated.
\textsuperscript{92} Rickert, 119 P.3d at 382.
language limiting the statute to those statements unprotected by the *New York Times*
actual malice standard, courts are reluctant to uphold punishments imposed against
violators of these negative campaign speech statutes.

B. A Challenge to Washington State’s Negative Campaign Speech Act

A Washington state statute prohibiting false political advertising did not withstand
constitutional challenge, despite the fact that the statute incorporated the *New York Times*
court invalidated an election law provision that prohibited “a person to sponsor with
actual malice ‘[p]olitical advertising that contains a false statement of material fact about
a candidate for public office.’” 93

Ms. Rickert, a Green Party candidate, ran against the incumbent for the office of
state senator. 94 In a political brochure, Ms. Rickert alleged that her opponent did not
support services for the mentally ill and voted to close a facility for the developmentally
challenged in his district. 95 In fact, the incumbent opponent did not vote to close the
institution referenced in Ms. Rickert’s political brochure. 96 Further, Ms. Rickert
mischaracterized the institution. It was a facility for juvenile defendants, not for the
developmentally challenged. 97

The incumbent won the election by a landslide. 98 He filed a complaint with the
Public Disclosure Commission, alleging that Ms. Rickert knowingly made false
statements of material fact in the campaign. 99 The Public Disclosure Commission found

93 *Rickert*, 119 P.3d at 380.
94 *Id.* at 380.
95 *Id.* at 381.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
that Ms. Rickert violated the false political advertising statute and imposed a fine of $1,000.\textsuperscript{100}

On appeal, Ms. Rickert raised both a facial and an as applied challenge to the pertinent campaign speech provision.\textsuperscript{101} Quoting extensively from a Washington State Supreme Court decision invalidating the previously enacted false campaign statute,\textsuperscript{102} the court found the amended statute, which incorporated the \textit{New York Times} actual malice standard, was also invalid.\textsuperscript{103}

The court rejected the argument that the false campaign speech statute should be analogized to the law of defamation. Finding that \textit{New York Times} permitted only public officials to sue for damages in tort for a defamatory statement made with actual malice, the court reasoned that \textit{New York Times} did not “speak to an action by the government against private individuals.”\textsuperscript{104} Since the campaign speech statute did not require an element of injury to reputation, as required by the law of defamation, the court found that it was not limited to the narrow category of speech that \textit{New York Times v. Sullivan} found undeserving of First Amendment protection.\textsuperscript{105}

No element of injury was established in the Public Disclosure Commission’s investigation against Ms. Rickert for violation of the false campaign speech act. The complaining party in the \textit{Rickert} case won the election by 79\% of the vote.\textsuperscript{106} Without a

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\begin{footnote}{\textsuperscript{100} \textit{Id}. at 382.}
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\begin{footnote}{\textsuperscript{101} \textit{Id}.}
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\begin{footnote}{\textsuperscript{102} Washington ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691 (Wash. 1998) (addressing the constitutionality of the former RCW 42.17.530(1)(a) (1998) (the 1984 version of the statute incorporated a reasonable standard, punishing political advertising that the person “knows or should reasonably be expected to know is false”).}
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\begin{footnote}{\textsuperscript{103} \textit{Rickert}, 119 P.3d at 387 (the false campaign advertising statute was amended in 1988, replacing the “reasonableness” standard of the previous statute to include the \textit{New York Times} actual malice standard).}
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\begin{footnote}{\textsuperscript{104} \textit{Id}. at 384.}
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requirement to show reputational injury, the court refused to find “that materially false statements alone . . . regardless of whether they are defamatory, are not constitutionally protected.”\(^{107}\)

C. Judicial Decisions on the Application of Negative Campaign Speech Acts

The \textit{Rickert} court recognized that it was addressing a case of first impression with little persuasive authority to guide its analysis.\(^{108}\) The Washington Supreme Court decision, upon which the \textit{Rickert} court relied, addressed the constitutionality of a statute prohibiting false campaign speech that the sponsor knew or should have known was false.\(^{109}\) Because \textit{Rickert} addressed the constitutionality of the amended statute that incorporated the actual malice standard, the Washington Supreme Court decision was persuasive, but not controlling.\(^{110}\) Other courts addressing the application of statutes prohibiting false campaign statements of material fact relating to a candidate have not addressed the constitutionality of the speech restriction directly.

In \textit{Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers}, the Oregon Supreme Court addressed whether the statements purported to be false and subject to penalty under its election law, were, in fact, false.\(^{111}\) This case is a good example of the difficulties encountered when courts attempt to determine the truth or falsity of campaign speech. Attempting the difficult task of trying to determine whether an ambiguous statement was capable of two meanings, the court stated the following:

\(^{107}\) \textit{Id.} at 386. With little analysis, the court also found that the statute was overbroad and not narrowly tailored to meet the Public Disclosure Commission’s asserted interest to promote integrity and honesty in the election process. \textit{Id.} at 387.

\(^{108}\) \textit{Id.} at 380.

\(^{109}\) \textit{Id.} at 382 (citing Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691 (1998)).

\(^{110}\) \textit{Id.}

\(^{111}\) Comm. of One Thousand to Re-Elect State Senator Walt Brown v. Eivers, 674 P.2d 1159 (Or. 1983) (determining that the inferences to be drawn from the alleged false campaign statements could make the statement true and, thus, not subject to penalty under the election law provision).
Hyperbole and circumlocution traditionally have characterized the selling of politicians and products in America. Understandably, therefore, courts hesitate to divine the line separating the hyperbole from a false statement of material fact in a human endeavor in which overstatement has become commonplace.\textsuperscript{112}

Another state Supreme Court addressing an as applied challenge to its state corrupt practices act, determined that a false statement negligently made could not be the basis for a violation of the provision prohibiting false political advertisements.\textsuperscript{113} The North Dakota Supreme Court determined that “the sensitive First Amendment considerations inherent to all political speech” required more than a negligence standard to punish campaign speech.\textsuperscript{114}

Although the election law at issue in \textit{Pennsylvania v. Wadzinski}\textsuperscript{115} did not involve the truth or falsity of campaign speech, the notice requirement implicated core First Amendment speech. The statute imposed criminal sanctions on a candidate for publishing a last-minute campaign ad without notice to his opponent, providing the opportunity for a pre-election response.\textsuperscript{116} The court rejected the argument that the statutory notice requirement was a valid time, place, and manner regulation that did not

\textsuperscript{112} \textit{Id.} at 1165 (citing Oregon Survey, Judicial Developments 1974, 54 OLR 372, 454–55 (1975)).

\textsuperscript{113} Snortland v. Crawford, 306 N.W.2d 614 (N.D. 1981) (upholding the district court’s dismissal of an action brought under the corrupt practices act for allegedly making false statements in a political advertisement and exceeding the statutory limits on campaign expenditures), \textit{superseded by statute as stated in} District One Republican Comm’n v. District One Democrat Comm’n, 466 N.W.2d 820 (ND 1991). \textit{See generally} Goldman, \textit{supra} note 20 (advocating a compromise between negligence and \textit{New York Times} actual malice to enforce false campaign advertising, which is a negligence standard subject to a clear and convincing standard of proof).

\textsuperscript{114} Snortland, 306 N.W.2d at 623 (the statement that the incumbent State Superintendent ordered the Ten Commandments be removed from school classrooms after a court decision on the issue was a false statement, but not “knowingly” made for purposes of the statute imposing misdemeanor charges for making false campaign statements).

\textsuperscript{115} Commonwealth v. Wadzinski, 422 A.2d 124 (Pa. 1980) (invalidating a statute requiring a candidate to give notice of a political advertisement referring to his opponent published 48 hours prior to an election, regardless of the truth or falsity of the statements, so that the opponent had time to respond).

\textsuperscript{116} \textit{Id.}
impose restrictions on the content of speech. Unlike a content-neutral time, place, and manner restriction, the notice requirement impacted substantially on the candidates’ decisions regarding the timing and content of pre-election communications to the voters. Concerned with the chilling effect on core First Amendment speech and unconvinced that the notice requirement was necessary to meet the asserted interest in preserving the integrity of the electoral process, the court found the statute unconstitutional.

A few cases have sustained sanctions for false or misleading campaign advertisements. However, even these cases do not directly address the constitutionality of a state statute that punishes false campaign speech. Instead, professional disciplinary rules provided the authority to enjoin campaign advertisements in one judicial race and to sustain professional discipline against a candidate in another judicial race.

In *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, the treasurer of an election committee in a judicial race brought an action to enjoin the rival campaign from publishing political advertisements that would mislead voters to believe its candidate was the incumbent judge. The plaintiff seeking injunctive relief alleged that the opposing campaign violated both a Michigan statute, restricting campaign advertisements that give the false impression of incumbency, and the Code of Judicial Conduct. The Michigan Appeals court upheld the injunction restricting the misleading advertisements and found that the candidate’s knowingly made misrepresentations did

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117 Id. at 131.
118 Id.
119 Id. at 131, 135.
121 Id. at 447.
122 Id. at 448.
not constitute constitutionally protected free speech.\textsuperscript{123} However, the court’s holding to affirm the injunctive relief was based on a violation of the Code of Judicial Conduct, without discussing the constitutionality of the Michigan statute.

Similar to the Michigan case, the court in \textit{In re Marie M. Donohoe} held that a lawyer who made false campaign statements in her bid for judicial office could be reprimanded.\textsuperscript{124} The court found that the attorney violated both the Code of Judicial Conduct and the Code of Professional Responsibility. Both of these professional codes require a judicial candidate to “maintain the dignity appropriate to judicial office” and “[to abstain] from conduct involving dishonesty.”\textsuperscript{125} As a lawyer, Ms. Donoho was bound by these rules of professional conduct, while campaigning for judicial office.\textsuperscript{126} Like the \textit{Fox} case, the Washington Supreme Court did not discuss a state election law provision prohibiting false campaign advertisements when affirming the reprimand against Ms. Donoho.\textsuperscript{127}

These cases that apply disciplinary rules to censure and restrict false campaign statements made by lawyers as candidates for judicial office are not instructive as to the issue of false campaign speech statutes and their constitutionality. For the reasons discussed in Part V of this paper, attorney speech rights are not co-extensive with the rights of non-lawyers. Therefore, courts have found no constitutional infirmity in

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\item \textsuperscript{123} \textit{Id.} at 449.
\item \textsuperscript{125} \textit{Id.} at 1098 (citing Canon 7 B(1)(a) of the Code of Judicial Conduct and DR 1-102(A)(4) of the Code of Professional Responsibility).
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{But see} Republican Party of Minn. v. White, 536 U.S. 765 (2002) (holding that the “Announce Clause” in Minnesota’s Code of Judicial Cannons, which prohibited candidates running for judicial office to express their views on disputed legal and political issues, violated the First Amendment because it was a content based restriction burdening core First Amendment political speech), \textit{remanded to} 361 F.3d 1035 (8th Cir. 2004), \textit{vacated, reh'g, en banc, granted}, Republican Party of Minn. v. Kelly, 2004 U.S. App. LEXIS 10232 (8th Cir. 2004).
\end{itemize}
\end{footnotesize}
restricting and punishing attorney speech in many contexts that would be unconstitutional as applied to non-attorneys. One area of attorney speech sharing similarities to restrictions on false campaign statements involves false statements that impugn the integrity of judges. A rule of professional responsibility that incorporates the *New York Times* actual malice language has been the basis for attorney discipline, despite unsuccessful First Amendment challenges.

However, incorporating the *New York Times* actual malice standard to statutes restricting false campaign speech should not be guided by the attorney speech cases. Furthermore, the fact that the Supreme Court carved out a narrow category of unprotected political speech does not warrant an application of *New York Times* defamation law to campaign speech in general. Unlike defamation cases, statutes restricting false political statements do not provide a private remedy for injury to reputation. Instead, these restrictions impose governmental sanctions of public reprimand, fines or misdemeanor charges and sweep within their reach a substantial range of protected speech. Unable to survive strict scrutiny analysis and facially overbroad, these statutes reflect a view that citizens “are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity of political debate.”

Before discussing these constitutional issues, Part IV will address the public’s reaction to false campaign speech, as measured by pollsters and political scientists. Proponents of restrictions on campaign speech point to the effects negative campaigning has on voters. Concern that voters will choose candidates based on falsehoods or, worse yet, stay home from the polls is not supported by the research. In fact, there is evidence

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128 Ferguson, *supra* note 20, at 485 (discussing other state regulations of campaign speech or candidates’ conduct that impose penalties ranging from civil fines to felony convictions.

that negative campaigning has just the opposite effect; in other words, negative advertising mobilizes voters and gives an “edge” to the candidate targeted by negative campaign attacks.

IV. Voters’ Reactions to Negative Campaigning

A. The Research – Negative Campaign Speech and Voter Turnout

The widely-held belief that negative campaigning keeps voters away from the polls on Election Day emanates from laboratory experiments conducted in the early 1990s. In these studies, citizens were exposed to a single negative political advertisement. After viewing the ad, the subjects claimed they would be less likely to vote. The reverse was true when exposed to a positive campaign ad. These were ground-breaking studies which concluded that negative campaign advertising demobilized voters.

However, political scientists began to question the efficacy of these findings based on survey research. “It appears that citizens believe that they are less likely to vote because of negative campaigning, but nonetheless act in the opposite manner.” Survey research tracks what voters actually do, rather than hypothesizes what voters will do based on laboratory findings. One survey study of presidential elections from 1960 – 1996 showed that there was no correlation between the “tone” of advertisements and

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131 Id. at 546.

132 Id.

133 Id.

134 Id.

135 Id.; see also Martin P. Wattenberg & Craig L. Brians, *Negative Campaign Advertising: Demobilizer or Mobilizer*, 93 AM. POL. SCI. R. 891 (1996), available at http://repositories.edlib.org/crisp/3 (attacks the generalization of the Ansolabehere et al.’s laboratory findings to real-world experience and negative political advertising has some positive effects on voter turnout).
Many other studies of both senate and presidential campaigns show that negativity may stimulate voter turnout.\textsuperscript{136} The predominant view of political scientists, who have researched the connection between the “tone” of campaigning and voter turnout, supports the conclusion that negativity has a mobilizing effect on voters.\textsuperscript{137} However, there is scant research to theorize on why negative advertising translates into increased voter participation. A recent study from a political psychologist suggests three reasons for the correlation between negative campaigning and voter mobilization.\textsuperscript{138} One plausible reason that negative advertising encourages people to vote is that such advertising may raise public consciousness about the country’s problems and the “stakes of the race.”\textsuperscript{139} The second posited reason is that negative campaigning “stimulates anxiety about candidates” and, thus, increases voter turnout.\textsuperscript{140} Lastly, negative advertising may increase voters’ perceptions of the closeness of the race and encourage voter participation.\textsuperscript{141}

While evaluating the efficacy of political science research is beyond the scope of this paper,\textsuperscript{142} it is instructive that the overwhelming amount of research in the area of negative campaign speech and voter turnout does not support the “harm” these campaign

\textsuperscript{136} Id. at 546 (referring to Finkel, S. & Greer, J., A Spot Check: Casting Doubt on the Demobilizing Effect of Negative Campaign Ads, 42 AM. J. POL. 573 (1998)).

\textsuperscript{137} Id. (Review of research on negative campaigning and voter mobilization).

\textsuperscript{138} Id. (citing to Lau, R. & Pomper, G. M., Effects of Negative Campaigning on Turnout in U.S. Senate Elections, 1988–1998, 63 J. POL. 804 (2001) (suggesting that negative campaigning has a “curvilinear effect” on voter turnout, meaning that extreme mud-slinging and unusually high levels of negativity may reduce voter turnout)).

\textsuperscript{139} Id.

\textsuperscript{140} Id. at 552 (explaining the model of “republican duty”: negative campaigning attacks the candidates’ positions on key issues facing the country; thus, people become more aware of public problems and recognize the importance of the election).

\textsuperscript{141} Id. at 553 (explaining the “candidate threat” model)

\textsuperscript{142} Id. at 554 (utilizing rational choice theory to suggest that citizens will participate in politics “if the utility of their participation outweighs the cost of their effort, which is more likely when if an election is close”).

\textsuperscript{143} Evaluating the efficacy of the political science research is also beyond the scope of this author’s training and expertise.
speech restrictions are intended to prevent. As will be discussed in Part V, a restriction on core First Amendment speech cannot stand on mere conjecture of a proposed harm. With such scant support that negative campaigning affects voter turnout, it would be difficult for the government to demonstrate that these restrictions are necessary to serve the interest in preserving electoral integrity by protecting voter participation and decision-making based on “truthful” information. Not only is there little support to connect negative campaigning to low voter turnout, research shows that voters are not “fooled” by deceptive and misleading campaign advertising.

B. Survey Research - Voters’ Reliance on Negative Campaign Speech

Public opinion polls demonstrate that the power of negative campaign speech to sway voters is minimal. When asked if negative campaign advertisements would make voters more or less likely to vote for the candidate who produced the ads, surveys indicate that negative campaign speech has an adverse effect on the candidate who produced the negative ad. In one survey, voters responded that they would be 11% more likely to vote for the candidate who produced the ads and their family and friends would be 8% more likely. In a similar survey regarding the Minnesota Senate race,

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144 One of the problems with negative campaign speech restrictions is how to determine the type of speech that improves the political debate and the type of speech that denigrates the integrity of the electoral process. As one court found, trying to determine truth from falsity in campaign speech is problematic. See Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers, 674 P.2d 1159 (Or. 1983). If distinguishing between truth and falsity is difficult; it would be even more problematic to determine the content of speech that satisfies the principles of “decency and fair play.” (referring to some of the clean campaign codes).


146 Id.
respondents said negative ads would make them 61% less likely to vote for the producer of the ads and 30% said the ads would have no impact.\footnote{Rasmussen Reports, Toplines – Minnesota Senate Election, Survey of 500 Likely Voters (April 22, 2008), available at http://www.rasmussenreports.com/public_content/politics/elections_20082/state_toplines (May 21, 2008) (surveying likely voters on the likely effect of negative campaign advertisements on their vote in the Minnesota senate election). See also Michael Cooper and Megan Thee, Poll Says Attacks Backfire on McCain,” N.Y. TIMES, Oct. 14, 2008 (survey results show that the McCain campaign’s attacks on Obama has an inverse relationship to voter support; voters’ support for McCain decreased and their support increased for Obama).}

While opinion polls and surveys can be criticized for methodology, their sample size and the possibility that respondents may say one thing and do another, these polls and many others support the view that Americans do not base their votes on negative campaign advertisements.\footnote{KEVIN ARCENEAUX & DAVID W. NICKERSON, TWO FIELD EXPERIMENTS TESTING NEGATIVE CAMPAIGN TACTICS 1, http://americandemocracy.nd.edu/working_papers/documents/Arceneaux_Nickerson_Negative_Messages.pdf, (prepared for presentation at the 2005 Meeting of the American Political Science Association, September 1 – 4, Washington, D.C.) (discussing the inconclusive and contradictory results of social scientists who study the effect negative and positive campaign speech has on voters’ decision-making)).} Like the misperception between voter turnout and negative campaign speech, the assumptions about negativity influencing voters’ decisions tend to be unsupported by the research.

However, generalizing a conclusion from the various studies on the influence negative campaign speech has on voter-decisions is difficult because researchers have not adopted a consistent definition of what constitutes negative campaign speech.\footnote{Id. at 5–6 (discussing the definitional problem of negative campaign speech; there is no distinction between “advocacy” ads that attack a candidate’s position or record and those that are nasty, inaccurate or unfair).} Voters, too, seem to disagree on what is and is not a negative campaign advertisement.\footnote{DEBORAH JORDAN BROOKS, GALLUP GUEST SCHOLAR, NEGATIVE CAMPAIGNING DISLIKED BY MOST AMERICANS, (July 17, 2000), http://www.gallup.com/poll/2731/Negative-Campaigning-Disliked-Most-Americans.aspx.} One Gallup poll found that 80% of a randomly selected national sample of adults responded that “criticizing an opponent for running negative advertisements is itself an example of
negative campaigning.” 151 Forty-two percent of those surveyed thought that criticizing an opponent for having ties to special interest groups is an example of negative campaigning. 152 Interestingly, over a majority of those surveyed thought that it is unfair and constituted negative campaigning for a candidate to bring up the extramarital relationships of an opponent (68%) or illegal drug use before the person held office (57%). 153

Despite the label of negative campaign speech, most would agree that information about “ties to special interest groups” or “issues of infidelity 154 and drug use” are legitimate topics for the public to consider when voting on candidates. The definitional problem of what constitutes negative campaign advertisements underscores the difficulty in enforcing statutes that attempt to restrict protected speech at its “fringes.” Such fine line-drawing does not give political speech “the breathing space it needs to survive.” 155

While a truly voluntary campaign pledge may raise the level of public discourse and enhance voters’ respect for a candidate, most state and local campaign speech acts are not truly voluntary. If a candidate chooses to conduct his or her campaign according to principles of “decency, honesty and fair play,” that is the candidate’s right. However, when government attempts to enforce “decency” in political debate, the promise of the First Amendment to let the people decide what information is relevant to self-government is threatened.

151 Id.
152 Id.
153 Id.
154 Perhaps there would be less agreement on whether a candidate’s infidelity is germane to political debate in an election. If the candidates and parties raise moral values and personal character as an issue, then, Americans have a right to know such information about the candidate. Whether it is right or wrong to consider information about infidelities in determining fitness for public office, from our earliest elections, allegations of infidelity have found their way in political campaigns. Thomas Jefferson was accused of adultery.
V. Campaign Speech Restrictions and First Amendment Considerations

A. *New York Times* Defamation

1. Campaign Speech Restrictions

It is not surprising that most of the statutes prohibiting false and misleading campaign advertisements incorporate the actual malice language from *New York Times v. Sullivan*. Campaign speech, like criticism of public officials, implicates core First Amendment speech. Akin to defamation law, negative campaign speech statutes prohibit false statements of material fact intending to injure or defeat a candidate. However, as the court in *Rickert v. Public Disclosure Commission* stated, government prohibition and punishment of negative campaign speech exceed the limited scope of *New York Times*.¹⁵⁶

For the first time, the Supreme Court, in *New York Times v. Sullivan*, addressed the constitutionality of state libel laws to impose civil damages against those who criticize public officials.¹⁵⁷ Justice Brennan, writing for the Court, articulated a "profound national commitment" to free and open debate on public issues.¹⁵⁸ Building upon the principles that government must be “responsive to the will of the people”¹⁵⁹ and

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¹⁵⁶ *Rickert v. Pub. Disclosure Comm’n*, 119 P.3d 379 (Wash. App. 2005). *See also Goldman, supra* note 20 (arguing that the “actual malice” standard of *New York Times* is inadequate to protect against the widespread false and misleading campaign advertisements; instead the author proposes a negligence standard held to a clear and convincing standard of proof). For the reasons stated in Part V, this author fundamentally disagrees with Professor Goldman’s proposed new “hybrid” negligence standard to restrict negative campaign advertisement. Professor Goldman’s “solution” to false and misleading campaign advertisements raises all kinds of First Amendment concerns, most of which he acknowledges.

¹⁵⁷ *N.Y. Times v. Sullivan*, 376 U.S. 254, 256, 269 (1964) (addressing “for the first time” to what extent the First Amendment limits the application of state libel law to award damages to public officials against those who criticize their official conduct).

¹⁵⁸ *Id.* at 269.

¹⁵⁹ *Id.* at 269–270 (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance 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.”)).
that “right conclusions [will arise] out of a multitude of tongues,” the Court recognized the need to create a “[conditional] privilege for the citizen-critic of government.”

Two interrelated ideas emerge from New York Times. First, the Court stated that it is the “duty” of citizens to criticize official conduct. Drawing an analogy between government officials who need protection from citizen libel suits to effectively do their jobs, the Court reasoned that citizens cannot be free to fulfill their “citizen-critic” functions without an analogous protection from civil damage suits. Secondly, not only does effective criticism need “breathing space” uninhibited from fear of lawsuits, but, citizens require wide-range in the manner and content of criticisms to ensure “right conclusions” for a self-governing people. The First Amendment guarantees a platform for expression of political ideas, irrespective of “the truth, popularity, or social utility of the ideas and beliefs which are offered.”

No where could the application of these principles be more necessary than in campaigns. Elections guarantee the “lawful means” for change of government according to the “will of the people.” So, campaign speech restrictions implicate the “lofty” First

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160 Id. at 270 (citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (referencing Judge Learned Hand’s assertion that the market place of ideas will result in right conclusions), aff’d, 326 U.S. 1 (1945)).
161 Id. at 282 (analogizing the privilege of a public official to be protected from libel suits by private citizens to the need to protect private citizens from libel suits when criticizing government officials).
162 Id. at 282 (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring) (“It is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.”), overruled in part by Brandenburg v. Ohio, 395 U.S. 444 (1969)).
163 Id. at 282–283.
164 Id. at 269–270 (articulating the central purpose of the First Amendment to ensure government by the people and that desired governmental changes occur by “lawful means”). New York Times articulates and supports some of the “values” or “purposes” in protecting free speech in a democratic society. See generally Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 878–79 (1963) (reasons for protecting free speech in a democratic society are (1) to assure individual self-fulfillment, (2) to create a means of attaining truth, (3) to secure equal participation of individuals in political decision making, and (4) to maintain a balance of stability and change in the society).
165 Id. at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).
166 Id. at 269–270 (citing Stromberg v. California, 283 U.S. 359, 369 (1931)).
Amendment principles articulated in *New York Times*. As such, any attempts to put parameters on the election debate should be strictly scrutinized.

Proponents argue that the application of strict scrutiny analysis to campaign speech restrictions is not required because *New York Times* carved out a category of unprotected speech for defamation of public officials, which applies to false and defamatory campaign speech.\(^{167}\) This unprotected category requires an application of actual malice and a clear and convincing standard of proof. Many of the campaign speech statutes incorporate the actual malice and burden of proof standards required under *New York Times*.\(^{168}\) Thus, there would seem to be no First Amendment impediment to restricting and punishing false campaign speech that “meets” the *New York Times* public official defamation standard.

However, the analysis of the Washington state court\(^{169}\) provides a more protective rule for election speech, which adheres to the principles articulated in *New York Times*. In carving out a special rule for public official defamation, the Supreme Court balanced First Amendment rights against the interest in protecting a public official’s private right to seek damages for reputational injury.\(^{170}\) *New York Times* did not create a government cause of action for public harms caused by false or misleading campaign statements made with actual malice.

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\(^{167}\) The majority refused to adopt the rule of the concurring opinions that would grant an absolute, unconditional privilege to criticize public officials. *Id.* at 293–305 (Black, J., concurring and Goldberg, J., concurring).

\(^{168}\) *See supra* Part II and accompanying notes.

\(^{169}\) *See supra* Part II, section B.

In the context of campaign speech, a candidate retains a private cause of action for damages caused by reputational injury. Proponents of campaign speech statutes argue that a candidate’s private defamation suit is “too little, too late.” The election will be over before a candidate is vindicated for the harm caused by knowingly made false campaign statements. However, there is no reason to believe that vindication, whether on behalf of the defamed candidate or the public, will come any sooner when government initiates either legal or administrative actions for violations of campaign speech statutes.

*New York Times* created a private cause of action for reputational injury, while balancing the public’s First Amendment right to freely criticize government officials. If the government is going to “stand in the shoes” of a defamed candidate, the government should be required to prove an element of injury before campaign speech falls outside the protection of the First Amendment. Proponents of false campaign speech statutes argue that the “injury” is to the public. False, deceptive and defamatory campaign speech is an affront to the electoral process and an assault on our democratic principles of participatory government. Further, government prohibition and punishment of false

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171 At the very least, government should be required to prove an element of reputational injury to meet the requirements of *New York Times*. If government is going to “stand in the shoes” of defamed candidates, *New York Times* retained the element of civil libel that required proof of a defamatory statement.

172 Although retaining the common law defamation element of presumed damages, the cause of action recognized in *New York Times* is a private remedy for reputational harm to government officials. Proof of reputational injury must be established, before damages are presumed. The campaign speech statutes restricting and punishing false statements made with actual malice permit “presumed damages” to the public without proof of reputational injury. Therefore, a government cause of action for defamation during elections, without proof of injury, exceeds the narrow category of unprotected political speech recognized by the balancing of free speech rights and recourse for reputational injury articulated in *New York Times*.

173 See Rickert, 119 P.3d at 384 (holding that “under *New York Times*, only defamatory statements made in violation of the [campaign speech] statute are not constitutionally protected speech. Specifically there must be an element of injury before the speech is undeserving of First Amendment protection.”).
campaign statements provide a cause of action for “public” defamation and the harm caused to “civic republicanism.”

The danger in recognizing a cause of action for public defamation is that “the state is enforcing a view of the truth about itself.” Citizens, not the government, must judge the veracity of public discourse. Anything less would resurrect seditious libel laws.

“[The] lesson to be drawn from the great controversy over the Sedition Act of 1798 . . . [was] neither factual error nor defamatory content [or a combination of the two] suffices to remove the constitutional shield from criticism of official conduct.”

2. Professional Disciplinary Sanctions

There is some symmetry between ethical rules that punish lawyers for knowingly made false statements of fact that impugn the integrity of the judiciary and campaign statements provide a cause of action for “public” defamation and the harm caused to “civic republicanism.”

174 In the waning days of the 2008 presidential election, there was grave concern about the tenor of vice presidential candidate, Governor Palin’s campaign rhetoric. She was accused of racial and religious animus. Commentators suggested that her references to “hockey moms” and “Joe six-pack” were code words calling upon white, middle class people to unite together against “the black candidate,” Senator Obama. Further, commenters suggested that references to Senator Obama’s middle name “Hussein” and allegations of his ties to “domestic terrorists” expressed anti-Muslim sentiments. See David Waters, Ann Coulter’s Anti-Muslim Name Calling, Washingtonpost.com, Aug. 28, 2008, available at http://newsweek.washingtonpost.com/onfaith/undergod/2008/08/ann_coulters_name_calling.html. It could be argued that the public is harmed by the injection of group libel or hate speech into the campaign. However, it is questionable whether either doctrine could support a “public” cause of action for defamatory and incendiary campaign speech consistent with the First Amendment. New York Times v. Sullivan decided after Beauharnais v. Illinois, 343 U.S. 250 (1952) (sustained conviction under a criminal libel statute for publications that “portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race”), raises doubt that government could punish group defamation unless the statements were made face-to-face, specifically targeted to individuals and likely to provoke a breach of the peace. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Further, it would be difficult to demonstrate that the objectionable campaign rhetoric constituted advocacy of imminent lawlessness unprotected by Brandenburg. See infra note 234.

175 Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. CHI. L. REV. 225, 226 (1992) (discussing the attack on free speech principles from liberal academic scholars who would condone speech restrictions based on the “consequences” of the ideas expressed; “‘civic republicanism’ is the banner under which this assault on liberty gathers.”).

176 Id. at 239 (discussing why “we allow actions for deception and defamation in the private domain but not the public”).

177 N.Y. Times, 376 U.S. at 274.

178 Rules 8.2 (a) of the ABA Model Rules of Professional Conduct prohibits statements “that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or
speech restrictions, especially those that subject candidates to administrative censure for false campaign statements made with actual malice. However, the attorney speech cases are distinguishable. While acknowledging that attorneys may be punished under ethical rules for knowingly made false statements about judges without violating First Amendment principles,\textsuperscript{179} it is not inconsistent to argue the opposite when government attempts to punish speakers for similarly made statements about candidates. For a host of reasons, the attorney speech cases do not\textsuperscript{180} and should not provide support for validating campaign speech statutes.

First, attorneys do not have First Amendment rights that parallel those of non-lawyers.\textsuperscript{181} Due to the multiple loyalties lawyers owe as officers of the court and to the administration of justice, as well as to their clients, lawyers’ speech rights must be balanced against other important rights.\textsuperscript{182} In the context of elections, candidates and other speakers do not have competing loyalties. Secondly, judges, who are the targets of knowingly made false statements, do not have the same self-help remedies as candidates and other public officials. Candidates usually have greater access to media than judges...
and are not constrained by the Canons of Judicial Conduct\textsuperscript{183} from responding to false defamatory statements.

Regarding commercial speech and speech criticizing the judiciary, greater restrictions on lawyers as opposed to non-lawyers are justified because the public may imbue greater veracity to the statements of lawyers.\textsuperscript{184} Premised on a paternalistic view of government’s role in limiting speech, this is equally “offensive” to the notion that the public will be unable to discern the truth from falsity in campaign speech. However, unlike attorney speech about the judiciary,\textsuperscript{185} most people expect campaign speech to be filled with hyperbole, exaggerations and half-truths.\textsuperscript{186}

Finally, ethical rules governing the legal profession apply only to lawyers.\textsuperscript{187} However, the majority of negative campaign advertisement statutes discussed above govern the speech of “any person.”\textsuperscript{188} The reach of the campaign speech statutes is not limited to the candidates, political parties and/or electioneering groups. Even if the statutes applied only to the candidate’s personally sponsored speech, the statutes have unlimited impact on the right of the voters to receive information about candidates and proposed government initiatives.\textsuperscript{189}

\textsuperscript{183} Judges are bound by ethical and professional considerations that do not apply to candidates (who are not bound by professional rules which impose speech restrictions). \textit{See} Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2003). \textit{But see supra} note 127 discussing Republican Party of Minn. v. White.


\textsuperscript{185} Conventional wisdom may lead to the conclusion that the public does not expect lawyer speech to be any more truthful than campaign speech. However, in the context of informing the public about judicial proceedings, the public views lawyers as a good source of truthful and educational information. \textit{See generally} \textit{Day, supra} note 179.

\textsuperscript{186} In one survey, 59\% of those surveyed believe that all or most candidates deliberately twist the truth and 39\% believe that all or most candidates deliberately lie to voters. \textit{Do Negative Campaign Ads Work?} at \url{http://www.thisnation.com/question/031.html}.

\textsuperscript{187} \textit{See} ABA Model Rules of Prof’l Conduct-Preamble and Scope (2000) available at \url{http://www.abanet.org/cpr/mrpc/}.

\textsuperscript{188} \textit{See supra} note 84.

Public official defamation law does not end the inquiry regarding the constitutionality of acts that prohibit knowingly-made false campaign statements. Even if the campaign speech restrictions do not fall into the narrow category of defamation speech undeserving of protection under *New York Times*, government can still regulate in the area of campaign speech if the restrictions are necessary to serve a compelling state interest. As discussed below, despite careful drafting and judicial narrowing constructions, the statutes do not survive strict scrutiny analysis.

3. The present-day validity of the *New York Times* rationale

In considering the assumptions underlying *New York Times v. Sullivan*, some may argue that the Court articulated a “naïve” view of the First Amendment that does not apply to campaign speech. As stated above, the Court premised its holding on two interrelated principles: 1) that it is the republican “duty” of Americans to criticize government; and 2) that “a multitude of tongues” will lead to “right conclusions” representing the “will of the people.”

Whether Americans actually recognize this “duty” and fulfill its obligation is difficult to ascertain. Perhaps the best evidence is the percentage of eligible Americans who actually vote in elections. Based on U.S. Census Bureau Reports, 64% of citizens over the age of 18 voted in the 2004 presidential election. The 2004 figures represented a 4% increase over the percentage of voters (60%) who said they voted in the

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190 Whether the principles of *New York Times* apply to the present day reality of political campaigns is a topic that could fill numerous papers and law reviews. The question has been raised in other First Amendment contexts, for example, in the areas of campaign finance and pornography. The author leaves the full exploration of this issue for another day and future papers.

191 *See supra* Part V (A) (1).

2000 presidential election.¹⁹³ A California survey indicated that “being too busy” was one of the excuses that kept infrequent voters (28%) and unregistered eligible voters (23%) from exercising their right to vote.¹⁹⁴ There was a very high percentage of infrequent (93%) and unregistered (81%) eligible voters who agreed that voting is “an important part of being a good citizen.”¹⁹⁵ If statistical surveys reflect reality, then it appears Americans do recognize that voting is a civic duty, regardless of whether they actually vote.

The second premise of New York Times is not so easily tested. Judge Hand’s famous quote¹⁹⁶ about “right conclusions” and “multitude of tongues” presupposes that every “voice” has access to and weighs equally in the market place of ideas. This notion that all “voices” are equal has been challenged in other First Amendment contexts.¹⁹⁷ The impetus for campaign finance reform is based, in part, on the idea that unlimited campaign contributions and expenditures by corporations will “drown out” the voices of individual voters. Further, the fear of quid pro quo corruption that comes from the power of amassed wealth influencing elections is sufficient to burden the First Amendment right

¹⁹³ Id. (indicating that in the 2004 presidential election, 72% of eligible voters were registered and of those registered voters, 89% said they voted; the comparable figures for the 2000 presidential elections were 70% and 86% respectively).
¹⁹⁵ Id. (representing percentage of those surveyed who believe that voting is important; two thirds of those surveyed said that they believed politics is controlled by special interests, which may contribute to their reasons for not voting).
¹⁹⁷ E.g., Catherine MacKinnon, Not a Moral Issue, 2 YALE L. & POL’Y REV. 321, 322–324 (1984) (discussing the feminist critique of pornography is politics, as distinguished from obscenity which is a moral issue).
to enter the political debate through contributions and expenditures of campaign
dollars.\textsuperscript{198}

Finally, skepticism that “right conclusions” will ultimately champion from an
“unregulated” market place of ideas is one of the arguments for campaign speech
restrictions. Advocates of these restrictions hope to remedy the problem of uninformed
voters who allegedly make ballot-box decisions for the wrong reasons, such as emotional
reactions to mudslinging or unfounded beliefs that campaign lies are true. A government
imposed remedy to “educate” the electorate on public matters through speech restrictions
is the very reason that \textit{New York Times} continue to be necessary and relevant to modern
day politics. As will be discussed below, it is impossible to draft a narrowly tailored
statute to foster an informed electorate that is capable of enforcement consistent with the
First Amendment.\textsuperscript{199}

\textbf{B. Strict Scrutiny Analysis}

Since campaign speech statues target the content of speech, these restrictions are
content-based and are subject to strict scrutiny.\textsuperscript{200} Under strict scrutiny analysis, the
government must show that the challenged restriction is “narrowly drawn and is
necessary to serve a compelling state interest.”\textsuperscript{201}

\textbf{1. Compelling State Interest}

\textsuperscript{198} FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2676 (Scalia, J., concurring).
\textsuperscript{199} A less restrictive remedy is to allocate government resources toward civic education. As articulated in
Rust v. Sullivan, 500 U.S. 173 (1991), government may indirectly impact protected activity by choosing to
fund a program that advances its own permissible goals without violating the First Amendment. See infra
note 223 (discussing the campaign spending caps as a condition on receipt of federal funds to finance
campaigns).
\textsuperscript{200} FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2664 (2007) (“restrictions that burden political speech
[are] subject to strict scrutiny”).
\textsuperscript{201} Boos v Barry, 485 U.S. 312, 321 (1988); see also First Nat. Bank of Boston v. Bellotti, 435 U.S. 765,
786 (1978).
Preserving the integrity of the electoral process is the overarching governmental interest served by campaign speech restrictions. Various corollaries to the interest of electoral integrity include: (1) the interest to foster an informed electorate; (2) the interest in preventing fraud and libel during election campaigns; (3) the interest in preventing a disincentive to run for public office; and (4) the interest to encourage citizens to exercise their constitutional right to vote, thus, ensuring that election results reflect the will of the people. While recognizing the legitimate state interest in preserving the integrity of the electoral process, the Court has cautioned that “when a State seeks to uphold that interest by restricting speech,” the state’s authority is limited by the First Amendment.

In Brown v. Hartlage, the Court considered the application of Kentucky’s campaign practices act to the question of whether a candidate’s election victory could be nullified due to “unlawful” promises made during the campaign. A candidate running for county commissioner made campaign promises to serve, if elected, without pay. After realizing that his pledge to serve in public office without remuneration violated the

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202 Brown v. Hartlage, 456 U.S. 45, 52 (1982) (recognizing that states have a legitimate interest in preserving the integrity of their electoral process).
203 Washington ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691, 697 (fostering an informed electorate is a legitimate state interest).
206 Michael v. Williams, 15 Cal. App. 4th 1243, 1247 (1993) (the ultimate intent of the legislature was to “encourage voters to exercise their constitutional right to vote, free from dishonest and unethical practices which tend to prevent the full and free expression of the will of the voters.”).
208 Id. (considering whether a candidate’s promise to serve in public office without remuneration in violation of the campaign speech act could nullify his victory; the Court said no).
209 Id. at 48.
state’s corrupt practices act, the candidate apologized and retracted his statement.\(^\text{210}\) His opponent lost the election and then sought to have the election declared void and the office vacated due to the winning candidate’s prohibited campaign promise.\(^\text{211}\) The Court concluded that nullification of an election based on a candidate’s unlawful promise to serve without remuneration was inconsistent with the First Amendment.\(^\text{212}\) Further, the Court rejected the notion that preserving electoral integrity was sufficiently compelling to “restrict directly the offer of ideas by a candidate to the voters.”\(^\text{213}\)

Although the *Brown* Court made it clear that campaign speech in violation of state election laws could not justify nullification of an election, the Court has not addressed whether the imposition of lesser sanctions, based on impermissible campaign speech, would be consistent with the First Amendment. Notwithstanding the discussion of governmental interests in *Brown v. Hartlage*, the body of law considering limitations on campaign finance creates some confusion as to whether preserving the integrity of the electoral process is a compelling state interest.

In *Buckley v. Valeo*, the Supreme Court recognized that campaign finance restrictions directly implicate speech.\(^\text{214}\) Recognizing that both contribution and expenditure limitations involve “fundamental First Amendment rights,” the Court upheld contribution limits, noting that these limits “involved little direct restraint on the

\(^{210}\) *Id.* at 48–49.
\(^{211}\) *Id.*
\(^{212}\) *Id.* at 61–62 (finding that “[nullification of] petitioner’s election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment”).
\(^{213}\) *Id.* at 53–54.
contributor’s speech.’’215 Further, the Court found that the governmental interest in preventing “corruption and the appearance of corruption” was sufficient to justify restrictions on this type of “core” fundamental speech.216 Later, in referring to the Buckley rationale for upholding limits on campaign contributions, the Court stated: “After all, the interests underlying contribution limits, preventing corruption and the appearance of corruption, ‘directly implicate the integrity of our electoral process.’”217

Even if the Court would consider the interest in preserving electoral integrity compelling in the campaign finance context, such a conclusion does not undermine the force of Brown v. Hartlage. In Brown, the Court concluded that the state interest in preserving the integrity of the electoral process could not justify restrictions that directly impact on “the offer of ideas by the candidates to the voters.”218 The conclusion of Brown is consistent with Buckley. The Court viewed the restrictions on campaign contributions to be an indirect limitation on the contributor’s freedom to “engage in unlimited political expression and association.”219

215 Id. at 25 (finding that the contribution limits “involve[d] little direct restraint on the contributor’s speech” since a contribution limit did not infringe on the contributor’s right to discuss candidates and issues).
216 Id.; see also FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2676 (Scalia, J., concurring) (explaining the Court’s rationale in Buckley: contribution limits place “marginal conditions upon the contributor’s ability to engage in free communication,” therefore, a lower level of scrutiny is justified).
217 See Randall v. Sorrell, 126 S. Ct. 2479, 2492 (2006) (quoting McConnell v. FEC, 540 U.S. 93, 136 (2002) (“the interests underlying contribution limits, preventing corruption and the appearance of corruption, ‘directly implicate the integrity of our electoral process.’”)). The Court’s articulation of the level of scrutiny applied to campaign contribution limits is confusing. The campaign finance cases seem to say that the interest in preventing corruption or the appearance of corruption is a compelling interest for consideration of limits on campaign expenditures, but “sufficiently important” for consideration of limits on campaign contributions. Although the Court is divided on whether there should be any limits on campaign finances at all, the most recent campaign finance cases dealing with limits on corporation contributions and expenditures suggest that strict scrutiny is to apply. See Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) (upholding state restrictions on corporations’ campaign expenditures for or against candidates for state elections); McConnell, 540 U.S. at 136; Wis. Right to Life, 127 S. Ct. at 2652 (requiring the government to demonstrate a compelling state interest).
218 Hartlage, 456 U.S. at 52.
219 Buckley, 424 U.S. at 19.
Again, in the area of campaign finance restrictions, the Court refused to uphold expenditure limitations.\textsuperscript{220} According to the Court, expenditure limitations “reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”\textsuperscript{221} Despite this full protection for campaign expenditures,\textsuperscript{222} in the context of federal election funding, the receipt of federal funds is conditioned on the candidate’s acceptance of spending caps.\textsuperscript{223} Proponents of campaign speech restrictions will argue that if First Amendment principles are not offended by campaign spending caps which reduce the overall quantity of political expression, certainly restrictions on false and deceptive campaign advertisements are constitutional.

However, the analogy of campaign speech restrictions to campaign spending caps imposed as a condition to receive federal funds is unavailing. In the context of government financed speech, the Court stated “There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”\textsuperscript{224} Consequently, government cannot directly affect the overall quantity of political speech through restrictions on negative advertisements or campaign expenditures; however, the indirect effects imposed by


\textsuperscript{221} \textit{Id}.

\textsuperscript{222} \textit{But see} McConnell v. FEC, 540 U.S. 93 (2003) (determining that section 203 of the Bipartisan Campaign Reform Act of 2002 which prohibits a corporation to broadcast ads that name a federal candidate for elected office (the functional equivalent of express campaign speech), during the BCRA blackout period, is not facially overbroad under the First Amendment; section 203 of BCRA governs essentially corporate campaign expenditures).

\textsuperscript{223} \textit{See generally} Buckley v. Valeo, 424 U.S. 1, 25-28, 45 (1976).

\textsuperscript{224} Rust v. Sullivan, 500 U.S. 173 (1991) (upholding regulations that condition receipt of federal funds for family planning services to those facilities that do not counsel, refer or provide abortions).
conditions on campaign spending as a requirement to receive federal funds is constitutional.

Unable to satisfy the requirement that campaign speech restrictions serve a compelling government interest, these statutes would fail strict scrutiny analysis. The issue of narrow tailoring is moot if the compelling interest prong of the strict scrutiny test is not met. Nevertheless, courts have connected the narrowly tailored requirement to the New York Times defamation analysis. Finding that a campaign speech statute is not limited to the narrow category of public official defamation unprotected by New York Times, courts have concluded that the statute is not narrowly tailored and is overbroad.  

The danger of overbroad statutes is that they will sweep into their reach otherwise protected speech and have a “chilling effect” on speech in general. In the area of campaign speech, any restriction that would have a chilling effect on the political discourse raises serious First Amendment concerns.

2. Narrowly Tailored

Under strict scrutiny analysis, a restriction on core First Amendment speech must be narrowly tailored and necessary to meet a compelling state interest.  

Government must demonstrate that the restriction targets a perceived harm, one that is real and not based on conjecture.  

The feared harm that flows from intentional campaign falsehoods is that voters will be deceived and their ballot box decisions will be based on untruths or, worse yet, the negativity will keep citizens from exercising their constitutional right to 

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226 See supra notes citing to FEC v. Wis. Right to Life.
227 Reno v. ACLU, 521 U.S. 844 (1997) (struck down two sections of the Communications Decency Act because they were not the least restrictive means of protecting children from offensive material on the internet; Congress made no findings on the efficacy of the restrictions posed by the CDA as opposed to less restrictive means).
vote. The political science research discussed in Part IV demonstrates that the cause and effect relationship between the “tone” of campaign speech and voter turnout is contrary to conventional wisdom. Instead of reducing voter turnout, negativity tends to mobilize citizens to exercise their constitutional right to vote.

Although the research is inconclusive about the extent to which voters base their ballot box decisions on campaign lies and deceptions, the difficulty in “divining the line separating the hyperbole from a false statement” is readily apparent. The Court’s recent foray in deciphering whether a political advertisement is “express advocacy” or “issue advocacy” foreshadows the near impossible task of determining the truth or falsity of campaign speech.

In Federal Election Comm’n v. Wisconsin Right to Life, the Court considered an as applied challenge to a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibiting corporate “electioneering communications” during periods prior to federal elections. BCRA prohibits ads referring to a candidate for federal office during the provision’s blackout period, but permits issue advocacy ads. The Wisconsin Right to Life (WRTL) nonprofit corporation proposed to run ads criticizing the senate filibuster of judicial nominees and implored voters to call their senators who were identified by name in the ads. The Court struggled with defining a test to apply in determining

\[ \text{\textsuperscript{228}} \text{Comm. of One Thousand to Re-Elect State Senator Walt Brown v. Eivers, 674 P.2d 1159 (Or. 1983).} \]
\[ \text{\textsuperscript{229}} \text{FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007) (considering the application of section 203 of BCRA which prohibits corporate political advertisements that refer to a candidate for federal office during specific “blackout period” to ads that criticized the Senate filibuster of judicial nominations and called upon voters to contact Wisconsin Senators Feingold and Kohl).} \]
\[ \text{\textsuperscript{231}} \text{Wis. Right to Life, Inc., 127 S. Ct. at 2660–62 (If the ad were considered promoting or opposing the candidacy of a “clearly identified candidate for Federal office,” then the ad would be subject to BCRA’s blackout period).} \]
whether WRTL’s ads were within the BCRA’s “prohibited” category or the “permissible” category of political ads.  

Although courts frequently rule on the truth and falsity of statements in various types of cases, the danger in campaign speech statutes is that “the state is enforcing a view of truth about itself.” There is a further danger of selective enforcement or punishment of truthful statements that have “bad effects.” For instance, a knowingly-made false statement about a candidate’s voting record is a false statement of material fact made with actual malice. A statement that a candidate held a fund-raiser at the home of a domestic terrorist is a “protected” statement, if true. However, the inference that could be drawn from the true statement is more “lethal” than the false statement. This is especially true if the allegation of terrorist ties is more likely to influence voters’ decisions to the detriment of a candidate than a candidate’s voting record. How could a statute serve the intended purpose of eliminating false and deceptive campaign speech that “wrongfully” influences voters without punishing true statements of fact and selectively enforcing false statements?

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232 Id. at 2663, 2667 (rejecting intent-and-effect test and instead applied the following test: “whether the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”).


234 The “bad effects” test is dangerously similar to the “bad tendency” test applied by courts in upholding convictions under the Espionage Act of 1917 and the Sedition Act of 1918. See e.g., Shaffer v. United States, 255 F. 886 (9th Cir. 1919) (affirming defendant’s conviction for violating the Espionage Act of 1917 based on “the reasonable and natural effect” of the publication to destroy the war effort). Luckily, the “bad tendency” test was put to rest by later cases. See Brandenburg v. Ohio, 395 U.S. 444 (1969) (advocacy that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action” falls outside the protection of the First Amendment). A type of “bad effects” test that punishes those campaign lies voters are most likely to believe and factor into their voting decision has multiple infirmities. If the power to persuade is determinative of which false statements to punish, then a standard of “sensibilities” must be adopted. The dangers of adopting a “reasonable voter” standard should be self-evident. The Court is unwilling to sanitize indecent speech on the internet to the sensibilities of children. Reno v. ACLU, 521 U.S. 844 (1997) (“the Government may not reduce the adult population to only what is fit for children”). In the context of campaign speech, the idea of “dummying down” the level of political discourse to the sensibilities of the “average” voter is unthinkable in light of the First Amendment.
The above example illustrates that a statute creating a public cause of action for false and deceptive campaign speech could not be narrowly tailored and still meet its objective. It is the very nature of speech that true statements can lead to false conclusions. Yet, “[t]he argument that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down.”\(^{235}\)

Statutes that reach a substantial amount of protected speech in order to restrict the targeted “evil” are overbroad and lead to problems of selective enforcement. A “chilling effect” is the “constitutional vice” of both overbreadth and selective enforcement.\(^{236}\) No other category of speech is most deserving of “breathing space” than political speech. Chief Justice Roberts reminds us that “when it comes to drawing difficult lines in the area of pure political speech – between what is protected and what the Government may ban,“\(^{237}\) legislatures and courts should be guided by the actual language the Framers’ used in the First Amendment: “Congress shall make no law . . . abridging the freedom of speech.”\(^{238}\)

C. Conclusion

History will be the judge of the 2008 presidential elections. In a time, when economic woes threatened 1929-Depression era proportions, Americans were embroiled in two controversial wars, fears of domestic and international terrorism spiraled and global warming ushered in weather-related devastation, the campaign rhetoric ran the

\(^{235}\) Wis. Right to Life, 127 S. Ct. at 2670 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) (government could not restrict virtual images of child pornography because it is difficult to distinguish from real child pornography) (“The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.”)).

\(^{236}\) See First Amendment Overbreadth Doctrine, supra note 78, at 853.

\(^{237}\) Wis. Right to Life, Inc., 127 S. Ct. at 2674 (recognizing that 216 years of First Amendment jurisprudence has rejected an absolutist approach; but, the actual words of the First Amendment should guide when considering the line of permissible restriction on pure political speech).

\(^{238}\) U.S. CONST. amend. I.
gamut of racism, sexism and fear-mongering. Despite voters’ desires to know how and who could lead the country in these desperate times, often the content and tenor of the political discourse resembled a verbal “bar room brawl.”

Citizen-led efforts and legislative attempts to exorcise the negativity and intentional falsehoods from campaign speech are a questionable failure (judging from the recent election) and constitutionally suspect. While the constitutional guarantee of freedom of speech is not absolute, “the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”239 Unless a clean campaign pledge is truly voluntary, clean campaign speech statutes that impose sanctions ranging from administrative censure to criminal punishments strike at the heart of the First Amendment and are per se unconstitutional.

Candidates have a private cause of action to seek damages for knowingly made false statements of fact. Statutes that create a government remedy for defamation during campaign elections are constitutionally infirm. Allegedly, these statutes, that permit government to “stand in the shoes” of defamed candidates, vindicate public harm caused by those who pollute the political debate with falsehoods. In the context of political speech, New York Times v. Sullivan carved out a narrow category of unprotected political speech. In doing so, the Court balanced the “prized American privilege” and public duty to freely “speak one’s mind” on public matters against an individual’s right to seek damages for reputational injury.240 New York Times did not create a public cause of action for false political speech.

Without the support of *New York Times*, government must demonstrate that negative campaign speech restrictions satisfy strict scrutiny analysis. As yet, government has failed to provide a sufficiently compelling state interest to justify direct restrictions on campaign speech. According to the Court, the state interest to preserve the integrity of the electoral process is not sufficient to “restrict directly the offer of ideas by a candidate to the voters.”

Unquestionably, the state interest in fostering an informed electorate meets an important and positive goal. However, false campaign speech statutes are premised on the assumption that Americans are either “too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate.” The voters, not government, should be the filters of political campaign falsehoods and character assassinations. In fact, negative campaign speech may have an overall positive effect on the electoral process. Political science research shows that nasty campaigning increases public awareness of the issues at stake and mobilizes voters to voice their opinions at the ballot box.

American political campaigning may be a verbal “free-for-all” full of mudslinging, half-truths and deceptions. However, corrections are left to the “market place of ideas,” which finds its most ardent support in the First Amendment and in the context of political speech. “To many this is . . . folly; but we have staked upon it our all”

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