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## Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies

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# FREE SPEECH AND DOMAIN ALLOCATION: A SUGGESTED FRAMEWORK FOR ANALYZING THE CONSTITUTIONALITY OF PROHIBITIONS OF LIES IN POLITICAL CAMPAIGNS

JAMES WEINSTEIN\*

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### *Introduction*

An important question with which lower courts have been wrestling for decades—and which the United States Supreme Court may soon address—is the extent to which the First Amendment permits governmental prohibitions on lies in political campaigns.<sup>1</sup> To date, most courts have analyzed such laws as if they were content-based restriction on public discourse; the restrictions are thus subjected to “strict scrutiny,” which almost always leads to the law’s invalidation. In this Article, I offer a different (and, I believe, more helpful) framework for judging the constitutionality of laws restricting campaign lies. I suggest that the basic inquiry in these cases should be whether the law in question is properly considered a regulation within the domain of public discourse, where

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1. In this Article I use the term “lie” to mean a statement of fact that the speaker knows to be untrue or which is made with reckless disregard of whether the statement is true or not. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (stating that a statement is made with reckless disregard of the truth if the speaker “entertained serious doubts” as to the truth of the statement). Some of the regulations discussed in this Article prohibit a broader category of expression, including literally true statements intended to mislead the audience. Most of the bans on campaign lies that I discuss, however, consistent with my usage involve factual misstatements that were either knowingly or recklessly made.

government's ability to regulate the content of speech, including lies, is indeed strictly limited; or, alternatively, whether the law is a regulation of speech in the election domain, a government-managed sphere where government has considerable authority to regulate the content of speech to promote the fairness and efficiency of elections.

Part I of this Article offers a comprehensive review of the relevant case law. Section I.A discusses the pertinent United States Supreme Court decisions. Although the Court has yet to directly rule on the constitutionality of a law prohibiting campaign lies, cases it has decided on related matters leave little doubt that it would invalidate on First Amendment grounds any broad ban on campaign lies. At the same time, however, these cases show that the Court is uncertain about the constitutionality of narrowly crafted laws targeting lies particularly injurious to the fairness or integrity of the electoral process. Section I.B discusses the lower court decisions. In the 1970s and '80s, courts were divided about the constitutionality of comprehensive bans on campaign lies. By the 1990s, however, the lower courts increasingly began to express skepticism about the validity of these laws and, consistent with what I have inferred from the Supreme Court decisions, have since the beginning of this century uniformly invalidated comprehensive bans on campaign lies. An open and pressing question, then, is the fate of narrow bans on lies concerning such matters as a candidate's incumbency or party affiliation, or about the time and place of an election.

As discussed in Part II, the answer to the question turns largely on the scope of a key component of the Supreme Court's First Amendment jurisprudence—the rule against content regulation. Section II.A describes the All-Inclusive Approach, a view that insists that, except for few narrow categories of expression, the rule against content discrimination applies to all speech. On this view, even limited, specifically targeted bans on campaign lies would likely be deemed unconstitutional. Section II.B describes the Domain-Specific Approach, an alternative—and, I believe, preferable—view of the scope of the rule against content discrimination. On this view, the rule against content regulation is primarily confined to public discourse, a domain consisting of expression essential to democratic self-governance. In other domains, particularly those which government manages to accomplish some particular purpose, government has far more leeway to regulate the content of speech. It is indisputable that government has the constitutional authority to manage elections by, for instance, setting the time for an election, providing voting apparatus, counting the ballots, and announcing the results. In addition, the Supreme Court has in several

cases upheld as part of this managerial authority the power of states regulate the content of election-related speech, such as by prohibiting write-in voting and banning electioneering near the polls. The difficult question, therefore, is not whether a government-managed domain of elections exists or whether in exercising its authority to manage that domain, government can sometimes constitutionally regulate the content of speech. Rather, the hard question is how to properly allocate regulations of expression, such as bans on campaign lies, at the cusp of the domains of public discourse and elections.

Part III addresses this crucial allocation question. It suggests that this allocation should depend upon (1) the extent to which the law in question promotes the fairness and efficiency of elections, as compared to (2) the extent that the law impairs the democratic function of public discourse. Laws comprehensively banning lies by anyone about ballot measures or candidates would seriously impair the democratic function of public discourse while not directly advancing the fairness or efficiency of elections. Such regulations should therefore be considered part of public discourse and accordingly be invalidated. In contrast, laws prohibiting lies about the time, place, or manner of elections, such as “Republicans vote on Tuesday, Democrats on Wednesday,” directly promote the fairness and efficiency of elections while not adversely impacting on public discourse. Such laws, therefore, should be allocated to the election domain and usually upheld. Between these two poles lie harder cases, both in terms of domain allocation and ultimate disposition. A law prohibiting candidates from lying about their opponents, for instance, presents a particularly difficult case. Because this law directly promotes election fairness and would not likely have a substantial negative impact on public discourse, it should be assigned to the election domain. Nonetheless, the possibility of selective enforcement by politically motivated officials puts the constitutionality of such laws in doubt.

The Article concludes with the discussion of *Minnesota Voters Alliance v. Mansky*, a Supreme Court decision issued shortly before this Article was published. Significantly, in striking down a law prohibiting the wearing of political badges, buttons, or insignias inside a polling place, the Court eschews the All-Inclusive Approach and adopts instead a mode of analysis functionally similar to the Domain-Allocation Approach suggested in this Article.

### I. Regulations and Judicial Decisions

Laws in the United States regulating false speech in political campaigns are not a new phenomenon, with the first such law dating to 1911.<sup>2</sup> By 1975, seventeen states had such laws or regulations on the books,<sup>3</sup> and by 2016 “[n]ineteen states [had] passed statutes prohibiting false campaign speech in some form.”<sup>4</sup> Despite the longstanding existence of such laws, however, there have been few challenges to their constitutionality until the last two decades.<sup>5</sup>

#### A. Relevant Supreme Court Cases

Although the Supreme Court has yet to issue an opinion discussing the constitutionality of statutes prohibiting false campaign statements,<sup>6</sup> it has decided several cases that cast light on whether such laws comport with the First Amendment.

##### 1. *Brown v. Hartlage*

During a press conference, Carl Brown, a candidate for the office of county commissioner in Jefferson County, Kentucky, criticized the office’s salary as exorbitant.<sup>7</sup> If elected, he promised to substantially reduce the salary he would take.<sup>8</sup> Upon learning shortly thereafter that this promise might have violated the Kentucky Corrupt Practices Act, Brown

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2. Mark Listes & Wendy Underhill, *Campaign Fair Practice Laws (Is There a Right to Lie?)*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 29, 2014), <http://www.ncsl.org/research/elections-and-campaigns/campaign-fair-practice-laws-is-there-a-right-to-lie.aspx>.

3. *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1273 (1975).

4. Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMP. L. REV. 41, 49 (2016).

5. *Developments in the Law: Elections*, *supra* note 3, at 1275 (referring to a “lack of direct authority on the constitutionality of campaign falsity statutes”). The article cites but two constitutional challenges. *Id.* at 1275–76 n.235. The cited cases are *Vanasco v. Schwartz*, 56 F.2d 524 (2d Cir. 1974) (remanding a suit challenging the constitutionality of a prohibition on false campaign statements for convocation of three-judge district court) and *Wilson v. Superior Court*, 532 P.2d 116, 118 (Cal. 1975) (holding that an injunction against republication of allegedly deceptive campaign literature was an unconstitutional prior restraint of speech).

6. In 1976, the Court summarily affirmed the decision of a three-judge district court striking down several provisions of a New York election code prohibiting false campaign statements. *Schwartz v. Postel*, 423 U.S. 1041 (1976). The decision of the lower court, *Vanasco v. Schwartz*, 401 F. Supp. 87 (S.D.N.Y. 1975) (three-judge court), is discussed in detail below. *See infra* notes 107–39 and accompanying text.

7. *Brown v. Hartlage*, 456 U.S. 45, 47–48 (1982).

8. *Id.*

immediately retracted it.<sup>9</sup> Despite the retraction, the Kentucky Court of Appeals held that the promise invalidated the election, which Brown had won.<sup>10</sup> The United States Supreme Court unanimously held that imposing such a penalty on Brown's speech violated the First Amendment.<sup>11</sup>

Writing for the majority, Justice William Brennan readily acknowledged that the states have a legitimate interest "in preserving the integrity of their electoral processes."<sup>12</sup> Brennan emphasized, however, that because "the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," it "has its fullest and most urgent application precisely to the conduct of campaigns for political office."<sup>13</sup> Accordingly, if "a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one."<sup>14</sup>

Brennan perceived "three bases upon which the application of the [Corrupt Practices Act] to Brown's promise might . . . be justified."<sup>15</sup> The first was a prohibition on buying votes.<sup>16</sup> Brennan found, however, that because "Brown did not offer some private payment or donation in exchange for voter support," his promise to reduce his salary, like a promise to lower taxes, "cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding."<sup>17</sup>

The second rationale was the concern that "emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve at a reduced salary."<sup>18</sup> But even though this may be a legitimate interest, Brennan explained, "[t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."<sup>19</sup>

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9. *Id.* at 48.

10. *Id.* at 50.

11. *Id.* at 61–62.

12. *Id.* at 52.

13. *Id.* at 53 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971)).

14. *Id.* at 53–54.

15. *Id.* at 54.

16. *Id.*

17. *Id.* at 58.

18. *Id.* at 59.

19. *Id.* at 60.

Finally, and particularly relevant to our inquiry, the sanction on Brown's speech was defended as a restriction on the making of false statements.<sup>20</sup> Since the salary for the office for which Brown ran was set by law, he would not have been able to deliver on his promise.<sup>21</sup> Brennan acknowledged that "[o]f course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."<sup>22</sup> "But," he continued, "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>23</sup> Because the Kentucky law could result in an election victory being overturned even if "the offending statement was made in good faith and was quickly repudiated," the law did not afford the "requisite 'breathing space.'"<sup>24</sup> Brennan concluded his opinion for the Court by observing that in a political campaign an inaccurate factual statement by a candidate is "unlikely to escape the notice of, and correction by, the erring candidate's political opponent."<sup>25</sup> For this reason, in this context "[t]he preferred First Amendment remedy of 'more speech, not enforced silence,'" has "special force."<sup>26</sup>

Reflecting what may well have been the Court's uncertainty on the subject, *Brown* sent mixed signals about whether it would be constitutional to prohibit knowing falsehoods by candidates for elective office. On the one hand, emphasizing that "[a] candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues," Brennan's majority opinion subjected the application of the restriction imposed on Brown's speech to strict scrutiny.<sup>27</sup> On the other hand, despite the "strict scrutiny" verbiage, the opinion acknowledged that some forms of electoral speech, including "*some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may

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20. *Id.* at 61.

21. *Id.* at 60.

22. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

23. *Id.* (alteration in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964)).

24. *Id.* at 61.

25. *Id.*

26. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). Chief Justice Earl Warren concurred in the judgment. *Id.* at 62 (Warren, C.J., concurring). Justice William Rehnquist concurred in the result only, noting that "on different facts I think I would give more weight to the State's interest in preventing corruption in elections." *Id.* (Rehnquist, J., concurring in result).

27. *Id.* at 53 (majority opinion) (quoting *Buckley v. Valeo*, 421 U.S. 1, 52–53 (1976)).



be declared illegal without constitutional difficulty.”<sup>28</sup> While the Court found that the Kentucky law provided inadequate “breathing space” for factual misstatements made in good faith in a political campaign, it emphasized that there had been no showing that Brown “made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not.”<sup>29</sup> This qualification seems to leave open the possibility that falsehoods made with such “actual malice” might be sanctionable.

## 2. *McIntyre v. Ohio Elections Commission*

Margaret McIntyre distributed leaflets opposing a referendum on a proposed school tax levy, violating a provision of Ohio’s Election Code requiring campaign material to identify the person or organization responsible for its publication.<sup>30</sup> The Ohio Elections Commission fined McIntyre \$100.<sup>31</sup> By a vote of seven to two, the Supreme Court invalidated this provision as violating the First Amendment’s guarantee of freedom of speech.<sup>32</sup> Finding that the law imposed a content-based restriction burdening “core political speech,” Justice John Paul Stevens’s majority opinion subjected the law to “exacting scrutiny.”<sup>33</sup> Stevens summarily rejected the state’s argument that its interest in supplying the electorate with pertinent information was compelling enough to justify the ban on anonymous campaign speech.<sup>34</sup> In his view, the identity of the speaker was no different than other information the author of the material might choose to omit.<sup>35</sup>

In contrast—and relevant to our inquiry about the constitutionality of restrictions on campaign lies—Stevens observed that “the state interest in preventing fraud and libel stands on a different footing.”<sup>36</sup> Stevens noted that this interest “carries special weight during election campaigns” because “false statements, if credited, may have serious adverse consequences for the public at large.”<sup>37</sup> He then explained that the “principal weapon against

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28. *Id.* at 55.

29. *Id.* at 61.

30. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 337–38 (1995).

31. *Id.*

32. *Id.* at 336, 357.

33. *Id.* at 347.

34. *Id.* at 348–49.

35. *Id.*

36. *Id.* at 349.

37. *Id.*

fraud”<sup>38</sup> was not the challenged ban on anonymous campaign material; rather, the remedy lay in other provisions of the Ohio Election Code providing “detailed and specific prohibitions against making or disseminating false statements during political campaigns.”<sup>39</sup> After quoting these provisions, however, Stevens explicitly reserved judgment about their conformity with the First Amendment:

We need not, of course, evaluate the constitutionality of the provisions. We quote them merely to emphasize that Ohio has addressed directly the problem of election fraud. To the extent that the anonymity ban indirectly seeks to vindicate the same goals, it is merely a supplement to the above provisions.<sup>40</sup>

Because the “ancillary benefits” provided by the ban on anonymous campaign speech could not justify such “extremely broad prohibition,” the Court invalidated the anonymity ban.<sup>41</sup>

Justice Antonin Scalia’s dissenting opinion, joined by Chief Justice William Rehnquist, would have upheld the anonymity ban in light of the “widespread and longstanding” American practice of banning anonymous campaign speech.<sup>42</sup> Scalia also accused the majority of significantly underestimating the role that the ban on anonymous campaign speech played in promoting Ohio’s various prohibitions of campaign lies.<sup>43</sup> Like the majority, Scalia did not express a view about the constitutionality of Ohio’s ban on false campaign speech. Significantly, however, he observed that “protection of the election process justifies limitations upon speech that cannot be imposed generally” and emphasized that “no justification for regulation is more compelling than protection of the electoral process.”<sup>44</sup> It

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38. *Id.* at 350.

39. *Id.* at 349.

40. *Id.* at 350 n.12. Stevens readily acknowledged that “ancillary benefits” provided by the ban on anonymous campaign speech were “assuredly legitimate” in that it deterred “the making of false statements by unscrupulous prevaricators.” *Id.* at 351. Of course, that an interest may be legitimate does not mean that it is sufficiently compelling to satisfy strict scrutiny.

41. *Id.* at 351.

42. *Id.* at 375 (Scalia, J., dissenting).

43. Scalia observed that “the distributor of a leaflet which is unlawful because it is anonymous runs much more risk of immediate detection and punishment than the distributor of a leaflet which is unlawful because it is false.” *Id.* at 382. For that reason, Scalia reasoned, it is more likely that people will obey a “signing requirement than a naked ‘no falsity’ requirement.” *Id.* Having thus identified themselves, Scalia continued, people will “be significantly less likely to lie in what they have signed.” *Id.*

44. *Id.* at 378–79.

might be fairly inferred, therefore, that, consistent with their view that the anonymity ban was constitutional, the dissenting justices would have found the bans on campaign lies constitutional as well.

### 3. United States v. Alvarez

*Brown* and *McIntyre* dealt directly with the First Amendment's protection of campaign speech but touched only tangentially on lies. Conversely, *United States v. Alvarez* focused directly and comprehensively on the First Amendment's protection of lies generally<sup>45</sup> but addressed *campaign* lies only briefly and inconclusively in a concurring opinion.<sup>46</sup>

When introducing himself as a board member of a water district, Xavier Alvarez falsely claimed that he held the Congressional Medal of Honor.<sup>47</sup> For telling this lie, Alvarez was convicted under the Stolen Valor Act, which criminalized falsely claiming that one had been awarded a military honor.<sup>48</sup> In a six to three decision, the Court invalidated the Act on First Amendment grounds.<sup>49</sup> A plurality opinion by Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor, began by stating that “content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar.”<sup>50</sup> Kennedy then observed that “[a]bsent from these few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”<sup>51</sup> Particularly pertinent to our inquiry, Kennedy stated that even knowing falsehoods or falsehoods made with reckless disregard for their truth are not among those few categories of expression that may be regulated because of their content consistent with the First Amendment.<sup>52</sup> Accordingly, Kennedy subjected the law to “the most exacting scrutiny.”<sup>53</sup>

Kennedy acknowledged that the government had a “compelling interest” in protecting “the integrity of the military honors system in general, and the

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45. 567 U.S. 709 (2012).

46. *Id.* at 738–39 (Breyer, J., concurring).

47. *Id.* at 713 (plurality opinion).

48. *Id.* at 713, 715.

49. *Id.* at 715.

50. *Id.* at 718 (quoting *United States v. Stevens*, 559 U.S. 460, 469 (2010)). For the exceptions listed in this opinion, see *infra* note 277 and accompanying text.

51. *Id.* at 718.

52. *Id.* at 718–19.

53. *Id.* at 724.

Congressional Medal of Honor in particular.”<sup>54</sup> He found, however, that the restriction on speech imposed by the Act was not “actually necessary” to achieve these interests because the government had “not shown, and cannot show, why counterspeech would not suffice to achieve its interest.”<sup>55</sup> In addition, Kennedy observed that because the government could provide a database listing the Congressional Medal of Honor winners, the speech restriction was not the “least restrictive means among available, effective alternatives.”<sup>56</sup> For these reasons, he concluded that the Act did not pass the “exacting scrutiny” to which content-based speech restrictions are subject.<sup>57</sup>

Concurring in the result, Justice Stephen Breyer, joined by Justice Elena Kagan, agreed that the Act was unconstitutional.<sup>58</sup> Breyer noted that “restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like” present a grave danger of suppressing truthful speech and, therefore, such restrictions should be subject to strict scrutiny.<sup>59</sup> But because this case did not involve such a law, but rather one that prohibits “false statements about easily verifiable facts that do not concern such subject matter,” such exacting scrutiny was inappropriate.<sup>60</sup> Recognizing that the Act might nonetheless threaten free speech, he subjected it to “intermediate scrutiny.”<sup>61</sup> Finding that the Act “applies in family, social, or other private contexts, where lies will often cause little harm,”<sup>62</sup> as well as in “political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high,”<sup>63</sup> he concluded that the Act was not sufficiently “narrowly tailored.”<sup>64</sup> Breyer suggested, however, that a more “finely tailored” statute might be constitutional, for instance, one that “focus[ed] its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.”<sup>65</sup>

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54. *Id.* at 724–25.

55. *Id.* at 726.

56. *Id.* at 729 (quoting *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 666 (2004)).

57. *Id.* at 729–30.

58. *Id.* at 730 (Breyer, J., concurring).

59. *Id.* at 731–32.

60. *Id.* at 732.

61. *Id.*

62. *Id.* at 736.

63. *Id.*

64. *Id.* at 737.

65. *Id.* at 738.

In discussing the narrow tailoring requirement, Breyer had this to say about regulation of false electoral speech:

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker), but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie.<sup>66</sup>

Justice Samuel Alito, joined by Justices Scalia and Clarence Thomas, dissented.<sup>67</sup> Noting the many occasions in which the Court had stated that “false statements of fact do not merit First Amendment protection for their own sake,”<sup>68</sup> Alito observed that the Court had also “recognized that it is sometimes necessary to ‘exten[d] a measure of strategic protection’ to these statements in order to ensure sufficient ‘breathing space’ for protected speech.”<sup>69</sup> In Alito’s view, however, “the Stolen Valor Act presents no risk at all that valuable speech will be suppressed.”<sup>70</sup> He explained that the Stolen Valor Act stands in “stark contrast to . . . laws prohibiting false statements about history, science, and similar matters.”<sup>71</sup> This is because, unlike the Stolen Valor Act, laws prohibiting false statements about “matters of public concern” would present a “grave and unacceptable danger of suppressing truthful speech.”<sup>72</sup>

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66. *Id.* (citations omitted).

67. *Id.* at 739 (Alito, J., dissenting).

68. *Id.* at 750.

69. *Id.* (alteration in original) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

70. *Id.* at 752. Nor in Alito’s judgment was the Act subject to facial invalidity on overbreadth grounds because of its potential application to private or political speech. In his view, there was no showing that the Act was *substantially* overbroad. *Id.* at 753.

71. *Id.* at 752.

72. *Id.* at 751.

So what does *Alvarez* tell us about the constitutionality of regulating lies in political campaigns? It reveals that after thirty years and a complete change of membership since *Brown v. Hartlage*, the Court is still unsure about the constitutionality of laws prohibiting lies in political campaigns. Breyer's opinion is the only one that directly addresses this issue—and it expressly reserves judgment.<sup>73</sup> Significantly, however, Breyer distinguishes between false statements about “philosophy, religion, history, the social sciences, the arts, and the like” and false statements in “political speech,” by which he seems to mean speech in political campaigns.<sup>74</sup> With respect to laws restricting lies in the former category, he would apply “strict scrutiny,” which he acknowledges “warrants . . . near-automatic condemnation” of a law.<sup>75</sup> In contrast, he apparently would subject restrictions on false statements in electoral contexts to “intermediate scrutiny”—albeit a particularly searching version of such scrutiny in light of the “risk of censorious selectivity by prosecutors.”<sup>76</sup> It is also manifest that the government would bear the burden of showing why counterspeech would be an insufficient remedy.

Alito's dissenting opinion similarly appears to hive off false statements in political campaigns from other forms of false statements on matters of public concern. Thus, Alito states that “any attempt” by government to restrict “false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern” would “present a grave and *unacceptable* danger of suppressing truthful speech.”<sup>77</sup> Noticeably missing from this litany are false statements in political campaigns. Indeed, the only mention in Alito's opinion of campaign speech is in a citation to *Brown* in support of the argument that “false statements of fact do not merit First Amendment protection for their own sake,” but “it is sometimes necessary to extend a measure of strategic protection to [false] statements in order to ensure sufficient ‘breathing space’ for protected speech.”<sup>78</sup> As detailed below, the basic thesis of this Article is that, with

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73. *Id.* at 738–39 (Breyer, J., concurring).

74. *Id.* at 731.

75. *Id.*

76. *Id.* at 736.

77. *Id.* at 751 (Alito, J., dissenting) (emphasis added).

78. *Id.* at 750–51 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). The parenthetical following the citation to *Brown* describes the case as “sustaining as-applied First Amendment challenge to law prohibiting certain ‘factual misstatements in the course of political debate’ where there had been no showing that the disputed statement was made ‘other than in good faith and without knowledge of its falsity, or . . . with reckless disregard

respect to the applicable level of First Amendment scrutiny, campaign speech should be distinguished from public discourse. So it is significant that, like Breyer's concurring opinion, Alito's dissent leaves open the possibility that government may have somewhat greater authority to prohibit at least some form of campaign lies than it does to punish knowingly false statements about "history, science, and similar matters."

In contrast, Kennedy's plurality opinion would seem implicitly to take a harder line against laws prohibiting campaign lies, which manifestly regulate speech based on its content. Since, in the plurality's view, there is no categorical exemption from the rule against content discrimination, even for intentional or reckless misstatement of fact, any prohibition on campaign lies would seem to be subject to strict scrutiny and, thus, "near-automatic" condemnation.

There are, however, plausible arguments that, even under the plurality's approach, prohibitions on at least some campaign lies might evade such scrutiny. First is the argument advanced by Professor Eugene Volokh: because lies by candidates are lies by people "seeking a paying job," such expression is a species of financial fraud, a category of speech the plurality recognized as categorically without First Amendment protection.<sup>79</sup> Another such argument arises from the statement in the plurality opinion confirming the constitutionality of laws punishing false statements made to law enforcement officials, perjury, and false representations that one is speaking on behalf of government.<sup>80</sup> Significantly, these types of expression are not (or, at least, not as such)<sup>81</sup> on the plurality's list of categories of expression exempt from the rule against content discrimination. It is understandable that the plurality did not want to imply that laws punishing lies that threaten the "integrity of Government processes" are "vulnerable" to First Amendment challenge.<sup>82</sup> But the plurality's recognition that these types of

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as to whether it was false or not." *Id.* at 751 (quoting *Brown v. Hartlage*, 456 U.S. 45, 61 (1982)).

79. Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, VOLOKH CONSPIRACY (June 28, 2012, 5:19 PM), <http://volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/>.

80. *Alvarez*, 567 U.S. at 720 (plurality opinion).

81. The plurality suggests that some of this expression might "implicate fraud or speech integral to criminal conduct." *Id.* at 721. As Eugene Volokh has aptly noted, the "speech integral to criminal conduct" exception is "indeterminate, dangerous, and inconsistent with more recent cases." Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1285 (2005).

82. *Alvarez*, 567 U.S. at 721.

lies may constitutionally be proscribed because they interfere with the integrity of essential government functions invites the argument that certain types of electoral lies may similarly be banned consistent with the First Amendment because they undermine the integrity of elections, another essential government function.

#### 4. Susan B. Anthony List v. Driehaus

Nearly two decades after its decision in *McIntyre*, the Supreme Court once again had occasion to discuss Ohio's ban on false campaign speech in a decision finding that an advocacy group had standing to challenge the law.<sup>83</sup> Although the Court again did not expressly comment on the law's constitutionality, the decision nevertheless strongly suggests that the law is constitutionally defective.

The Susan B. Anthony List (SBA), a "pro-life advocacy organization," publicly criticized various members of Congress—including then-Congressman Steve Driehaus, who voted for the Patient Protection and Affordable Care Act (ACA)—as supporting taxpayer-funded abortion.<sup>84</sup> In addition to criticizing his vote in a press release, the SBA planned to do so on a billboard that would have read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."<sup>85</sup> After Driehaus's counsel threatened legal action, however, the owner of the billboard space refused to display that message.<sup>86</sup>

Driehaus filed a complaint with the Ohio Elections Commission alleging that the claim that he voted for "taxpayer-funded abortion" was a false statement in violation of the Ohio's false statement statute.<sup>87</sup> A Commission panel voted two to one that probable cause existed that a violation had been committed and set a hearing before the full commission for ten business days later. The SBA then filed suit in federal district court seeking declaratory and injunctive relief, arguing that the provision of the Election Code under which Driehaus brought his complaint violated the First Amendment.<sup>88</sup> The district court stayed the lawsuit pending completion of

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

84. *Id.* at 2339.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*



Commission proceedings.<sup>89</sup> The parties then agreed to postpone the full Commission hearing until after the election.<sup>90</sup>

After Driehaus lost the election, he withdrew his complaint, and the district court lifted the stay.<sup>91</sup> The district court consolidated the SBA's suit with a separate suit brought by another advocacy organization, the Coalition Opposed to Additional Spending and Taxes (COAST).<sup>92</sup> COAST also wanted to distribute material criticizing Driehaus as voting "to fund abortions with tax dollars," but was deterred from doing so because of the complaint against the SBA.<sup>93</sup> In light of Driehaus's dropping his complaint against the SBA, the district court dismissed both suits as non-justiciable, finding that neither sufficiently alleged concrete injury for purposes of standing and ripeness.<sup>94</sup> The Sixth Circuit affirmed on ripeness grounds.<sup>95</sup>

Writing for a unanimous Court, Justice Thomas held that the advocacy groups' pre-enforcement challenge to Ohio's false statement statute was justiciable because the groups had alleged sufficiently imminent injury.<sup>96</sup> While the opinion focused on the injury-in-fact requirement for Article III standing,<sup>97</sup> Thomas made several observations that are arguably relevant to the merits of both the Ohio false statement statute and similar provisions in other states. First, in considering whether the challenged law arguably proscribed conduct in which the advocacy organizations wanted to engage, Thomas observed that the "Ohio false statement law sweeps broadly."<sup>98</sup> Relatedly, he firmly rejected the Sixth Circuit's reasoning concerning whether further prosecution of the SBA was likely. The lower court had held that, because the statute proscribes only knowingly false statements and the SBA had not claimed that it "plan[ned] to lie or recklessly disregard the veracity of its speech,"<sup>99</sup> the possibility of prosecution for statements the SBA claimed were truthful was "exceedingly slim."<sup>100</sup> Thomas observed that, despite the SBA's insistence that its claims about Driehaus

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89. *Id.*

90. *Id.* at 2340.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 2343.

97. *Id.* at 2341–46.

98. *Id.* at 2344.

99. *Id.*

100. *Id.*

were true, a Commission panel had previously found probable cause that the SBA's statements had violated the law.<sup>101</sup>

It is a fair inference from these observations that the Court was concerned about the wide variety of expression within the scope of the Ohio law's prohibition, a worry not cured by the law's application only to knowingly or recklessly false speech. But it is the section of the opinion documenting the substantiality of "the threat of future enforcement of the false statement statute"<sup>102</sup> that provides the most insight into how the Court might rule on the merits of Ohio's false statement law or a similar prohibition on campaign lies.

Thomas explained that the threat of future enforcement arising from the prosecution of the SBA "is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or any agency" constrained by "explicit guidelines or ethical obligations."<sup>103</sup> Rather, under the Ohio false statement law "any person' with knowledge of the purported violation" can file a complaint.<sup>104</sup> Citing an amicus brief filed by Ohio's attorney general, Thomas found that there is "a real risk" that complaints will be filed by political opponents, who will thereby "gain a campaign advantage without ever having to prove the falsity of a statement."<sup>105</sup> He explained:

[C]omplainants may time their submissions to achieve maximum disruption of their political opponents while calculating that an ultimate decision on the merits will be deferred until after the relevant election. Moreover, the target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election. And where, as here, a Commission panel issues a preelection probable-cause finding, such a determination itself may be viewed [by the electorate] as a sanction by the State.<sup>106</sup>

It is always risky to make a prediction about how the Court will rule on the constitutionality of a law based on comments not focusing on the law's merits. Still, in light of the concerns about the practical operation of Ohio's

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101. *Id.* at 2344–45.

102. *Id.* at 2345.

103. *Id.*

104. *Id.*

105. *Id.* at 2345–46.

106. *Id.* (citations and internal quotation marks omitted).

false statement law expressed in an opinion for the entire Court, I will go out on a limb and make the following prediction: while the Court may remain uncertain about the constitutionality of a narrowly focused prohibition on electoral lies that contains adequate procedural safeguards, it would likely invalidate any broad restriction on campaign speech that allows anyone to file a complaint. Indeed, in striking down laws similar to Ohio's ban on false campaign statements, several lower courts have relied extensively on the Court's opinion in *SBA List*.

*B. Lower Court Rulings on the Constitutionality of Laws Prohibiting False Campaign Speech*

*I. Vanasco v. Schwartz*

*Vanasco v. Schwartz*,<sup>107</sup> decided in 1975, is apparently the first reported case to directly rule on the constitutionality of a law prohibiting campaign lies.<sup>108</sup> In 1974, pursuant to a recently enacted New York Election Law, the New York State Board of Elections ("the Board") promulgated a Fair Campaign Code ("the Code").<sup>109</sup> At issue in the case were three provisions of the Code: section 6201.1(d), prohibiting "misrepresentation of any candidate's qualifications," including "personal vilification" and "scurrilous attacks";<sup>110</sup> section 6201.1(e), forbidding "misrepresentation of any candidate's position";<sup>111</sup> and section 6201.1(f), banning "misrepresentation

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107. 401 F. Supp. 87 (S.D.N.Y. & E.D.N.Y. 1975).

108. A comprehensive law review article written in 1975 mentions no case involving a challenge to the constitutionality of a law regulating false campaign statements other than the then-undecided *Vanasco* suit. See *Developments in the Law: Elections*, supra note 3, at 1275-76 n.235; cf. *Wilson v. Superior Court*, 532 P.2d 116, 122-23 (Cal. 1975) (holding injunction against republication of allegedly deceptive campaign literature an unconstitutional prior restraint of speech). There were earlier reported cases involving laws regulating false campaign statements but none that I have been able to find involved constitutional challenges to the law. See, e.g., *Effertz v. Schimelpfenig*, 291 N.W. 286, 288 (Minn. 1940) (refusing to void an election under Minnesota's Corrupt Practices Act because the plaintiff failed to prove his opponent's lies were "material"); *State ex rel. Hampel v. Mitten*, 278 N.W. 431, 436 (Wis. 1938) (refusing to void election because candidate's campaign statements about his opponent's "moral character" were not susceptible to being proven true or false).

109. The Code was codified at N.Y. ELEC. LAW § 6201.1 (McKinney 1974). See *Vanasco*, 401 F. Supp. at 88 n.1.

110. *Vanasco*, 401 F. Supp. at 88 (quoting N.Y. ELEC. LAW § 6201.1(d)).

111. *Id.* (quoting N.Y. ELEC. LAW § 6201.1(e)).

of a candidate's party affiliation or party endorsement."<sup>112</sup> These prohibitions applied "during the course of any campaign for nomination or election to public office or party position" to misrepresentations made "by means of campaign literature, media advertisements, or broadcasts, public speeches, press releases, writings or otherwise."<sup>113</sup>

The Code also established detailed procedures for filing complaints and answers with the Board and for conducting hearings before the Board. The Board was empowered to impose a fine of up to \$1000 for each violation; to issue a report setting forth its findings; and to institute judicial proceedings to enforce its orders,<sup>114</sup> including seeking an injunction against violation of its orders.<sup>115</sup>

The plaintiffs in this case—Roy Vanasco, Joseph Ferris, and Robert Postel—were candidates in the 1974 election for the New York State Assembly; each had been sanctioned by the Board for violating the Code.<sup>116</sup> The Board had found that since Vanasco was not the candidate of the Liberal Party, his use of the phrase "Republican-Liberal" on his campaign literature misrepresented his party endorsement in violation of section 6201.1(f) of the Code.<sup>117</sup> It found that Ferris misrepresented his opponent's voting record in violation of section 6201.1(e) of the Code.<sup>118</sup>

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112. *Id.* (quoting N.Y. ELEC. LAW § 6201.1(f)). Also involved in this case was a provision prohibiting "attacks on a candidate based on race, sex, religion or ethnic background." *Id.* (quoting N.Y. ELEC. LAW § 6201.1(c)).

113. *Id.* (quoting N.Y. ELEC. LAW § 6201.1). The court noted that while the Code refers to "misrepresentation," the New York election law authorizing the Code refers to "deliberate misrepresentations." *Id.* at 88 n.2.

114. *Id.* at 99.

115. *Id.* at 89 n.5.

116. *Id.* at 89–91.

117. *Id.* at 89. Vanasco argued to the Board that, although he had failed to get enough signatures on his nominating petition to be listed on the ballot as the Liberal Party candidate, he reasonably and in good faith believed he had the endorsement of that party. *Id.* at 89 n.3. But the Board concluded that, while members of the Liberal Party may have promoted Vanasco's candidacy, he was not in fact the candidate of the Liberal Party, and, thus, his use of the phrase "Republican-Liberal" on his campaign literature misrepresented his party affiliation. *Id.*

118. *Id.* at 90. Ferris claimed in a leaflet that his incumbent opponent, Vincent Riccio, "voted himself a \$17,000 salary increase; received his salary for less than 100 days work; opposed increased funds for recreation for the aging and opposed aid to community colleges." *Id.* at 89. A newspaper also quoted Ferris as stating that Riccio voted for gerrymandering the District he represented in the State Assembly. *Id.* at 89 n.6. In response to Riccio's complaint filed with the Board, Ferris alleged that "(1) Riccio did vote for a salary increase but it did not become effective until January 1975; (2) that the New York State Assembly is in session less than 100 days a year; (3) Riccio had opposed a bill (other

Both of these candidates complied with the Board's order to surrender the offending campaign literature or submit a plan for "re-marking" the literature.<sup>119</sup> Shortly before these orders issued, however, they sued the Board in the United States District Court for the Eastern District of New York; these plaintiffs sought to convene a three-judge court for the purposes of declaring the statute and the Code unconstitutional (both on their face and as applied) and enjoining the enforcement of the statute and the Code.<sup>120</sup> The district court dismissed the complaint.<sup>121</sup> The United States Court of Appeals for the Second Circuit, however, reversed the district court and ordered that a three-judge court be convened.<sup>122</sup>

Postel's case was heard by the same three-judge court.<sup>123</sup> Postel was accused by his opponent, A. B. "Pete" Grannis, of making false representations about him.<sup>124</sup> The Board issued an interim order requiring Postel to cease and desist from distributing any literature containing the language about which Grannis had complained.<sup>125</sup> Before the hearing could be completed, however, Postel obtained a temporary restraining order from the United States District Court for the Southern District of New York against further proceedings by the Board.<sup>126</sup> The Court of Appeals then

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than the one he supported) dealing with increased funds for recreation of the aging; and (4) Riccio had voted in favor of budgets which had the effect of reducing aid to community colleges." *Id.* With respect to Ferris's statement to the press, Riccio claimed that he voted against gerrymandering, but Ferris countered that he was referring to an earlier vote. *Id.* The Board found that Ferris had misrepresented Riccio's voting record and did so "with actual knowledge of its falsity and with reckless disregard of its falsity." *Id.* at 90 n.7.

119. *Id.* at 89, 90.

120. *Id.* at 90.

121. *Id.*

122. *Id.*

123. *Id.* at 91.

124. *Id.* at 90. As recounted by the court:

Specifically, Grannis charged that certain Postel campaign literature misrepresented that Grannis had a 'patronage job' in the State Department of Environmental Conservation; received major financial support from Republican 'big whigs' such as Laurence Rockefeller and Henry Diamond; that the New York Court of Appeals had directed a new election after having adduced proof that a number of Republicans had voted illegally in a Democratic primary; that a complaint against Grannis had been filed with the U.S. Commission on Civil Rights and that Grannis was a registered Republican in 1973.

*Id.*

125. *Id.* at 91.

126. *Id.*

ordered the three-judge court convened to hear Vanasco's and Ferris's claims to consider Postel's case as well.<sup>127</sup>

The three-judge district court, in an opinion by Judge Henry F. Werker, began its constitutional analysis by declaring that the "regulation of the speech of 'public officers' and 'public figures' during campaigns for political office [is] where the constitutional guarantee of freedom of speech 'has its fullest and most urgent application.'"<sup>128</sup> Nonetheless, it agreed with the Board that "calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected."<sup>129</sup> At the same time, the court emphasized that it must "bear in mind the necessity for legislators to use only the most 'sensitive tools' in separating legitimate from illegitimate speech so that First Amendment freedoms are given the necessary 'breathing space' they need to survive."<sup>130</sup> Finding that the challenged provisions of the Code "cast a substantial chill on the expression of protected speech," the court held these provisions "unconstitutionally overbroad and vague on their face."<sup>131</sup>

With respect to section 6201.1(d), the court observed that the prohibition on "misrepresentation of any candidate's qualifications" expressly included "'personal vilification' and 'scurrilous attacks.'"<sup>132</sup> The court held that while such expression may be offensive, it does not "by that fact alone . . . lose its constitutional protection."<sup>133</sup> Similarly, with respect to section 6201.1(f), the court noted that the Board "merely found that [Vanasco] had 'misrepresented' his party endorsement" but did not make a finding that "the misrepresentation was deliberate or that it was made with knowledge of its falsity or reckless disregard of the truth."<sup>134</sup> This construction by the Board "clearly demonstrated" that the provision at issue was "susceptible to application to protected speech."<sup>135</sup> Finally, with respect to the prohibition on "misrepresentation of a candidate's position" imposed by section 6201.1(e), the court noted "the often difficult task of trying to define . . . what a political candidate's 'position' is on issues discussed during a

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127. *Id.*

128. *Id.* at 93 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

129. *Id.*

130. *Id.* (first quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958) and then quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

131. *Id.* at 95.

132. *Id.* at 96.

133. *Id.* (citing *Cohen v. California*, 403 U.S. 15, 22–23 (1971)).

134. *Id.*

135. *Id.*

campaign.”<sup>136</sup> As a result, “the term ‘misrepresentation’ could be applied to almost all campaign speech,” thereby “chilling” speech protected by the First Amendment.<sup>137</sup>

The court concluded by recognizing the “state’s legitimate interest in insuring fair and honest elections” and conceded that “deliberate calculated falsehoods when used by political candidates can lead to public cynicism and apathy.”<sup>138</sup> But due to the “irresistible force of protected expression under the First Amendment,” even the important state interest of assuring fair and honest elections does not justify the state in “tamper[ing] with what it will permit the citizen to see and hear.”<sup>139</sup> Three years later, another court would uphold a narrower ban on the making of false campaign statements.

## 2. DeWine v. Ohio Elections Commission

*DeWine v. Ohio Elections Commission*, a 1978 decision by the Ohio Court of Appeals, involved a facial challenge to an Ohio law that made it a misdemeanor to “[p]ost, publish, circulate, or distribute a written or printed false statement knowing the same to be false concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate.”<sup>140</sup> The challenger was R. Michael DeWine,<sup>141</sup> a successful candidate in a 1976 election for county prosecutor.<sup>142</sup> The Ohio Elections Commission determined that statistics DeWine used in his campaign brochure about the prosecutorial record of the incumbent prosecutor he defeated were a “misleading representation” of his opponent’s record in violation of the Ohio law.<sup>143</sup> Finding that the false statement statute implicated the fundamental right of free speech, the court, in an opinion by Judge Alba L.

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136. *Id.* at 97.

137. *Id.* In addition to striking down these three provisions prohibiting misrepresentations, the court also invalidated section 6201.1(c), the provision banning attacks on a candidate based on race, sex, religion, or ethnic background. *Id.* at 94.

138. *Id.* at 100.

139. *Id.* The Supreme Court summarily affirmed this decision. See *Schwartz v. Postel*, 423 U.S. 1041 (1976).

140. *DeWine v. Ohio Elections Comm’n*, 399 N.E.2d 99, 102 (Ohio Ct. App. 1978) (quoting OHIO REV. CODE ANN. 3599.091(B)(9) (West 1976)). The law at issue here was the predecessor to the one at issue in *SBA List*. See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014).

141. This was the same person who more than thirty-five years later in his capacity as the Attorney General of Ohio filed the amicus brief cited extensively by the United States Supreme Court in *SBA List*. See *SBA List*, 134 S. Ct. at 2345–46.

142. *DeWine*, 399 N.E.2d. at 101.

143. *Id.*

Whiteside, subjected the law to “close judicial scrutiny.”<sup>144</sup> It held that there was a “very compelling state interest to promote honesty in the election of public officers.”<sup>145</sup> In addition, the court ruled that freedom of speech “does not include a right to purposely, with knowledge of its falsity, publish a false statement about a candidate for public office.”<sup>146</sup> For these reasons, the court held that the statute was facially constitutional,<sup>147</sup> allowing the prosecution of DeWine to proceed.<sup>148</sup> Twenty years would pass before there would be another major decision on the constitutionality of campaign lies.

### 3. State *ex rel.* Public Disclosure Commission v. 119 Vote No! Committee

In 1998, a divided Washington Supreme Court invalidated on its face a law prohibiting anyone acting with “actual malice” from sponsoring “political advertising that contains a false statement of fact.”<sup>149</sup> The law specified that a violation must be proven by “clear and convincing

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144. *Id.* at 102.

145. *Id.* at 103.

146. *Id.*

147. *Id.* The court also found that the trial court erred in holding that the law required that the Commission use a proof beyond a reasonable doubt standard rather than a preponderance of the evidence standard to make a determination that a violation of the law had occurred. *Id.* at 105.

148. Seven years later, relying heavily on *DeWine*, a different division of the court of appeals upheld a conviction under this law. See *State v. Davis*, 499 N.E.2d 1255 (Ohio Ct. App. 1985). Subsequently, the United States Court of Appeals for the Sixth Circuit, as had the Ohio Supreme Court in *DeWine*, also rebuffed a facial challenge to the Ohio false statements law. See *Pesttrak v. Ohio Elections Comm’n*, 926 F.2d 573, 577 (1991). In doing so, the Sixth Circuit upheld the provision of the law empowering the Commission to determine whether a challenged campaign allegation was true or not and to proclaim this finding to the electorate. *Id.* at 579. (This “truth-determining” aspect of this case is discussed in more detail *infra* notes 376–379 and accompanying text.) But while upholding this provision, the court invalidated two key provisions of the law: 1) the provision empowering the commission to issue fines, on the ground that the law did not require the relevant findings to be made by “clear and convincing evidence”; and 2) the provision allowing for cease-and-desist orders as authorizing unconstitutional prior restraints on speech. *Pesttrak*, 926 F.2d at 578. Twenty-five years later, the Sixth Circuit facially invalidated an amended version of Ohio’s false statements law. See *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016), discussed, *infra* notes 253–274 and accompanying text. Soon thereafter, the Ohio Court of Appeals followed suit, finding the law facially invalid under both the First Amendment and the Ohio Constitution. See *Magda v. Ohio Elections Comm’n*, 2016-Ohio-5043, 58 N.E.3d 1188.

149. State *ex rel.* Pub. Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691, 693 n.2 (Wash. 1998).



evidence.”<sup>150</sup> The case arose when the state’s Public Disclosure Commission filed charges against the 119 Vote No! Committee, its executive director, and its treasurer for statements the Committee published criticizing a ballot measure to legalize assisted suicide.<sup>151</sup> The complaint alleged that the Committee’s statements, which asserted that the ballot measure included inadequate safeguards, contained materially false statements of fact published with actual malice—“that is, with knowledge that the statements . . . were false or in reckless disregard of whether the statements were false.”<sup>152</sup> The complaint prayed that the defendants be fined up to \$10,000 plus costs, attorney’s fees, and treble damages.<sup>153</sup> The trial court dismissed the complaint, finding that the advertisement did not contain materially false statements, and awarded the Committee attorney’s fees and costs.<sup>154</sup> Despite the dismissal, the American Civil Liberties Union, which had intervened in the case, sought a declaration that the statute was facially invalid.<sup>155</sup> The trial court declined to invalidate the law.<sup>156</sup>

On appeal, the Washington Supreme Court unanimously agreed that the publication did not violate the statute.<sup>157</sup> The Court was sharply divided, however, about the validity of the law, holding five to four that the statute was facially unconstitutional. Writing for himself and two other justices, Justice Richard Sanders held that, because the law infringes protected speech, it must be subject to “exacting scrutiny.”<sup>158</sup> He rejected the state’s “claimed compelling interest to shield the public from falsehoods during a political campaign” as “patronizing and paternalistic.”<sup>159</sup> In Sanders’s view, this justification “assumes the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate, and it is the proper role of the government itself to fill the void.”<sup>160</sup> He found that the state’s reliance on defamation law was misplaced in that defamation law “is designed to protect the property of an individual in his or her good name.”<sup>161</sup> Sanders found the law more

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150. *Id.*

151. *Id.* at 693.

152. *Id.*

153. *Id.*

154. *Id.* at 694.

155. *Id.*

156. *Id.*

157. *Id.* at 693, 699, 701.

158. *Id.* at 696–97.

159. *Id.* at 698.

160. *Id.* at 699.

161. *Id.* at 697.

comparable to the Sedition Act of 1798's attempt to suppress seditious libel.<sup>162</sup> Because the law could not be justified by a compelling state interest and because it chilled political speech, Sanders concluded the law was unconstitutional on its face.<sup>163</sup>

Justice Barbara Madsen, joined by one other justice, agreed that the law was facially unconstitutional because it included speech about a ballot measure.<sup>164</sup> Madsen wrote separately, however, to emphasize that she was not convinced that a law prohibiting knowing or reckless falsehoods *about a candidate* would violate the First Amendment.<sup>165</sup>

Justice Richard Guy, speaking for himself and one other justice, disagreed that the law was facially unconstitutional.<sup>166</sup> Because in his view “[c]alculated lies are not protected political speech,” and because such lies “do not foster debate; they foster deception,” he disagreed with the majority that the law on its face violated the First Amendment.<sup>167</sup>

Justice Phil Talmadge, joined by one other justice, vehemently disagreed with the majority's conclusion that the law was facially unconstitutional.<sup>168</sup> Condemning the majority for being the “first court in the history of the Republic to declare First Amendment protection for calculated lies,” he feared that the “sweep of the majority's rhetoric is so encompassing that no statute designed to ensure statements of fact in political campaigns are truthful would survive a First Amendment challenge.”<sup>169</sup> Relying on United States Supreme Court dicta that deliberate falsehoods are not protected speech,<sup>170</sup> Talmadge disagreed with the majority that regulation of campaign lies need be justified by a compelling state interest.<sup>171</sup> In any event, in his view, “ensuring the integrity of the electoral process, for ballot measures as well as for election of candidates,” constitutes a compelling state interest.<sup>172</sup> In addition, he found that the “chilling effect of the statute on free speech is infinitesimal, if it exists at all,” in that it does not reach “hyperbole or rhetoric [or] polemic” but only “the calculating liar.”<sup>173</sup>

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162. *Id.* at 696.

163. *Id.* at 699.

164. *Id.* (Madsen, J., concurring).

165. *Id.*

166. *Id.* (Guy, J., concurring).

167. *Id.*

168. *Id.* at 701 (Talmadge, J., concurring).

169. *Id.*

170. *Id.* at 703–04.

171. *Id.* at 707.

172. *Id.* at 708.

173. *Id.* at 707.

In light of Madsen's concurring opinion, in 1999 the Washington legislature amended the statute to apply only to "a false statement of material fact about a candidate for public office," excluding statements that a candidate or the candidate's agent makes about himself or herself.<sup>174</sup> The amended law, however, was also invalidated on its face by a sharply divided Washington Supreme Court.

#### 4. Rickert v. State *ex rel.* Public Disclosure Commission

The validity of the amended law came before the Washington Supreme Court in 2007 after a candidate for the Washington State Senate published a campaign brochure charging that her opponent, the incumbent, had voted to close a facility for the developmentally disabled.<sup>175</sup> The Public Disclosure Commission found that this charge was false in that the facility was not for the developmentally disabled and that the incumbent had not voted to close the facility.<sup>176</sup> Finding that the statement was made with "actual malice," the Commission imposed a penalty of \$1000 on the candidate.<sup>177</sup>

A plurality opinion by Justice James Johnson joined by three other justices (including Justice Sanders) expressed basically the same views as Sanders's opinion in *119 Vote No! Committee*. Quoting from that case, Johnson wrote that the claim that the state "may prohibit false statement of fact in political advertisements . . . presupposes the State possesses an independent right to determine truth and falsity in political debate," a proposition that Johnson found "fundamentally at odds with the principles embodied in the First Amendment."<sup>178</sup> In addition, he found this claim "naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech," when "political speech is usually as much opinion as fact."<sup>179</sup> For this reason, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us."<sup>180</sup>

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174. WASH. REV. CODE § 42.17.530(1)(a) (1999) (currently codified at WASH. REV. CODE § 42.17A.335 (2012)).

175. *Rickert v. State ex rel. Pub. Disclosure Comm'n*, 168 P.3d 826, 827 (Wash. 2007).

176. *Id.* at 828.

177. *Id.*

178. *Id.* at 829.

179. *Id.*

180. *Id.* (quoting *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 695 (1998)).

Because the law was a content-based restriction on political speech, Johnson subjected it to strict scrutiny.<sup>181</sup> He found that the stated purpose of the law—“to provide protection for candidates for public office” beyond the reputational protection provided by defamation law—is not a compelling state interest.<sup>182</sup> He then turned to the interest in “preserving the integrity of the election process.”<sup>183</sup> Distinguishing content-based restrictions on speech that the United States Supreme Court had upheld—measures “protecting the election poll area” or “avoiding voter confusion by avoiding ballot overcrowding by multiple candidates with little support”—Johnson found that the prohibition on false factual statements about candidates did not prevent “direct harm to elections.”<sup>184</sup> In holding the law unconstitutional, Johnson explained that the “election system already contains the solution to the problem that [the law in question] is meant to address”: “[t]he preferred First Amendment remedy of ‘more speech,’ not enforced silence.”<sup>185</sup>

The deciding vote was cast by Chief Justice Gerry Alexander. In a brief concurring opinion, he distanced himself from the plurality’s opinion, which he read as concluding that “any government censorship of political speech,” including prohibitions on defamation, “would run afoul of the First Amendment.”<sup>186</sup> But because the law at issue “prohibits nondefamatory speech in addition to defamatory speech,” Alexander agreed that it was overbroad and, thus, facially unconstitutional.<sup>187</sup>

Justice Madsen, joined by three other justices, dissented.<sup>188</sup> Consistent with her opinion in *119 Vote No! Committee*, she found that deliberate falsehoods about a candidate for public offices are not “protected speech.”<sup>189</sup> Accordingly, she found that a law proscribing such expression

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181. *Id.*

182. *Id.* at 829–30. Johnson also found the law not “narrowly tailored” because of the exemption of a candidate’s speech about himself or herself. *Id.* at 831.

183. *Id.* at 830.

184. *Id.* at 830–31.

185. *Id.* at 832 (quoting *Brown v. Hartlage*, 456 U.S. 45, 61 (1982)). Johnson also found that various “faulty procedural mechanisms,” including that members of the Commission are appointed by the governor, “a political officer,” confirmed that the law was not narrowly tailored. *Id.* at 831–32. Johnson acknowledged—but not without a warning that such holdings “should be neither admired or emulated”—that some courts have upheld statutes restricting false campaign speech. *Id.* at 827. The sole case cited by Johnson is *Pesttrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991). *Id.* at 827 n.3. (*Pesttrak* is discussed *infra* notes 375–378 and accompanying text.)

186. *Rickert*, 168 P.3d at 832 (Alexander, C.J., concurring).

187. *Id.* at 833.

188. *Id.* (Madsen, J., dissenting).

189. *Id.* (stating that “the use of calculated falsehood is not constitutionally protected”).

to protect the reputational interests of candidates comported with the First Amendment.<sup>190</sup> Madsen regarded the court's decision as "an invitation to lie with impunity," adding that it is "little wonder that so many view political campaigns with distrust and cynicism."<sup>191</sup>

5. 281 Care Committee v. Arneson

*281 Care Committee v. Arneson*<sup>192</sup>—decided by the U.S. Court of Appeals for the Eighth Circuit in 2014—was the first major decision on the constitutionality of false campaign laws to be decided after *United States v. Alvarez*. The case involved a challenge to a provision of the Minnesota Fair Campaign Practices Act, under which it was a gross misdemeanor to make a knowingly false statement about a ballot proposition.<sup>193</sup> Pursuant to this provision, anyone could lodge a complaint with the Minnesota Office of Administrative Hearings (OAH), which could impose a civil penalty of up to \$5000.<sup>194</sup> In addition, after the administrative proceedings were complete, the complaint was subject to criminal prosecution by the county attorney.<sup>195</sup> The provision was challenged in federal district court on First Amendment grounds by two advocacy organizations founded to oppose school funding ballot initiatives.<sup>196</sup> Finding that the law served the compelling interests of preserving fair and honest elections and preventing fraud upon the electorate, the district court rejected the challenge.<sup>197</sup>

On appeal, the Eighth Circuit, in an opinion by Judge C. Arlen Bean, disagreed and held the statute unconstitutional.<sup>198</sup> In light of *Alvarez*'s teaching that "false statements do *not* represent a category of speech altogether exempt from First Amendment protection"<sup>199</sup> and because the challenged provision was a content-based regulation of "political speech" occupying "the core of the protection afforded by the First Amendment," the court subjected the law to strict scrutiny.<sup>200</sup> In doing so, the court pretermitted deciding whether "preserving fair and honest elections and preventing fraud on the electorate" qualified as a compelling state

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190. *Id.* at 835.

191. *Id.* at 833.

192. 766 F.3d 774 (8th Cir. 2014).

193. *Id.* at 777–78.

194. *Id.* at 778.

195. *Id.*

196. *Id.* at 777. The leaders of the organizations were also plaintiffs in this action. *Id.*

197. *Id.* at 779.

198. *Id.* at 795–96.

199. *Id.* at 783 (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)).

200. *Id.* at 784.

interest.<sup>201</sup> It instead focused on whether the provision was “narrowly tailored,” concluding that it was not.<sup>202</sup>

To be narrowly tailored, the court explained, a regulation must: (1) “actually advance” the compelling state interest; (2) be neither over-inclusive nor under-inclusive; and (3) be the least-restrictive alternative.<sup>203</sup> The court found that Minnesota’s false statement law failed each of these requirements. With respect to the first requirement, the court faulted the state for failing to adduce any empirical evidence that there are “actual, serious threats of individuals disseminating knowingly false statements concerning ballot initiatives.”<sup>204</sup> More damningly, the court found that the law did not actually advance the interest in preserving fair and honest elections because the provision “tend[ed] to perpetuate the very fraud it is allegedly designed to prohibit.”<sup>205</sup>

To support this conclusion, the court relied heavily on the Supreme Court’s opinion in *Susan B. Anthony List v. Driehaus*, which, in the court’s view, “illuminated the many abuses that emanate” from prohibitions on false campaign statements.<sup>206</sup> It noted that, like the Ohio law at issue in *SBA List*, “it is immensely problematic that *anyone* may lodge a complaint with the OAH” alleging a violation of the Minnesota law.<sup>207</sup> As a result, like the Ohio law, complaints under the Minnesota law can be filed “at a tactically calculated time so as to divert the attention of an entire campaign from the meritorious task at hand of supporting or defeating a ballot question.”<sup>208</sup> In addition, the complaint can result in “possibly diffusing public sentiment and requiring the speaker to defend a claim before the OAH, thus inflicting political damage.”<sup>209</sup>

The court also found the Minnesota law both over-inclusive and under-inclusive. Again focusing on the ability of anyone to file a complaint, the court found that, while only knowingly false factual assertions may be within the literal scope of the law, the proceedings confirmed that “there is nothing to prohibit the filing of a complaint against speech that may later be

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201. *Id.* at 787.

202. *Id.* at 787–96.

203. *Id.* at 787 (quoting *Republican Party of Minn. v. White*, 416 F. 3d 738, 751 (8th Cir. 2005)).

204. *Id.* at 787.

205. *Id.* at 789.

206. *Id.* (citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2344–46 (2014)).

207. *Id.* at 790.

208. *Id.*

209. *Id.*

found wholly protected.”<sup>210</sup> By the time the OAH starts the process of weeding out unmeritorious claims, however, “damage is done, the extent which remains unseen.”<sup>211</sup> For this reason, the court found the law over-inclusive.<sup>212</sup> At the same time, it found the prohibition under-inclusive due to its exemption of “news items or editorial comments by the news media” and its limitation to “paid political advertising or campaign material.”<sup>213</sup>

Finally, the court found that the state had “not offered persuasive evidence” to show why the less restrictive means of “counterspeech” would not as effectively accomplish the state’s asserted compelling interest in promoting fair and honest elections.<sup>214</sup> Echoing a sentiment expressed decades earlier by Justice Sanders in *119 Vote No! Committee*, the court concluded its opinion by insisting that “[t]he citizenry, not the government, should be the monitor of falseness in the political arena. Citizens can digest and question writings and broadcasts in favor or against ballot initiatives . . . .”<sup>215</sup>

#### 6. Commonwealth v. Lucas

*Commonwealth v. Lucas*, a remarkable case heard by the Supreme Judicial Court of Massachusetts, involved the criminal prosecution of a political action committee leader for distributing literature critical of a candidate for public office.<sup>216</sup> In October 2014, Jobs First Independent Expenditure Political Action Committee (“Jobs First”) distributed brochures critical of Brian Mannal, an incumbent candidate for the Massachusetts House of Representatives.<sup>217</sup> The brochures included the following statements:

Brian Mannal chose convicted felons over the safety of our families. Is this the kind of person we want representing us?

Helping Himself: Lawyer Brian Mannal has earned nearly \$140,000 of our tax dollars to represent criminals. Now he wants to use our tax dollars to pay defense lawyers like himself to help convicted sex offenders.

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210. *Id.* at 792.

211. *Id.*

212. *Id.*

213. *Id.* at 794.

214. *Id.* at 793.

215. *Id.* at 796.

216. 34 N.E.3d 1242, 1244–45 (Mass. 2015).

217. *Id.* at 1245.

Brian Mannel is putting criminals and his own interest above our families.<sup>218</sup>

Approximately two weeks prior to the 2014 general election, Mannel filed an application for a criminal complaint in state court against Melissa Lucas, the chairwoman and treasurer of Jobs First, alleging that she published knowingly false statements in violation of Massachusetts law prohibiting false campaign statements.<sup>219</sup> Mannel coordinated this filing with a press conference at which he detailed the reasons for the complaint and suggested that the brochures “could put [Lucas] behind bars.”<sup>220</sup> Lucas filed a motion to dismiss the complaint, alleging that the Massachusetts false statement law was unconstitutional.<sup>221</sup> A probable cause hearing was set for approximately two weeks after the election.<sup>222</sup> Mannel won reelection by 205 votes.<sup>223</sup> After the probable cause hearing, a magistrate issued a complaint formally charging Lucas with violating the false statement law.<sup>224</sup> Lucas then petitioned the Supreme Judicial Court of Massachusetts for relief from the criminal complaint on the ground that the false statement law was unconstitutional.<sup>225</sup> The high court, in an opinion by Justice Robert J. Cordy, unanimously agreed, finding the law “antagonistic to the fundamental right of free speech,” and ordered that the criminal complaint against Lucas be dismissed.<sup>226</sup>

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218. *Id.*

219. *Id.* The law in question provided:

No person shall make or publish, or cause to be made or published, any false statement in relation to any candidate for nomination or election to public office, which is designed or tends to aid or to injure or defeat such candidate.

No person shall publish or cause to be published in any letter, circular, advertisement, poster or in any other writing any false statement in relation to any question submitted to the voters, which statement is designed to affect the vote on said question.

Whoever knowingly violates any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months.

MASS GEN. LAWS, ch. 56, § 42 (2016), *quoted in Lucas*, 34 N.E.3d at 1244–45 n.1.

220. *Lucas*, 34 N.E.3d at 1245.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1246.

225. *Id.*

226. *Id.* at 1257. The court rested its holding on the free speech guarantee of the Massachusetts Declaration of Rights rather than on First Amendment grounds. *See id.* at 1252. But the court relied primarily on First Amendment jurisprudence in finding that the



Like the United States Supreme Court in *SBA List* and the Eighth Circuit in *281 Care Committee*, the Supreme Judicial Court of Massachusetts was acutely aware of the potential for broad restrictions on campaign lies to be used strategically for political gain. The state argued that the complaint against Lucas should be dismissed on statutory rather than constitutional grounds because the statements at issue were opinions beyond the scope of the law.<sup>227</sup> In response, the court explained that even if the statute were confined to false statements of fact, it could still be misused.<sup>228</sup> It pointed out that in the case at hand a candidate used the filing of an application for a criminal complaint “as a political tool not only to discredit the statements [in Jobs First’s brochure] but also to persuade [Jobs First] to refrain from airing a political advertisement shortly before the election. . . . Thus even if the application had been dismissed, the damage was already done.”<sup>229</sup> The court also emphasized that “anyone may initiate a complaint . . . and, in so doing, create lingering uncertainties of a criminal investigation and chill political speech by virtue of the process itself.”<sup>230</sup>

Having rejected the state’s argument for avoiding the constitutional issue, the court considered whether the regulated speech fell within either the fraud or defamation exception to the constitutional protection of free speech.<sup>231</sup> With regard to fraud, the court explained that “any legitimate interest in preventing electoral fraud must be done by narrowly drawn laws designed to serve those interests without unnecessarily interfering with First Amendment freedoms.”<sup>232</sup> Because the false statement law did not require a showing of reliance or damages, which the court deemed to be essential elements of fraud, it found the law reached not just fraud but expression that is not fraudulent.<sup>233</sup> For that reason, the law “cut[] too far into other protected speech.”<sup>234</sup>

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false campaign statement law violated the Massachusetts Constitution, as well as lower court cases holding that false statement laws in other states violate the First Amendment. *See id.* at 1252–57.

227. *Id.* at 1246.

228. *Id.* at 1247–48.

229. *Id.* at 1247 (citing *281 Care Comm. v. Arneson*, 776 F.3d 774, 790 n.12 (8th Cir. 2014)).

230. *Id.* (citing *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring)).

231. *Id.* at 1248.

232. *Id.* at 1249.

233. *Id.*

234. *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 316 n.2 (2008) (Souter, J., dissenting)). In a footnote, the court mentions the state’s argument that a false factual

The court found the state's attempt to "shoehorn" the false statement law into the defamation exemption to be similarly flawed.<sup>235</sup> It observed that while some false campaign speech might be defamatory, other types of false campaign speech, such as candidates' statements about themselves or comments about a ballot proposition, are not capable of being defamatory.<sup>236</sup> Accordingly, because the false statement law regulated protected speech, the court subjected the law to strict scrutiny.<sup>237</sup>

Applying strict scrutiny, the court stated that "[a]s a general matter" it agreed that the state has a "compelling interest in the maintenance of free and fair elections."<sup>238</sup> It added that this interest includes "preserving the integrity of its election process"<sup>239</sup> such as by "thwart[ing] political corruption, voter intimidation, and election fraud."<sup>240</sup> This did not mean, however, that the state has "carte blanche to regulate the dissemination of false statements during political campaigns."<sup>241</sup> In particular, the state's "claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."<sup>242</sup> The court found such skepticism well founded because the state did not establish that the law was "actually . . . necessary to serve the compelling interest in fair and free elections."<sup>243</sup> To the contrary, the court

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statement might be unprotected even in the absence of a showing of concrete harm if it threatens the "integrity of Government processes." *Id.* at 1249 n.8 (quoting *Alvarez*, 567 U.S. at 721). The court rejected that argument because the state did not show that the range of speech prohibited by the false campaign statement law posed "an actual and substantial threat to the electoral process." *Id.*

235. *Id.* at 1249.

236. *Id.* at 1250.

237. *Id.* The court noted the argument that Justice Breyer's concurring opinion in *Alvarez* mandates the application of intermediate scrutiny to laws outlawing false statements of fact but opined that the opinion "abrogated the well-established line of First Amendment precedent holding that content-based restrictions on political speech must withstand strict scrutiny." *Id.* at 1251. Because "the applicable standard for content-based restrictions on political speech is clearly strict scrutiny" under the Massachusetts Declaration of Rights, however, it applied that standard to the false statement law. *Id.* at 1251-52.

238. *Id.* at 1252.

239. *Id.* (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

240. *Id.*

241. *Id.* (quoting *281 Care Committee v. Arneson*, 766 F.3d, 774, 787 (8th Cir. 2014)).

242. *Id.* (quoting *281 Care Committee*, 766 F. 3d at 787).

243. *Id.* at 1252.

found that counterspeech was an adequate and much safer remedy for campaign lies.<sup>244</sup>

Finally, the court addressed what it called the “rather remarkable argument” that the state has broader power to restrict speech in the election context than it does with respect to speech generally.<sup>245</sup> The court responded that, to the contrary, “First Amendment rights of speech and association have their ‘fullest and most urgent application precisely to the conduct of campaigns for political office.’”<sup>246</sup> It then dealt with the state’s specific argument, bolstered by language in *McIntyre*, that “the state interest in preventing fraud carries special weight during election campaigns”<sup>247</sup> and that the Massachusetts false statement law “reaches falsehoods far more insidious and difficult to discredit on the eve of an election than, for example, the lie uttered in *Alvarez*.”<sup>248</sup> The court acknowledged the point that the “the shortened time frame of an election” may make counterspeech an ineffective remedy.<sup>249</sup> Still, this distinction could not save the law at issue because it was not “narrowly tailored” to address this problem.<sup>250</sup> Rather, the Massachusetts false statement law applied not only to the election of public officers, but also to ballot issues, and not only to statements widely disseminated through commercial advertisement, “but also those exchanged between two friends engaged in a spirited political discussion in a local pub.”<sup>251</sup> In addition, the law applied “to a broad range of content that does not pose a realistic threat to the maintenance of fair and free elections.”<sup>252</sup>

#### 7. Susan B. Anthony List v. Driehaus

In 2014, shortly after the Supreme Court ruled that the plaintiffs had Article III standing to pursue a pre-enforcement challenge to Ohio’s false

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244. *Id.* at 1253.

245. *Id.*

246. *Id.* at 1253–54 (quoting *Weld for Governor v. Dir. of the Office of Campaign & Political Fin.*, 556 N.E.2d 21 (Mass. 1990)). In making this statement, the court failed to mention Justice Scalia’s observation in his dissent in *McIntyre* that “protection of the election process justifies limitations upon speech that cannot constitutionally be imposed generally.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

247. *Lucas*, 34 N.E.3d at 1254 (citing *McIntyre*, 514 U.S. at 349).

248. *Id.* at 1254.

249. *Id.*

250. *Id.*

251. *Id.* at 1255.

252. *Id.*

campaign statement law,<sup>253</sup> the U.S. District Court for the Southern District of Ohio ruled on the merits of the challenge, holding the law to be an unconstitutional infringement of the First Amendment.<sup>254</sup> In 2016, the United States Court of Appeals for the Sixth Circuit affirmed this decision.<sup>255</sup> The Sixth Circuit began its opinion by determining the proper level of scrutiny to apply to the law.<sup>256</sup> Finding it to be a content-based regulation of “core-protected” political speech, the court applied strict scrutiny.<sup>257</sup> The court agreed that the state’s interests “in preserving the integrity of its elections, protecting ‘voters from confusion and undue influence,’ and ‘ensuring that an individual’s vote is not undermined by fraud in the election process’” are compelling.<sup>258</sup> But for five reasons, it found that the law was not “narrowly tailored to protect the integrity of Ohio’s elections.”<sup>259</sup>

First, the court found that the timing of the administrative process established by the law “does not necessarily promote fair elections.”<sup>260</sup> The court noted that while the law provides for expedited procedures for complaints filed close to an election, “complaints filed outside this timeframe are free to linger for six months.”<sup>261</sup> And even with the expedited procedure, there is no guarantee that proceedings would conclude before the election “or within time for the candidate’s campaign to recover from any false information that was disseminated.”<sup>262</sup> As a result, “candidates filing complaints against their political opponents count on the fact that ‘an ultimate decision on the merits will be deferred until after the relevant election.’”<sup>263</sup> The court held that a final finding occurring after the election “does not preserve the integrity of the election,” and, therefore, that the law was not narrowly tailored to promote this interest.<sup>264</sup>

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253. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014); *see also supra* notes 83–106 and accompanying text.

254. *See* Susan B. Anthony List v. Ohio Elections Comm’n, 45 F. Supp. 3d. 765 (2014).

255. Susan B. Anthony List v. Driehaus, 814 F.3d 466 (2016).

256. *Id.* at 472.

257. *Id.* at 473.

258. *Id.* (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)).

259. *Id.* at 474.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 474 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346 (2014)).

264. *Id.*

Second, the court faulted the law's procedural mechanism for failing to screen out frivolous complaints prior to a probable cause hearing.<sup>265</sup> As a result, "some complainants use the law's process 'to gain a campaign advantage without ever having to prove the falsity of a statement . . . tim[ing] their submissions to achieve maximum disruption [and] . . . forc[ing] political opponents] to divert significant time and resources . . . in the crucial days leading up to an election.'"<sup>266</sup> In this way, too, the process was not narrowly tailored to promote Ohio's interest in preserving fair elections.<sup>267</sup> A third reason the court found the law not narrowly tailored to preserve fair elections was that it applied to *all* false statements, including non-material statements.<sup>268</sup>

A fourth flaw the court found with the law was that it applied not just to the speaker of the false statements, but also to "anyone who advertises, 'post[s], publish[es], circulate[s], distribute[s], or otherwise disseminate[s]' false political speech."<sup>269</sup> As such, the law applied to commercial intermediaries, such as the billboard company dissuaded in this case from accepting the SBA List's advertisement.<sup>270</sup> "Conducting hearings against or prosecuting a billboard company executive, who was simply the messenger," the court found, "is not narrowly tailored to preserve fair elections."<sup>271</sup>

Fifth, and finally, the court found the law to be both over- and under-inclusive.<sup>272</sup> It was over-inclusive because "[c]ausing damage to a campaign that ultimately may not be in violation of the law" does not preserve the integrity of elections, but rather "undermines the state's interest in promoting fair elections."<sup>273</sup> And it was under-inclusive because "the law may not timely penalize those who violate it, nor does it provide for campaigns that are the victim of potentially damaging false statements."<sup>274</sup>

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265. *Id.*

266. *Id.* at 475 (quoting *SBA List*, 134 S. Ct. at 2346).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* For good measure, the court added that the false statement laws "ha[d] similar features" to the Ohio law prohibiting anonymous leafleting that the Supreme Court struck down in *McIntyre*. *Id.* at 476. The court noted that the "Supreme Court struck down Ohio's election law because its prohibitions included non-material statements that were 'not even arguably false or misleading,' made by candidates, campaign supporters, and individuals

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In summary, in contrast to the mixed results of earlier cases, recent lower court decisions have uniformly found broad bans on lies in political campaigns to violate the First Amendment. This is true whether the challenged law governs ballot measures, candidate elections, or both. Moreover, relevant Supreme Court decisions strongly suggest that the Court would reach the same conclusion about a general ban on campaign lies. The open question concerns narrowly focused bans such as those forbidding intentionally false or misleading statements about election procedures or requirements or about incumbency or party affiliation. Whether such laws comport with the First Amendment depends on the scope of the rule against content discrimination—the central question explored in Part II.

## *II. The Basic Structure of American Free Speech Doctrine*

The ability of government to punish campaign lies consistent with the First Amendment depends in large part on how one views the basic structure of American free speech doctrine. Under a commonly held view, aptly dubbed the All-Inclusive Approach, the First Amendment generally protects human expression—in all of its manifestations and wherever it may occur—from government-imposed content regulation. On this view, government has little or no authority to regulate election lies. An alternative view, which I shall call the Domain-Specific Approach, posits that the government's ability to regulate the content of speech depends on the setting or domain in which the speech occurs. On this view, at least some speech occurring in the election domain, including some types of lies, might be subject to punishment. As I shall demonstrate, the Domain-Specific Approach more accurately describes the actual structure of free speech doctrine than does the All-Inclusive Approach.

### *A. The All-Inclusive Approach*

Under the All-Inclusive Approach, “as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>275</sup>

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acting independently and using only their own modest resources,” whether made “on the eve of an election, when the opportunity for reply is limited, or months in advance.” *Id.* (quoting *McIntyre v. Ohio*, 514 U.S. 334, 351–52 (1995)). In the court's view, Ohio's false statement laws “ha[d] all of the same flaws” and, therefore, were “not narrowly tailored to preserve fair elections.” *Id.*

275. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

Justice Kennedy's plurality opinion in *Alvarez* exemplifies the All-Inclusive Approach: "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar."<sup>276</sup> The exceptions noted by Justice Kennedy are "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent."<sup>277</sup> So, on this view, while government has a great deal of leeway to regulate speech for reasons unrelated to its message (such as the time, place, or manner of the speech),<sup>278</sup> content-based regulations are subject to "the most exacting scrutiny."<sup>279</sup> For content-based laws to be justified under this test, the government must prove that they are "narrowly tailored to serve compelling state interests."<sup>280</sup> Application of such "strict scrutiny" almost always results in the regulation being declared invalid.<sup>281</sup>

As noted above, laws regulating electoral lies unquestionably do so based on the content of the speech; thus, under the All-Inclusive Approach, the government would have an exceedingly difficult burden to justify the prohibition of electoral lies.

The All-Inclusive Approach is supported by statements in other Supreme Court decisions<sup>282</sup> as well as by prominent commentators.<sup>283</sup> But as has

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276. *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

277. *Id.* at 717 (internal citations omitted).

278. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

279. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage or impose differential burdens upon speech because of its content.")

280. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

281. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). ("[I]t is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest."); *see also United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (noting that strict scrutiny implies "near automatic condemnation" of the law under review); *McConnell v. FEC*, 540 U.S. 93, 314 (2003) (Kennedy, J., concurring) ("Under strict scrutiny [a law], for the most part, cannot survive."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 380 (1995) (Scalia, J. dissenting) (describing strict scrutiny as "ordinarily the kiss of death"); Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1304 (2007) ("[T]he Supreme Court has sometimes suggested that strict scrutiny will permit infringements of preferred rights only to avert rare, catastrophic harms. The Court has frequently described the freedom of speech in terms that make its claims sound almost categorically unyielding.")

282. *E.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

been aptly observed, the position that there is “a general, ‘normal’ conception of free speech right[s] that applies the same in nearly all contexts” is, upon close examination, “long on rhetoric and short on substance.”<sup>284</sup> Any such view is inconsistent with both the scope and level of protection actually provided to speech in American society. In addition to the “narrow categories of expression” that the proponents of the All-Inclusive Approach acknowledge can be prohibited because of their content, there is in fact an enormous range of speech routinely regulated on account of its content, all without a hint of interference from the First Amendment. This includes expression regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract and negligence.<sup>285</sup> In addition, there are numerous Supreme Court holdings providing less-than-strict scrutiny to content-based regulation of expression beyond the “narrow exceptions” recognized by the All-Inclusive Approach, including commercial speech; sexually explicit (but non-obscene) speech;

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283. For example, Dean Erwin Chemerinsky asserts:

[T]here are some categories of speech that are unprotected or less protected by the First Amendment, such as incitement or illegal activity, obscenity, and defamation. These categories, by definition, are content-based. But apart from these categories, content-based discrimination must meet strict scrutiny, and the Court has recently indicated that content-based distinctions within these categories must also pass strict scrutiny.

ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 933 (3d ed. 2006); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1254 (8th ed. 2010) (“If the government wants to punish speech based on its content apart from these categories, the government bears a heavy burden of proving that its regulation is one that is narrowly drawn to promote . . . a compelling government interest.”); Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 *EMORY L.J.* 661, 662 (2016) (“Content-based restrictions (unless they fall within one of the categories of unprotected speech) are invalid unless necessary to a compelling state interest.”).

284. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 *TEX. L. REV.* 1803, 1819–20 (1999).

285. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 *HARV. L. REV.* 1765, 1768, 1778–84 (2003); see also James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 *CASE W. RES. L. REV.* 1091, 1097–98 (2004) [hereinafter Weinstein, *Speech Categorization*]. To adopt Schauer’s useful terminology, this speech is not just devoid of protection, but because its regulation “does not present a First Amendment issue at all,” it is outside First Amendment “coverage.” Schauer, *supra* at 1769.



and speech in a non-public forum.<sup>286</sup> Of particular importance to our inquiry, the government routinely regulates the content of speech in settings over which it exercises managerial control, such as the courtroom, the government workplace, and the public school classroom.<sup>287</sup> Contrary to the assumption underlying the All-Inclusive Approach, then, there is in fact no general rule against content regulation of speech.

### *B. The Domain-Specific Approach*

In contrast, the Domain-Specific Approach readily accounts for these numerous examples of permissible content regulation. It postulates that the prohibition against content regulation is primarily confined to expression essential to democratic self-governance—expression that the Court and commentators often refer to as “public discourse.”<sup>288</sup>

#### *1. The Domain of Public Discourse and the Right to Lie*<sup>289</sup>

It is in the domain of public discourse that the people—the ultimate governors in a democracy—can freely examine and discuss the rules, norms, and conditions that constitute society. Such expression includes more than “political speech in the narrow sense”: it also embraces more generally “speech concerning the organization and culture of society.”<sup>290</sup>

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286. See James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 492 (2011) [hereinafter Weinstein, *Participatory Democracy*].

287. See Weinstein, *Speech Categorization*, *supra* note 285, at 1097.

288. See, e.g., *Cohen v. California*, 403 U.S. 15, 22 (1971); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990). Since this democratic expression is not always aimed at the public, however, but also includes informal conversations between two friends or a small group of individuals, the term “democratic discourse” is more descriptive. See James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 642 (2011) [hereinafter Weinstein, *A Reply*]. However, since the term “public discourse” is commonly used to describe this domain, I will use that term in this Article.

289. This section of the Article draws substantially from material previously published in James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341 (2018).

290. ERIC BARENDT, *FREEDOM OF SPEECH* 189 (2005). There is no simple algorithm for determining whether expression qualifies as public discourse entitled to rigorous protection from content discrimination. It is possible nonetheless to identify two factors that are crucial to making this determination: (1) whether the speech is about a matter of public concern; and (2) whether the expression occurs in settings dedicated or essential to democratic self-governance, such as on the internet or in books, magazines, films, or public forums such as the speaker’s corner of the park. For a more extensive discussion of methodology by which

Within this domain, every proposition is open to question. For if government were allowed to manage the content of this discussion, either by excluding certain ideas as wrong or offensive or even by setting the agenda, the opinion formed by public discussion would not reflect the independent will of the people, but would rather reflect the preferences of those temporarily entrusted to govern society.<sup>291</sup> In this domain, even the most minimal of civility norms may not be enforced for fear that such regulation will inevitably reflect the cultural or political norms of some particular community when it is these very norms that are up for debate.<sup>292</sup> Thus, in this domain, a speaker is allowed to use words or symbols of the speaker's choosing, even highly inflammatory ones.<sup>293</sup> And of particular relevance for our inquiry, in this domain, government is generally prohibited from punishing even knowing misstatements of fact.

Public discourse promotes vital democratic interests of both speakers and audience.

*a) Speaker Interests*

The opportunity to participate in public discourse is vital to the legitimacy of the legal system in that it allows individuals to have their say about laws that bind them.<sup>294</sup> There may be no fully satisfactory answer to the age-old question of what justifies the state's use of force to make free and autonomous people obey laws with which they reasonably disagree.

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the Court has drawn the boundaries of public discourse, see Weinstein, *A Reply*, *supra* note 288, at 639–41.

291. As James Madison declared in the Report on the Virginia Resolutions of 1789, denouncing the Alien & Sedition Act: "The people, not the government, possess the absolute sovereignty." See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569–70 (1876)).

292. See *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15, 26 (1971).

293. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2355, 2371 (2000) ("Even irrational and abusive speech can, within particular circumstances, serve as a vehicle for the construction of democratic legitimacy.").

294. For an extensive discussion of how the opportunity to participate in public discourse as speakers promotes political legitimacy, see James Weinstein, *Hate Speech Bans, Democracy and Political Legitimacy*, 32 CONST. COMMENT. 527 (2017) [hereinafter Weinstein, *Hate Speech Bans*]; James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361 (2011); see also Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972) (arguing that for a government to be legitimate, citizens must be able to recognize its authority "while still regarding themselves as equal, autonomous, rational agents").

But the democratic process—in particular, the ability to vote for representatives who enact the laws and the opportunity to freely criticize or support laws that representatives are considering enacting—is “arguably the best that can be done . . . for justifying the legitimacy of the social order.”<sup>295</sup> In addition to promoting legitimacy in this essential, normative sense, the opportunity to participate in public discourse contributes to “the descriptive conditions necessary for a diverse and heterogeneous population to live together in a relatively peaceable manner under a common system of governance and politics.”<sup>296</sup>

Crucially, the opportunity to freely and openly participate in public discourse promotes not just the legitimacy of the entire legal system, but also the legitimacy of particular laws. In a recent article, I discussed, for instance, how restrictions on peoples’ ability to use what other democracies would consider unlawful “hate speech” to oppose antidiscrimination measures will diminish—or may, under certain circumstances, even destroy—the legitimacy of enforcing these measures against those whose speech was curtailed.<sup>297</sup>

As vital to democracy and political legitimacy as the right to participate in public discourse may be, these interests do not, at least as a theoretical matter, entail a right of a speaker to try to deceive the public by proclaiming as fact something the speaker knows to be untrue. Pragmatically, however, there is good reason not to entrust government officials with the power to determine the truth or falsity of factual claims made in the often highly ideological context of public discourse, especially when the claims are factually complex or uncertain.<sup>298</sup> There is even greater reason to distrust the ability of government officials to fairly and accurately determine the speaker’s state of mind in making the allegedly false statement.

Specifically, government officials hostile to the speaker’s point of view are more likely to believe that the speaker knew that the statement was false, while officials who share the speaker’s ideological perspective will be more likely to find that any misstatement of fact was an innocent one. For

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295. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 262, 263 (2011).

296. Robert Post, *Legitimacy and Hate Speech*, 32 CONST. COMMENT. 651, 651 (2017).

297. See Weinstein, *Hate Speech Bans*, *supra* note 294, at 566–74.

298. “[Our] forefathers did not trust any government to separate the true from the false for us.” *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). For examples of factual misstatements on complex, highly contentious issues of public concern, see James Weinstein, *Seana Shiffrin’s Thinker-Based Theory of Free Speech: Elegant and Insightful, but Will It Work in Practice?*, 27 CONST. COMMENT. 385, 395–96 (2011).

this reason, I shudder at the thought of authorities in Alabama having the power to prosecute an abortion rights activist because they have concluded that the speaker intentionally made false or misleading statements about how often partial-birth abortion is medically necessary; I similarly recoil at the thought of California officials prosecuting an anti-abortion activist for falsely misrepresenting the extent to which abortion causes depression. It is no answer that judges, at trial and on appeal, provide a safeguard against speakers being wrongfully punished for making knowing misstatements of fact in public discourse. For one, in highly ideological cases even judges are subject to “judicial viewpoint discrimination.”<sup>299</sup> But even if the speaker is ultimately vindicated, defending against a prosecution or even an investigation can be an expensive and arduous process.

As discussed in more detail below, it may be true that, even when the serious pragmatic problems just described are accounted for, allowing government some limited power to punish knowingly false factual statements in public discourse would improve the quality of public debate. But the core speaker interest protected by the First Amendment is not principally concerned with the quality of public discussion; rather, its focus is the legitimacy that the opportunity to participate in public discourse confers on the legal system. So despite any improvement in the quality of public discourse, prosecuting lies in this domain will likely deter speakers from making honest but mistaken claims on highly contentious matters of public concern. As a result, the legitimacy of the legal system would be diminished. For this reason, consistent with what seems to be the view of all nine justices in *Alvarez*, the core democratic value underlying the First Amendment ordinarily protects an individual from legal sanction for making even intentional misrepresentations of fact in public discourse.

Suppose that Alan, a popular libertarian blogger with a scientific background, is persuaded by his perusal of relevant, peer-reviewed literature that the case for anthropogenic climate change is overwhelming. He confides as much in an email to his sister. Nonetheless, for ideological reasons, Alan believes that proposed climate legislation is wrong in principle and bad for the American economy. So, in addition to making economic arguments against such legislation, Alan persistently contends that the evidence for anthropogenic climate change is more uncertain than he knows it to be. If a prosecutor in a state with particularly broad anti-fraud laws were to prosecute Alan for misleading the public through his

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299. See James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471 (1996).

deceitful commentary, the First Amendment would no doubt bar such a prosecution. Indeed, because the right of an individual in the United States to participate in public discourse is so rigorously protected, few prosecutors in this country would even consider prosecuting a blogger for even intentional misstatements of facts designed to mislead the public with regard to the desirability of legislation.

*b) Audience Interests*

*(1) The Interest in Receiving Information on Matters of Public Concern*

Another important democratic interest served by free and open public discourse is the audience interest in receiving information needed to develop informed views on matters of public policy.<sup>300</sup> And while only flesh-and-blood individuals have democratic interests in participating in public discourse, “[c]orporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”<sup>301</sup> It could be powerfully argued, however, that lies not only fail to promote but actually undermine “the discussion, debate, and the dissemination of information” needed by citizens to knowledgeably participate in public discourse and to competently perform their electoral duties.

A powerful argument for extending First Amendment protection to lies in order to promote the audience’s interest in access to information and perspectives is the concern, discussed above, that government officials cannot be trusted to fairly and accurately identify and prosecute knowingly false statements in the often highly ideological context of public discourse. It is possible that “the risk of censorious selectivity by prosecutors”<sup>302</sup> would impede information and distort perspectives made available to the audience to such an extent that the cure would be worse than the disease. Still, even when the likely distorting effects of selective prosecutions are accounted for, it may be that the accuracy—and, hence, the reliability and usefulness—of the information available to citizens would be enhanced if lies in public discourse were not protected by the First Amendment.

Whether granting government the power to punish lies in public discourse will impede or promote the audience interest in receiving useful information and perspectives is a difficult empirical question. So, if

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300. See Weinstein, *Participatory Democracy*, *supra* note 286, at 500–01.

301. *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

302. *United States v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring).

providing information and perspectives to the electorate were the only consideration, a good case might be made that the First Amendment should not protect intentional factual misrepresentations in public discourse. Standing in the way of this conclusion, however, is a deep, though underexplored, principle of American popular sovereignty.

*(2) The Interest in Being Treated as Rational Agents Capable of Exercising Authority as Ultimate Sovereign*

As James Madison wrote in denouncing the Sedition Act of 1798, “The people, not the government, possess the absolute sovereignty.”<sup>303</sup> For this reason, as Madison had earlier observed in discussing the nature of popular sovereignty, “the censorial power is in the people over the Government, and not in the Government over the people.”<sup>304</sup> To vindicate this basic democratic precept, the First Amendment forbids the government from punishing speech even if the government believes the expression will lead the electorate to make unwise or even disastrous social policy decisions.<sup>305</sup>

Imagine that certain persuasive voices in public discourse were influencing public opinion against ratification of a treaty essential to our national security. Even if it could be shown to a moral certainty that rejection of this treaty would have catastrophic consequences for the nation, including greatly increasing the risk of nuclear attack on our soil, it would be unthinkable within our democratic traditions for the government to prohibit public opposition to the treaty.<sup>306</sup> And I would suggest that it is no

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303. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 569–70 (1876)).

304. 4 ANNALS OF CONG. 934 (1794).

305. The First Amendment “embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad . . . . The State’s fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.” *Brown v. Hartlage*, 456 U.S. 45, 60 (1982); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine.”).

306. See, e.g., THOMAS CHRISTIANO, *THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY* 15–16 (1996) (“[C]itizens have a right to rule because the right embodies the liberty or the equality of citizens. Even if citizens make bad decisions on certain occasions, it remains that the mistakes are rightfully theirs to make.”); see also Thomas Christiano, *Democracy*, STAN. ENCYCLOPEDIA OF PHIL. (Spring 2015), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=democracy> [<https://perma.cc/JX8A-6L2H>] (“[T]he right of self-government gives one a right, within limits, to do wrong. Just as an individual has a right to make some bad decisions for himself or herself, so a group of individuals have a right to make bad or unjust decisions for themselves regarding those activities they share.”).

more permissible for government to suppress this expression because it contains factual misrepresentations calculated to mislead the public into opposing the ratification of the treaty. This is because the First Amendment presumes that, in our capacity as the ultimate governors of society, we are rational agents capable of sorting out truth from falsity without government supervision.<sup>307</sup> As Justice Robert Jackson eloquently explained more than seventy years ago, “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field every person must be his own watchman for truth.”<sup>308</sup>

This is not to say, of course, that humans in general, or the American populace in particular, are, in fact, fully rational beings. We obviously are not. But the attribution of rationality to participants engaging in public discourse is not a *description*; it is, rather, an *ascription*. As Justice Jackson suggests, this ascription derives from the basic democratic precept that “We the People,” who possess the ultimate sovereign power, are capable of self-government without the need of government guardianship to keep us from being misled in our capacity as ultimate sovereign.<sup>309</sup> Through this lens, allowing government to determine which claims in public discourse are true and which are false would present not just the pragmatic difficulties I have emphasized; such government guardianship would *in principle* violate the core democratic precept that the people are capable of ruling themselves.

To see why governmental suppression of lies in public discourse to prevent the people from being misled is contrary to a basic precept of popular sovereignty—at least as traditionally understood in this country—imagine that you are a ruler who originally possessed all of the political power in a certain society. In order to form a “more perfect” society, “establish Justice,” etc., you “ordain and establish” a constitution, which, among other things, delegates legislative power to a national assembly. Despite this delegation, however, you retain the ultimate sovereignty in this society, including the power to select the members of the assembly, to directly make provincial laws, and to adopt a new constitution.

Suppose that the assembly passes a law empowering your ministers to keep from you any publication that in their judgment contains knowing

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307. See *Citizens United v. FEC*, 558 U.S. 310, 355 (2010) (stating that our form of government “entrust[s] the people to judge what is true and what is false”).

308. *Thomas*, 323 U.S. at 545 (Jackson, J., concurring).

309. See *id.* at 545–46 (“This liberty was not protected because the forefathers expected . . . that its exercise always would be wise, temperate, or useful . . . [T]his liberty was protected because they knew of no other way by which free men could conduct representative democracy.”).

falsehoods that might deceive you into making the wrong decision in the exercise of your retained power. Let us further suppose that, although there is a possibility that such censorship will deprive you of valuable information or perspectives you need to make these decisions, on balance it is more likely that this guardianship arrangement will improve the quality of the information you receive. Even with the possibility of receiving more accurate information, wouldn't you prefer that, instead of being prevented from having access to any mendacious material, your ministers let you see it while pointing out to you the statements that they thought were untrue? It seems to me that this advisory arrangement would better respect your authority as ultimate sovereign than would the guardianship arrangement.

What this thought experiment shows, I believe, is that government might properly add its own voice to the discussion and advise citizens that a statement made in public discourse is a lie. But it also suggests that punishing speakers for making knowing factual misrepresentations in order to prevent these lies from deceiving the people about the desirability of legislation or any other matter of public concern is inconsistent with the people's role as the ultimate governors of society.

The Supreme Court would undoubtedly agree that bans on knowing misstatements in public discourse run afoul of the First Amendment. As Justice Kennedy explained in *United States v. Alvarez*, "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."<sup>310</sup> Rather, "The remedy for speech that is false is speech that is true."<sup>311</sup> And both the concurring and dissenting opinions in that case expressed similar sentiments.<sup>312</sup>

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310. 567 U.S. 709, 723 (2012).

311. *Id.* at 727

312. *See id.* at 731–32 (Breyer, J., concurring) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like . . . in many contexts . . . call[] for strict scrutiny."); *id.* at 751–52 (Alito, J., dissenting) (stating that "laws prohibiting false statements about history, science, and similar matters" would present a "grave and unacceptable danger of suppressing truthful speech"). The one exception is the imposition of civil liability, subject to various First Amendment safeguards, for defamation of public officials or of private figures on matters of public concern, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). But the rationale for defamation laws is to protect individual reputations, not to prevent the people from being misled about some matter within their authority as ultimate governors of society. As discussed below, the precept that it is wrong in principle for the government to prohibit lies in public discourse to prevent the audience from being misled carries over to the election domain. *See infra* note 344 and accompanying text.



## 2. *Government-Managed Domains*

While government regulation of the content of speech in the domain of public discourse must be strictly limited for this domain to accomplish its core democratic purpose, in other settings, pervasive government management of various activities—including speech—is essential if government is to accomplish its various functions.<sup>313</sup> Thus, in settings devoted to some purpose other than public discourse—such as effectuating government policy in the workplace, the administration of justice in the courtroom, or education in public schools—government has far greater leeway to regulate the content of speech.<sup>314</sup> For instance, although an anti-war protestor has a right to wear a jacket on a public street bearing the message “Fuck the Draft,”<sup>315</sup> profanity may be constitutionally banned in the government workplace, in the courtroom, and in the public classroom.<sup>316</sup> Similarly, while a blogger may have a First Amendment right to make knowingly false claims about the causes and effects of climate change, a government employee can, consistent with the First Amendment, be fired for making a knowingly false statement on this subject in a government report.<sup>317</sup> Likewise, a student can be disciplined for lying to his

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313. In conceptualizing the terrain of speech regulation as being divided into various domains, I have been heavily influenced by the seminal work of Robert Post. *See, e.g.*, ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY AND MANAGEMENT* (1995).

314. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that the discharge of assistant district attorney for criticism of her superior did not violate the First Amendment); *Zal v. Steppe*, 968 F.2d 924, 925–26, 928 (9th Cir. 1992) (rejecting First Amendment challenge by an attorney defending anti-abortion protestors who was held in contempt for violating a court order prohibiting the attorney from using words such as “baby killer” linked to excluded defenses because “[d]uring a trial, lawyers must speak . . . with relevance and moderation”).

315. *Cohen v. California*, 403 U.S. 15, 16 (1971).

316. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (rejecting First Amendment challenge by a student suspended for using “offensively lewd and indecent speech” at a high school assembly); *Bonnell v. Lorenzo*, 241 F.3d 800, 820–21 (6th Cir. 2001) (concluding that a university instructor’s suspension for using profane language in class did not violate the First Amendment); *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1985) (rejecting a First Amendment challenge by a university instructor discharged for persistent use of profanity in the classroom); *Jackson v. Bailey*, 605 A.2d 1350, 1359 (Conn. 1992) (upholding a contempt conviction against the party for using profanity in the courtroom); *Dargi v. Terminix Int’l Co.*, 23 S.W.3d 342, 346 (Tenn. Ct. App. 2000) (upholding a contempt conviction against the party for use of profanity during a deposition).

317. *See United States v. Alvarez*, 567 U.S. 709, 720 (2012) (discussing 18 U.S.C. § 1001 (2012), which criminally punishes a person who “in any matter within the jurisdiction

teacher about why he did not turn in on time his report on climate change, and an expert witness in a court case can be convicted for making knowingly false statements about climate change.<sup>318</sup> There can be reasonable disagreement about whether the right to engage in invective and lies in public discourse promotes or hinders democratic self-governance; but there can be no doubt that such expression is inimical to the proper functioning of government-managed domains such as the workplace, the classroom, and the courtroom.

### 3. Elections as a Government-Managed Domain

In a previous article, I suggested that “the election domain” is “a sphere which the Constitution permits, and on occasion, even requires the government to manage.”<sup>319</sup> This claim should be uncontroversial, for there can be no sensible objection to the government setting the time for an election, designating polling places, designing the ballot, providing voting apparatus, counting the ballots, and announcing the results. Indeed, government has an affirmative constitutional duty to provide for elections<sup>320</sup> and to conduct them in a fair and equitable manner.<sup>321</sup> So the question is not whether a government-managed domain of elections exists<sup>322</sup> but rather

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of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry”).

318. See *Alvarez*, 567 U.S. at 720 (acknowledging the “unquestioned constitutionality of perjury statutes”) (internal quotations omitted).

319. James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1083 (2002). For a comprehensive discussion of elections, including election speech, as a domain distinct from the domain of public discourse, see Schauer & Pildes, *supra* note 284. See also C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998) (conceiving election speech as “institutionally bound” as part of the governmentally structured institution of elections); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999) (distinguishing between the realm of politics and political speech, on the one hand, and elections and election-related speech, on the other).

320. See *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964); see also *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884); John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1269 (2014) (“[E]lections must also be considered a non-delegable governmental function.” (citing *Terry v. Adams*, 345 U.S. 461, 469 (1953) (plurality opinion))).

321. See *Bush v. Gore*, 531 U.S. 98, 110 (2000).

322. See Joel L. Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 DUKE L.J. 851, 863–64 (“There can be no elections

what activities are properly assigned to that domain. In Part III of this Article, I will discuss the crucial and difficult question of which type of campaign *lies* may be properly regulated as part of the election domain and which are properly deemed part of public discourse. But first, I will note the many other forms of campaign speech that government may constitutionally regulate as part of its authority to manage the election domain.

The propriety of some speech regulation in this domain is undisputed—for instance, laws mandating that candidates' names appear with equal prominence on the ballot.<sup>323</sup> More controversially, the Supreme Court has upheld as consistent with the First Amendment the power of government to exclude the names of marginal parties and candidates from the ballot;<sup>324</sup> to prohibit write-in voting, even when such voting is engaged in as a means of political protest;<sup>325</sup> and to forbid electioneering speech near the polls.<sup>326</sup> Tellingly, in upholding these restrictions the Court has expressly affirmed rationales for speech regulation that would be patently improper for regulating public discourse.

In *Burdick v. Takushi*, for instance, in upholding a prohibition on write-in voting, the Court observed that “the function of the election process is to winnow out and finally reject all but the chosen candidates”<sup>327</sup> and that “[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.”<sup>328</sup> There can be no doubt, however, that the Court would roundly condemn as unconstitutional any attempt by government to regulate the content of public discourse to make it operate “fairly and efficiently.”

Similarly, in *Jenness v. Fortson*, in permitting the exclusion of marginal candidates from the ballot, the Court explained: “There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding

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without rules to guide them, and, for more than a century at the federal level, rules have been enacted, and sustained by courts, which go beyond simple facilitation of election mechanics to regulate in detail how candidates and their supporters might permissibly behave.” (citations omitted).

323. See, e.g., ARIZ. REV. STAT. ANN. § 16-466 (2004) (detailing uniformity required in candidates’ appearance on the ballot).

324. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

325. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

326. *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

327. *Burdick*, 504 U.S. at 438 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

328. *Id.*

confusion, deception, and even frustration of the democratic process . . . .”<sup>329</sup> As with regulation to promote fairness and efficiency, it would be blatantly unconstitutional for government in the United States to regulate the content of public discourse to avoid “confusion [or] deception” or “even frustration of the democratic process.”

In *Burson v. Freeman*, which upheld a ban on solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place, the Court relied on the state’s interest in preventing “intimidation and fraud.”<sup>330</sup> While the state has some closely circumscribed power to prevent these harms by regulating the content of public discourse,<sup>331</sup> it plainly has no such power to achieve these ends by such broad, prophylactic measures.<sup>332</sup> Professors Frederick Schauer and Richard Pildes are therefore surely correct in characterizing elections as “highly structured spheres” that include speech regulations “that would be impermissible in the general domain of public discourse.”<sup>333</sup>

Significantly, the power of government to regulate speech within the election domain extends beyond the polling place and the ballot. As I have previously suggested, campaign finance laws often regulate activities at the cusp of the public discourse and election domains.<sup>334</sup> From this perspective, the Supreme Court’s decisions in this area can be seen as attempting to give each domain its due by assigning some election financing activities to the domain of public discourse, while placing other activities in the election domain.<sup>335</sup> Such an allocation is most apparent in the Court’s contribution/expenditure dichotomy. Noting that large contributions have the potential to corrupt or appear to corrupt elected officials, and finding that contribution limitations only marginally affect speech, the Court in effect assigned contributions to the election domain, thereby allowing government considerable authority to regulate this activity.<sup>336</sup> In contrast, the Court has found independent expenditures for election speech to be an

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329. *Jenness*, 403 U.S. at 442.

330. *Burson*, 504 U.S. at 211.

331. See *Virginia v. Black*, 538 U.S. 343 (2003); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003).

332. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980).

333. Schauer & Pildes, *supra* note 284, at 1816; accord *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 378–79 (1995) (Scalia, J., dissenting) (observing that “protection of the election process justifies limitations upon speech that cannot be imposed generally”).

334. Weinstein, *Speech Categorization*, *supra* note 285, at 1082–84.

335. *Id.* at 1084–85.

336. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 20–21, 59 (1976).

essential part of the public debate and, thus, assigned this activity to the realm of public discourse where it has received rigorous protection.<sup>337</sup>

Disclosure requirements provide another example of the government's ability to regulate electoral speech in a way that would be impermissible with respect to public discourse. Despite well-established precedent recognizing the right of speakers engaged in public discourse to speak anonymously,<sup>338</sup> the Court has upheld laws requiring political advertisements on behalf of candidates to disclose the names of the sponsors of the advertisements.<sup>339</sup> Cases involving public employee speech provide another example. While the First Amendment generally protects the right of public employees to participate in public discourse,<sup>340</sup> the Court has

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337. *Id.* at 19–20, 39, 45–54. The Court in *Buckley* did not expressly acknowledge this dichotomy as reflecting domain allocation and may not even have perceived of elections as being a distinct domain from public discourse. *See Baker, supra* note 319, at 29 (“*Buckley* did not even take up the possibility of viewing electoral speech as part of an institutionally-bound governing process.”); Schauer & Pildes, *supra* note 284, at 1825 (explaining that the Court in *Buckley* did not confront the question of whether “elections can be demarcated, for First Amendment purposes, from the general domain of public discourse.”). Indeed, adopting something akin to the All-Inclusive approach, it purported to apply “strict scrutiny” to contribution limitations. *Buckley*, 424 U.S. at 48–49. As the Court subsequently acknowledged, however, this is not the level of scrutiny actually employed in such cases: “[W]hen reviewing Congress’ decision to enact contribution limits, there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’ . . . The less rigorous standard of review we have applied to contribution limits (*Buckley*’s ‘closely drawn’ scrutiny) shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.” *McConnell v. FEC*, 540 U.S. 93, 137 (2003) (internal quotations omitted), *overruled on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). Although recent cases have applied somewhat greater First Amendment scrutiny to contributions to political candidates, *see, e.g., McCutcheon v. FEC*, 134 S. Ct. 1434, 1441–42 (2014); *Randall v. Sorrell*, 548 U.S. 230, 236 (2006), it is still far less rigorous than the protection provided independent expenditures.

338. *E.g., Talley v. California*, 362 U.S. 60 (1960).

339. *See, e.g., Citizens United*, 558 U.S. at 366–71; *Buckley*, 424 U.S. at 64–76. As discussed above, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court invalidated a law prohibiting the distribution of anonymous literature concerning a ballot initiative. As discussed below, restrictions on lies about ballot initiatives, as opposed to lies by and about candidates for elected offices, should be allocated to the domain of public discourse rather than to the election domain. *See infra* Sections III.B, III.C.2.

340. *See United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454 (1995); *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

upheld restrictions on public employees' ability to participate in electoral politics, including speaking in favor of a candidate for office.<sup>341</sup>

The cases just discussed suggest that government generally has more authority to regulate speech, including false statements of fact, in the election domain than it does in the domain of public discourse. But this is not always the case. Indeed, speech in the election domain is, arguably, sometimes entitled to *greater* protection than it would be in public discourse.<sup>342</sup> So Schauer and Pildes are correct in observing that “we could decide that elections constitute[] a distinct domain for First Amendment purposes without committing to what we would do within that domain.”<sup>343</sup>

Relatedly, although public discourse and elections are usefully conceptualized as distinct domains, they share a similar purpose in that they are the two indispensable features of democratic self-governance. Whatever else it may be, a political system lacking either free and fair elections or the right of citizens to participate in public discourse is no democracy. For this reason, both when participating in public discourse and when engaging in our electoral functions, we are acting in our capacity as ultimate sovereign. Accordingly, the basic precept of American popular sovereignty discussed in Section II.B.1, above, applies to the election domain as well as the domain of public discourse. This means that, as lower courts have held,<sup>344</sup> it

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341. See *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

342. There is some suggestion in the case law that defamatory statements about *candidates* for elected office should be entitled to absolute immunity, not just the *New York Times v. Sullivan* malice standard generally applicable to defamatory statements about the official duties of those who hold that office. See, e.g., *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971) (stating that because the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office,” publications concerning candidates “must be accorded *at least as much protection* under the First and Fourteenth Amendments as those concerning occupants of public office” (emphasis added)); see also *Rickert v. Wash. Pub. Disclosure Comm'n*, 168 P.3d 826, 833 (Wash. 2007) (Alexander, C.J., concurring) (suggesting that the plurality opinion could be interpreted as holding that the First Amendment provides absolute immunity against defamation suits by candidates for elected office). Accord, Schauer & Pildes, *supra* note 284, at 1808 n.24. (suggesting that the Court in *Brown v. Hartlage*, 456 U.S. 45 (1982), might have provided absolute immunity to false campaign promises rather than the qualified immunity of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). See also *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 669 (1998) (indicating that a public broadcaster's exclusion of a candidate from a candidate debate is subject to greater First Amendment scrutiny than other exercises of editorial judgment by a public station.).

343. Schauer & Pildes, *supra* note 284, at 1808.

344. See *281 Care Committee v. Arneson*, 766 F.3d 774, 790 (8th Cir. 2014) (“observing that [t]he citizenry, not the government, should be the monitor of falseness in the political

is wrong in principle for government to ban lies in political campaigns in order to prevent the electorate from being misled about a matter within its collective decision making authority. As we will see, however, this crucial limitation nevertheless leaves room for banning lies for other reasons.

But while elections and public discourse are the two essential components of democracy, and while there is considerable overlap in the democratic functions they serve (particularly in promoting political legitimacy), there are also significant differences in the purposes of these democratic domains. Most significantly, an important function of public discourse is to provide citizens with information and perspectives needed to “vote wise decisions,”<sup>345</sup> while the key purpose of elections is to enable citizens to select their governors or, through ballot initiatives, to enact laws directly.

Another significant difference inheres in the reasons that government regulates these two essential democratic domains. When government seeks to regulate public discourse, it usually does so for reasons not directly related to promoting democratic self-governance, such as preserving public order, protecting individual dignitary interests, or defending national security. In contrast, regulations on speech in the election domain, be it a ban on writing in candidates or a prohibition on election lies, are usually justified as promoting the fairness or efficiency of an essential democratic process. As such, unlike regulation of speech in public discourse, regulation of speech in the election domain usually involves democracy on both sides of the ledger. For this reason, it is true both that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns

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arena”); *Rickert v. Washington*, 168 P.3d 826, 827–28 (Wash. 2007) (criticizing the claim that “the State possesses an independent right to determine truth and falsity in political debate” as “fundamentally at odds with the principles embodied in the First Amendment”); *State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 698–99 (Wash. 1998) (referring to the “claimed compelling interest to shield the public from falsehoods during a political campaign” as “patronizing and paternalistic” because it “assumes the people of this state are too ignorant or disinterested to investigate, learn and determine for themselves the truth or falsity in political debate, and it is the proper role of the government itself to fill the void”). *See also* *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1256 (Mass. 2015) (quoting statement from *281 Care Comm.* quoted above).

345. *See* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960).

for political office”<sup>346</sup> and that “no justification for regulation is more compelling than protection of the electoral process.”<sup>347</sup>

### *III. Allocating Laws Regulating Election Lies to Their Proper Domain*

As illustrated by the cases discussed in Part I, the typical approach to deciding whether a prohibition on false statements in the election context violates the First Amendment is to assess to what level of scrutiny the law should be subjected. Under the All-Inclusive Approach, laws punishing even knowing falsehoods not fitting within “the few historic and traditional categories of expression long familiar to the bar”<sup>348</sup> are subject to strict scrutiny and, thus, “near-automatic condemnation.”<sup>349</sup> Not only does this approach have the potential to invalidate laws that should be deemed constitutional, it also clouds analysis of the interests at stake. With respect to laws that judges wish to uphold, this approach would likely obscure analysis as well as distort doctrine by requiring them to procrusteanly force the law into one of these “traditional” exceptions. Alternatively, judges wanting to uphold bans on campaign lies could apply a watered-down version of strict scrutiny, thereby weakening a test that performs an import function in protecting public discourse.<sup>350</sup>

The use of intermediate scrutiny for measuring the validity of laws regulating false campaign statements, which dicta in Justice Breyer’s plurality opinion in *Alvarez* appears to endorse,<sup>351</sup> provides a better vehicle than does the All-Inclusive Approach for analyzing the relevant interests and for reaching correct results. It is nonetheless sub-optimal, for it does not directly consider how the law in question might affect the domains of public discourse and elections.

The framework I propose, in contrast, seeks first to properly allocate the law in question either to the domain of public discourse or to the election

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346. *Monitor Patriot Co.*, 401 U.S. at 272.

347. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting).

348. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (internal quotations omitted)).

349. *Id.* at 731 (Breyer, J., concurring).

350. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2016) (Breyer, J., concurring); Weinstein, *Participatory Democracy*, *supra* note 286, at 512; see also Baker, *supra* note 319, at 6.

351. *Alvarez*, 567 U.S. at 730–31, 736 (Breyer, J., concurring). See *supra* note 76 and accompanying text. See also *supra* note 237.



domain; it then focuses on the proper level of scrutiny to be applied. To determine the domain to which the law should be assigned, this framework inquires: (1) the extent to which the law in question advances the core purposes of the election domain to promote fair and efficient elections; as compared to (2) the extent to which the law in question impairs the core democratic purposes of the domain of public discourse to promote political legitimacy and to provide the public with useful information and perspectives.<sup>352</sup>

As mentioned above, it is very likely that the United States Supreme Court would invalidate on First Amendment grounds a broad-based prohibition of campaign lies, such as the Minnesota and Ohio laws struck down by the Eighth and Sixth Circuits in *281 Care Committee* and *SBA List*, respectively.<sup>353</sup> The domain-allocation framework I propose is consistent with the results in these cases. As we shall see, under the domain-allocation framework, much of the speech regulated by such broad bans on campaign lies would be deemed public discourse, rendering these law substantially overbroad and, hence, facially unconstitutional. In contrast, narrower laws directly promoting the fairness and efficiency of elections might well pass constitutional muster. An example of such narrowly-focused laws are those prohibiting false statements about election procedures, such as the day the election will be held, the proper place to cast one's vote, or voting requirements.

#### *A. Laws Prohibiting False Statements About the Time, Place, or Manner of Voting*

In a lucid and insightful article on regulation of campaign lies, Professor Richard Hasen discusses the constitutionality of punishing knowingly false statements about the day an election is going to be held.<sup>354</sup> He gives an example of the false statement that “Republicans vote on Tuesday, Democrats vote on Wednesday.”<sup>355</sup> I agree with Hasen that it should be constitutional for a state to criminalize such speech if made both with

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352. Accord Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1842–43 (1999) (“How we decide which speech gets incorporated into the [election domain], and which speech remains within public discourse, must . . . depend on a full assessment of the impact on public discourse and on elections.”).

353. See *supra* Sections I.A.4, I.B.5, I.B.7.

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

355. *Id.* at 71.

knowledge that the statement was false and with the intent to deceive.<sup>356</sup> I also agree that government has a compelling interest in protecting the right to vote, that these laws present little risk of selective prosecution, and that the falsity of this speech is easily verifiable.<sup>357</sup> I suggest, however, that the framework I propose offers more telling reasons that such a law does not violate the First Amendment.

Looking first to the election domain, laws banning knowing falsehoods calculated to deceive someone about when to vote directly promote the fairness of the election. Indeed, if government were powerless to stop such deception, the integrity of the election process might be badly compromised. As to the effect of the law on the domain of public discourse, by no latitude of interpretation can such knowingly false statements about election procedures, as opposed to false statements about the substance of an election, be characterized as an attempt by the speaker to persuade others about “the organization and culture of society” or otherwise as contributing to the formation of public opinion. For this reason, the proscription does not violate the precept of American popular sovereignty, discussed in Section II.B.1, that it is wrong in principle for government to prohibit false statements in order to prevent the people from being misled about some collective decision within the authority as ultimate sovereign.

Relatedly, banning such expression will not diminish the legitimacy of the legal system with respect to someone prevented from engaging in such intentional misstatements. Similarly, banning false statements about when an election will be held obviously will not deprive the electorate of valuable information or perspectives; nor will such a narrowly-targeted ban “chill” the expression of any useful information.

To be sure, the miniscule risk of selective enforcement and the easily verifiable falsity of these statements—factors Hasen emphasizes—are relevant to this analysis. Similarly, that the state may have a “compelling,” rather than just an important, reason to ban such lies is surely a relevant consideration. However, the significance of these considerations is better understood, I believe, within this overall framework.

For the reasons just stated, bans on knowingly false statements about election procedures should be allocated to the election domain. Such an allocation does not mean, however, that a law automatically comports with the First Amendment (or, for that matter, with any other constitutional limitation). In light of exceedingly strong reasons for outlawing lies about

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356. *Id.* at 57.

357. *Id.* at 71.

the date of an election and the corresponding lack of impairment to any free speech or other constitutional values resulting from the ban, there is no conceivable claim that this law is not a proper exercise of governmental management of the election domain.

In contrast, other laws properly allocated to the election domain may raise more substantial constitutional concerns. For example, as Hasen correctly concludes, laws prohibiting misleading, as opposed to literally false, statements about an election procedure can present difficult questions.<sup>358</sup> He gives as an example the statement “bring identification with you to the polls” in a state that does not have a voter identification requirement. Such a statement might deter voters without identification from voting.<sup>359</sup>

A law prohibiting intentionally misleading, as well as literally false, statements about election procedures would, like a law proscribing only false statements, vindicate an important, perhaps even compelling, purpose of the election domain. Concededly, the greater scope and uncertainty of such a law might have a more significant impact on the legitimizing and information functions of the domain of public discourse. Still, since it proscribes only intentionally deceptive statements about election procedures, not opinions about the subject of the election, the detriment to this domain would be minimal. Thus, like a ban on literally false statements, this law should be allocated to the election domain. But if, as Hasen contends, such a law “would open up prosecutorial discretion and the potential for political gamesmanship,”<sup>360</sup> then the law should be deemed unconstitutional. It should be invalidated, however, not because it fails to pass the strict scrutiny applicable to content-based restrictions on speech in the domain of public discourse. Rather, if Hasen is right in his assessment, it should be unconstitutional because the law on balance fails to promote, and may even undermine, the key purpose of the election domain to promote fair elections.

Having considered regulations on a type of speech falling squarely within the election domain, I now want to move to the other end of the spectrum and discuss regulations that, in my view, should unquestionably be allocated to the domain of public discourse.

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358. *Id.* at 71–72.

359. *Id.* at 72.

360. *Id.*

### *B. Laws Punishing Lies About Ballot Measures*

Suppose that Beth, a reproductive rights activist opposing a state ballot initiative restricting certain abortion procedures, makes statements that she knows to be false about the medical necessity of late-term abortions. This lie seems for First Amendment purposes basically indistinguishable from Alan's lie, discussed above, about the causes and effects of climate change.<sup>361</sup> Even if prohibiting lies in public discourse would improve the reliability of the information and perspectives provided to the electorate, such restrictions would, as I argued above, also have a significant, detrimental effect on the legitimacy of the legal system as a whole, as well as on the morality of enforcing particular laws against dissenters. The only relevant difference between Alan's lies and Beth's lies is that the cumulative effect of lies about a ballot initiative are arguably more likely to result in misguided laws than lies in public discourse that influence public opinion generally. And lies made by official sponsors of a ballot measure or by committees, such as those alleged in *119 Vote No! Committee*, might have a particularly pernicious effect as compared to bloggers like Beth lying about a ballot measure.

To begin with, the interest in preventing voters from being deceived into enacting misguided laws does not directly relate the core function of the election domain of assuring fair and efficient elections. But more fundamentally, this justification runs headlong into the basic principle of popular sovereignty that, as discussed in Section II.B.1, it is wrong in principle for government to prohibit speech in order to prevent the people from being misled about a matter within their capacity as ultimate sovereign. For this reason, laws prohibiting lies about ballot initiatives should be allocated to the domain of public discourse, where they will be subject to strict scrutiny and invalidated.<sup>362</sup>

### *C. Laws Regulating Lies by and about Candidates*

As just discussed, with respect to laws banning lies about ballot measures, it makes no difference if the law punishes an independent speaker or the official sponsors of the measure. In contrast, with regard to laws prohibiting lies in candidate elections, the distinction between speech

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361. *See supra* Section II.B.1.a.

362. Because the basic precept of American popular sovereignty that it is wrong for government to punish lies in public discourse in order to prevent the people from adopting an unwise law carries over to the election domain, the result would be the same even if the law were allocated to the election domain. *See supra* note 344 and accompanying text.

made independent of a candidate's campaign and speech made by a candidate or those associated with a candidate's campaign becomes crucial.

*1. Laws Prohibiting Anyone from Making Knowingly or Recklessly False Statements about a Candidate for Public Office*

Suppose that Beth, the pro-choice blogger, falsely accuses a pro-life candidate for the United States Senate of having recently paid for his daughter to have an abortion. Suppose further that, in making this allegation, Beth had no reason to believe that it was true: she just made it up. Finally, suppose that Beth is criminally charged under a law prohibiting knowingly or recklessly false statements about a candidate for political office.

For basically the same reasons I gave in discussing Beth's lie about the ballot measure, a law punishing Beth for this lie should be allocated to the domain of public discourse. This assignment, however, does not necessarily mean that the lie is protected. If accusing someone of paying for an abortion is defamatory under these circumstances, the First Amendment would not protect the statement. But it does mean that lies about candidates should be treated precisely the same as speech by citizens about elected officials made in public discourse, with all of the constitutional protections afforded such expression. Accordingly, a law that prohibited anyone from lying about a candidate for public office, as did a provision of the Ohio law at issue in *SBA List*, would be vulnerable to invalidation as substantially overbroad.<sup>363</sup>

*2. Laws Prohibiting Lies by a Candidate About an Opponent*

Now suppose instead that this false accusation is made not by an individual acting independently of the campaign, but rather by the opposing candidate or that candidate's organization.<sup>364</sup> Under the proposed framework, this law should be assigned to the election domain. The law directly promotes the fairness concern of the election domain by punishing lies by candidates or their organizations about other candidates. Indeed, such a law can be thought of as a basic ground rule for a fair contest analogous to a rule prohibiting boxers from hitting each other below the belt. Relatedly, as Professor William Marshall observes about campaign falsehoods in general, "false statements can lead or add to voter alienation

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363. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

364. The Kentucky law involved in *Brown v. Hartlage*, though not proscribing lies generally, applied only to speech by candidates. In contrast, the Ohio law, which generally proscribed election lies, applied to anyone. Compare *Brown v. Hartlage*, 456 U.S. 45, with *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

by fostering cynicism and distrust of the political process.”<sup>365</sup> Scurrilous campaign lies by candidates about their opponents are likely to be a particularly potent source of voter alienation. Accordingly, laws seeking to curb such expression will also promote this concern of undoubted relevance to the election domain.

At the same time, laws limited to prohibiting lies by candidates, or those acting in concert with them, will not impair the core legitimating function of the domain of public discourse. Unlike restrictions against lying in public discourse imposed on ordinary citizens like Alan or Beth, laws prohibiting candidates from lying about their opponents will not significantly diminish a candidate’s allegiance to the legal system or undermine the morality of applying to candidates for public office laws with which they can reasonably disagree. Although a subsidiary purpose of a candidate’s speech might sometimes be to contribute to public opinion in the hopes of changing laws or policy, this is rarely, if ever, the primary purpose of such speech. Rather, the dominant purpose of such expression is to influence public opinion in order to get elected.

A more realistic concern is the adverse consequences that such laws might have on candidates’ supplying the electorate with useful information. Specifically, it is possible that the beneficial effect of a ban on knowing or reckless falsehood by candidates would be outweighed by the “chilling effect” such a prohibition might have on truthful speech. Mitigating this concern is the requirement, common in contemporary laws regulating campaign lies, that the government must show by clear and convincing evidence that the false statement was made with knowledge of its falsity or with reckless disregard for the truth. On balance, then, a law prohibiting a candidate from making false statements about another candidate should be deemed part of the election domain rather than part of the domain of public discourse.

Again, this does not mean that such a law is necessarily constitutional. Of particularly serious concern is “the risk of censorious selectivity by prosecutors” noted by Justice Breyer. Relatedly, there is reason to be skeptical about whether “government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech.”<sup>366</sup> There is, it is true, little to be concerned about in this regard when the statement is easily verifiable, as with, for instance, an accusation

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365. William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 295 (2004).

366. *Rickert v. Washington*, 168 P.3d 826, 829 (Wash. 2007).

that a candidate has been convicted of a felony. It is with more complicated questions that this problem will likely arise, such as with claims about “a candidate’s voting record on a particular issue.”<sup>367</sup> Determining whether such claims are true or false “may very well require an in-depth analysis of legislative history that will often be ill-suited to the compressed time frame of an election,” making any such determination “exceedingly difficult.”<sup>368</sup>

It could therefore be strongly argued that the purpose of the election domain in promoting fair elections will actually be undermined rather than promoted by bans on election lies even if limited to falsehoods by candidates about their opponents. I do not, however, have the expertise in election law to make a confident judgment about this difficult empirical matter.

Another objection is that punishment of even knowing falsehoods violates the basic precept of American popular sovereignty, discussed in Section II.B.1, that the people must be trusted, free from government guardianship, to separate truth from falsehood. Significantly, however, as also explained above, a ban on candidates making knowingly or recklessly false accusations about an opponent can fairly be justified on different grounds—namely, maintaining rules for a fair contest and preventing voter alienation.<sup>369</sup> No doubt part of the motivation for the proscription of lies by candidates is to keep the voters from being misled.<sup>370</sup> But it is a familiar and salutary feature of First Amendment jurisprudence that the validity of a law is judged by its justification, not the actual motivation of legislators who enacted it.<sup>371</sup>

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367. *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1256 (2015).

368. *Id.* An example of a claim about a voting record whose truth or falsity is “exceedingly difficult” to ascertain is the accusation in *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016), that Congressman Driehaus supported taxpayer-funded abortion because he voted for the Patient Protection and Affordable Care Act. See Sam Baker, *The Right to Lie in Campaigns Is Safe, for Now*, THE ATLANTIC (June 16, 2014), <https://www.theatlantic.com/politics/archive/2014/06/the-right-to-lie-in-campaigns-is-safe-for-now/440508/> (“SBA List believes its attack is entirely true, citing the structure of the health care law’s insurance subsidies, which calls into question whether an attack like this one could ever be ruled definitively true or false.”).

369. It is true that these justifications are intrinsically bound up with preventing the electorate from being misled. But, as with defamation laws, preventing people from being misled is not the ultimate justification. See *supra* note 312.

370. Cf. *Marshall*, *supra* note 365, at 294 (“First, and most obviously, false statements can distort the electoral process.”).

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

*3. Prohibition of False or Misleading Statements by Candidates About Incumbency or Party Affiliation*

There can be little doubt that prohibition of false statements by a candidate about matters of incumbency or party affiliation are properly allocated to the election domain. Such a prohibition directly promotes the domain's core function of promoting fair and efficient elections. For instance, government must have authority to designate incumbency or party affiliation on the ballot. Laws prohibiting candidates from falsely claiming that they are the incumbent or the nominee of a political party, or from making statements likely to mislead voters about these matters, are directly related to this authority. In contrast, any effect of such prohibitions on the legitimizing or informational function of public discourse would be de minimis.

Considered as part of the government's authority to regulate speech in the domain of elections, a law banning literally false claims by candidates about incumbency or party affiliation, made either knowingly or recklessly, presents no substantial constitutional concern. A somewhat more difficult issue is raised by the prohibition of misleading claims, such as those involved in *Treasurer of Committee to Elect Lostracco v. Fox*,<sup>372</sup> one of the election cases cited in Justice Breyer's concurring opinion in *Alvarez*. There, the campaign material of a judicial candidate referred to the candidate as "Judge Fox."<sup>373</sup> While this statement was arguably not literally false in that Fox, who was running for Circuit Judge, was currently a District Judge, this usage was likely to mislead a voter into thinking that Fox was the incumbent Circuit Judge and, thus, give him an unfair advantage over his opponent.<sup>374</sup> While Breyer is certainly correct that, in the political process, "the risk of censorious selectivity by prosecutors" is generally "high," it is not at all apparent that this is true with respect to misleading claims about incumbency and party affiliation. For this reason, such laws should be deemed facially constitutional, with any challenges to selective prosecution made on an "as applied" basis.

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372. 389 N.W.2d 446 (1986).

373. *Id.* at 447.

374. *Id.* at 447–48. Because the ultimate justification is fair play among candidates, this justification would not violate the precept, discussed in Section II.B.1, that it is wrong in principle for government to suppress speech to prevent the people from being misled about a collective decision within their capacity as ultimate sovereign. See *supra* note 369 and accompanying text.



#### *4. Comprehensive Bans on Lies by Candidates*

Finally, we come to laws that broadly ban candidates from knowingly or recklessly making false statements material to an election, including lies about themselves. To begin with, the “ground rule for a fair election” justification for such a comprehensive ban on lies is more attenuated than with a prohibition against candidates lying about other candidates. On the other hand, a broader proscription might more effectively advance the interest in preventing voter alienation. With respect to its effect on public discourse, a broader ban on candidate lies would, in light of the primary reason that candidates engaging in campaign speech, likely not have a significantly greater negative effect on political legitimacy than would a narrower proscription on candidates lying about each other.

Though such a comprehensive ban on lying by candidates in campaigns for public office might arguably improve the usefulness of the information and perspectives that candidate speech provides the electorate, it is also possible that the “chilling effect” of such a ban could impair the audience’s vital interest in receiving information. This is a difficult empirical question that needs further investigation. Still, comprehensive as the ban may be, since it applies only to candidate speech and its effect on the core legitimizing function of public discourse would be minimal, such a ban should be allocated to the election domain.

But even when analyzed as a regulation in such a government-managed domain, the constitutionality of such a ban can be seriously doubted. Once again, the major problem would be “the risk of censorious selectivity by prosecutors,” but now with respect to a vast range of speech, some involving statements whose falsity will not be readily verifiable. In addition, as discussed above, such a broad law would be more difficult to justify as a basic ground rule for fair elections than a narrower ban on candidates lying about other candidates. And while preventing voter alienation may be a relevant function of the election domain, it is not directly related to the domain’s core function to assure fair and efficient elections. For these reasons, it could be forcefully argued that such a law would be unconstitutional.

#### *D. The Importance of the Type of Remedy*

The type of remedy imposed by a regulation on campaign lies is relevant both to allocating the regulation to its proper domain and determining whether the regulation is a constitutional regulation of speech in the domain to which it is assigned. Criminal sanctions will tend to have a greater “chilling effect” on non-targeted speech than will civil sanctions. With

respect to speech about ballot measures or election speech by those not associated with the campaign, this distinction will not matter: imposition of even civil penalties would still have an undue chilling effect and, thus, would be unconstitutional. In contrast, civil penalties rather than criminal sanctions might support the constitutionality of even broad bans on lies by candidates.

But a remedy that might assure the constitutionality of a regulation on *all* election lies, arguably even including those about ballot initiatives or about candidates by ordinary citizens, is government counterspeech in the form of an official determination that a challenged statement is false. A provision providing for such a procedure was upheld by the United States Court of Appeals for the Sixth Circuit in *Pesttrak v. Ohio Elections Commission*.<sup>375</sup> The Ohio Election Code prohibited anyone during a political campaign from using campaign materials to publish any “false statement, either knowing the same is false or with reckless disregard of whether it was false.” It empowered the Ohio Elections Commission to determine whether challenged statement violated this provision and to announce its determination to the electorate.<sup>376</sup> The statement at issue, which the Commission found to be false, was made in a newspaper advertisement placed by a candidate in a primary election for the office of county commissioner alleging that the incumbent commissioner had committed illegal acts.<sup>377</sup> The court, in an opinion by Judge Danny J. Boggs, found that investing the Commission with what it referred to as a “truth declaring” function squares “exactly with the tenet that ‘the usual cure for false speech is more speech.’”<sup>378</sup>

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375. 926 F.2d 573, 575 (6th Cir. 1991).

376. *Id.* at 575, 579.

377. *Id.* at 575, 576.

378. *Id.* at 579 (quoting *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1206 n.27 (11th Cir. 1985)). Nine years later, the Ohio Supreme Court upheld against a First Amendment challenge the authority of the Election Commission under Ohio’s false statement law to issue a reprimand letter to a candidate for distributing, with knowledge of its falsity or reckless disregard for whether it was false or not, a brochure accusing his opponent of bribery. See *McKimm v. Ohio Election Comm’n*, 89 Ohio St.3d 139 (2000). As discussed above, the Sixth Circuit recently facially invalidated the Ohio false statements law in its entirety in *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016). See *supra* notes 253–274 and accompanying text. Shortly thereafter, and relying heavily on the Sixth Circuit’s decision in *Susan B. Anthony List*, the Ohio Court of Appeals also found the law facially unconstitutional. See *Magda v. Ohio Elections Comm’n*, 2016-Ohio-5043, 58 N.E.3d 1188.

Admittedly, such an official truth declaring function might have some “chilling effect” on speakers who refrain from making true statements for fear that the government will brand them liars. Still, any such chilling of expression is miniscule as compared to the chilling effect of even civil fines, let alone criminal penalties. A much more formidable objection to this type of remedy is that it is not the proper role of government to denounce false claims in the political context; rather, the appropriate remedy is counterspeech by private citizens or fact checking by news organizations. But here I think it is important to distinguish between practical objections to the government assuming this function and the objection that it is, *in principle*, wrong for government to play such a role in the political arena.

The practical objection is that government cannot be trusted to determine the truth or falsity of statements made in the highly charged and often partisan context of politics. Particularly in today’s political environment, this objection has considerable merit. For this reason, at least as a policy matter—and perhaps even as a constitutional one—even this non-punitive remedy should not be applied to lies about ballot measures or about candidates by members of the public not associated with a campaign. In these contexts, the rough and tumble of public discourse should be allowed to sort truth from falsity without the supplement of potentially biased government findings. Where such a remedy would be both useful and appropriate is as an alternative to coercive measures of questionable constitutionality, such as a ban on candidates lying about other candidates.<sup>379</sup> Use of this non-punitive remedy would greatly strengthen the case for the constitutionality of such laws.

The objection on principle, reflected in several lower court opinions,<sup>380</sup> is that it is simply not the job of government to protect people from being misled by political speech. This is similar to the basic precept of American popular sovereignty that I identify and discuss in Section II.B.1—but different in one crucial respect. As I tried to demonstrate in that discussion, it is wrong in principle for the government to prevent the ultimate sovereign, which in the United States is “We the People,” from being exposed to lies in order to prevent the sovereign from being misled about some matter within the sovereign’s authority. But as I also have tried to show, it is not in principle wrong for the government to advise the sovereign that some statement is, in the government’s judgment, a lie. So

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379. *See supra* Section III.C.2.

380. *See supra* note 344.

while such a government “Truth Commission” may, for pragmatic reasons, be a bad idea—and because of these practical concerns arguably even unconstitutional—such a procedure is not contrary to this basic democratic precept.

### *Conclusion*

As this Article was to go to press, the United States Supreme Court decided an important campaign speech case that casts light on several issues discussed in this Article. In *Minnesota Voters Alliance v. Mansky*,<sup>381</sup> the Court invalidated on First Amendment grounds a state law prohibiting individuals from wearing political badges, buttons or other political insignia inside a polling place on Election Day.

Writing for the majority, Chief Justice Roberts, joined by Justices Kennedy, Thomas, Ginsburg, Alito, Kagan and Gorsuch, found that a polling place was a “nonpublic forum.”<sup>382</sup> The Court explained that “[t]he government may reserve such a forum ‘for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because the public officials oppose the speaker’s view.’”<sup>383</sup> Because the law did not discriminate on basis of viewpoint, the question for decision was “whether Minnesota’s ban on political apparel is ‘reasonable in light of the purpose served by the forum: voting.’”<sup>384</sup> To answer this question, the Court first inquired whether Minnesota was “pursuing a permissible objective” in banning apparel with political messages inside the polling place.<sup>385</sup>

The Court easily found that it was. “Casting a vote,” the Court explained, “is a weighty civic act, akin to a jury’s return of a verdict, or a representative’s vote on a piece of legislation. It is a time for choosing, not campaigning.”<sup>386</sup> For that reason, the Court held that the government “may reasonably decide that the interior of the polling place should reflect that

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381. 138 S. Ct. 1876 (2018).

382. *Id.* at 1886. Justice Sotomayor, joined by Justice Breyer, dissented. She argued that the Court should have certified the case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban. *Id.* at 1893 (Sotomayor, J., dissenting).

383. *Id.* at 1885 (majority opinion) (quoting *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 46 (1983)).

384. *Id.* at 1886 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

385. *Id.*

386. *Id.* at 1887.

distinction.”<sup>387</sup> Thus, the Court concluded that “in light of special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.”<sup>388</sup>

The Court next inquired whether the regulation was reasonable, and found that it was not. To pass this reasonableness test, “the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.”<sup>389</sup> But because of the “unmoored use of the term ‘political’ in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court,” the Court held that the restrictions imposed under the law “fail even this forgiving test.”<sup>390</sup> As evidence of the lack of “some sensible basis” for distinguishing between prohibited and permitted expression under the Minnesota law, the Court cited the answers given by the Minnesota’s lawyer at oral argument before the Court:

A shirt declaring “All Lives Matter,” we are told, could be “perceived” as political. How about a shirt bearing the name of the National Rifle Association? Definitely out. That said, a shirt displaying a rainbow flag could be worn “*unless* there was an issue on the ballot” that “related somehow . . . to gay rights.” A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the *First* Amendment? “It would be allowed.”<sup>391</sup>

Such an “indeterminate prohibition,” the Court admonished, “carries with it [t]he opportunity for abuse . . . .”<sup>392</sup> And if voters are subject to, or even witness, “unfair or inconsistent enforcement of the ban, the State’s interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.”<sup>393</sup> Significantly, however, in invalidating the Minnesota law, the Court emphasized that it was not saying that, in trying to advance the purposes of the polling place by banning speech inimical to those purposes, Minnesota

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387. *Id.*

388. *Id.* at 1888.

389. *Id.*

390. *Id.*

391. *Id.* at 1891 (alteration in original) (citations omitted).

392. *Id.* (alteration in original) (quoting *Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987)).

393. *Id.*

“has set upon an impossible task.”<sup>394</sup> It noted that other States “have laws proscribing displays (including apparel) in more lucid terms.”<sup>395</sup>

*Mansky* sends signals both about the method of analysis the Court might employ in determining the constitutionality of bans on lies in political campaigns and about which types of bans it might uphold and which it will likely invalidate. A potentially significant feature of Court’s decision is that, consistent with the framework I suggest in this Article, the Court treated Minnesota’s ban on apparel with political messages in the polling place as a regulation not of public discourse but as a speech regulation in a government-managed domain. As a result, the Court did not apply strict scrutiny to what was manifestly a content-based restriction of expression; rather, it inquired—again consistent with the approach I suggest—whether this regulation promoted the purposes of the domain in a manner that is both viewpoint neutral and reasonable.

I do not want, however, to exaggerate the significance of the domain allocation in this case. Because the law in question regulated speech on government property, the Court was able to employ “forum analysis” to allocate the ban on political apparel at issue to a government-managed domain (that is, a non-public forum). Accordingly, the Court was able to avoid any conflict with the “All-Inclusive Approach.”<sup>396</sup> It remains to be seen, therefore, whether the Court will engage in such domain allocation when faced with a narrow ban on campaign lies serving some core purpose of the election domain but which is not confined to speech on government property. There are, however, two indications in *Mansky* that it might be willing to finally recognize the domain allocation implicit in the cases discussed above.<sup>397</sup>

First, there is the Court’s response to the state’s argument that it properly banned “Please I.D. Me” buttons because they were designed to confuse voters that they needed photo identification to vote. The Court rejected that argument because it found that the asserted interest did not align with the state’s construction of the law.<sup>398</sup> In doing so, however, the Court stated: “We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”<sup>399</sup> Notably, and perhaps significantly, the Court does not limit its statement that government may

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394. *Id.*

395. *Id.*

396. *See supra* Section II.A.

397. *See supra* Section III.B.3.

398. *Mansky*, 138 S. Ct. at 1889 n.4.

399. *Id.*

undoubtedly prohibit such intentionally misleading speech to expression occurring in a polling place.

This omission may indicate that if and when faced with a law banning messages intended to mislead voters about voting requirements and procedures that it wants to uphold, the Court might extend the government-managed election domain it recognized in *Mansky* beyond regulation of speech on government property to other settings. For instance, it might uphold a ban that applied not just to false or misleading statement in the polling place but also extended to flyers put under doors of potential voters reading: “Republicans Vote on Tuesday, Democrats on Wednesday<sup>400</sup> and Make Sure to Bring Photo I.D.”<sup>401</sup> Also suggesting that the Court might in such a case expressly allocate speech occurring beyond the confines of government property to the election domain is this statement near the end of its opinion: “Cases like this ‘present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote.’”<sup>402</sup> It is also possible, of course, that the Court might, following the plurality opinion it cites for this statement,<sup>403</sup> uphold the law as comporting with strict scrutiny.

This brings us to the second—and somewhat clearer—signal that *Mansky* sends about regulation of campaign lies. Whether it employs the domain allocation approach suggested in this Article or subjects the law to strict scrutiny, the Court seems inclined to uphold narrow restrictions not just on outright lies about voting requirements and procedures but intentionally misleading statements on such subjects as well.<sup>404</sup> By the same token, *Mansky* confirms that whether the Court uses strict scrutiny or the often more “forgiving” standard applicable to speech regulation in a government-managed domain,<sup>405</sup> broad bans on campaign lies will be found to violate the First Amendment.

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400. See *supra* note 355 and accompanying text.

401. See *supra* note 359 and accompanying text.

402. *Mansky*, 138 S. Ct. at 1892 (quoting *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion)).

403. See *supra* note 402.

404. For discussion of an argument that bans on intentionally misleading (as opposed to literally false) statements about voting requirements and procedures should be deemed unconstitutional, see *supra* notes 360 and accompanying text.

405. See *Mansky*, 138 S. Ct. at 1888.