Montana Law Review

Volume 74
Issue 1 *Winter*

Article 4

5-13-2013

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Recommended Citation
Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Mont. L. Rev. 53 (2013).
Available at: http://scholarship.law.umt.edu/mlr/vol74/iss1/4

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A CONSTITUTIONAL RIGHT TO LIE IN CAMPAIGNS AND ELECTIONS?

Richard L. Hasen*

I. Introduction

Election 2012 may well go down in history as the "4 Pinocchios Election." It is perhaps no coincidence that the recent election season saw both a rise in the amount of arguably false campaign speech and the proliferation of journalistic "fact checkers" who regularly rate statements made by candidates and campaigns.[1] Journalistic ratings such as PolitiFact's "Truth-o-meter" rank candidate statements from "true" and "mostly true" to "false" and even "pants on fire."[2] The *Washington Post* rating system, which relies upon the judgment of its fact checker, Glenn Kessler, uses one to four "Pinocchios" for false statements.[3] The granddaddy of fact checking groups, FactCheck.org, while avoiding a rating system, offers analysis that regularly describes controversial campaign claims as "false" or "wrong."[4]

Both the Romney and Obama 2012 presidential campaigns received stinging ratings from fact checkers. The *Washington Post*'s fact checker, Glenn Kessler, gave the Obama campaign "4 Pinocchios" for claiming that Mitt Romney, while working at Bain Capital, "outsourced" jobs and was a "corporate raider."[5] Romney's campaign similarly got "4 Pinocchios" for

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1. Michael Cooper, *Campaigns Play Loose with Truth in Fact-Check Age*, New York Times, http://www.nytimes.com/2012/09/01/us/politics/fact-checkers-howl-but-both-sides-cling-to-false-ads.html (Aug. 31, 2012).

2. *See* PolitiFact, *About PolitiFact*, Tampa Bay Times, www.politifact.com/about (accessed Oct. 31, 2012) ("PolitiFact is a project of the *Tampa Bay Times* and its partners to help you find the truth in politics. Every day, reporters and researchers from PolitiFact and its partner news organization examine statements by members of Congress, state legislators, governors, mayors, the president, cabinet secretaries, lobbyists, people who testify before Congress and anyone else who speaks up in American politics. We research their statements and then rate the accuracy on our Truth-O-Meter – True, Mostly True, Half True, Mostly False and False. The most ridiculous falsehoods get our lowest rating, Pants on Fire.").

3. Glenn Kessler, *The Fact Checker: The Truth Behind the Rhetoric*, Washington Post, http://www.washingtonpost.com/blogs/fact-checker (accessed Oct. 31, 2012).

4. *See* The Annenberg Public Policy Center, *FactCheck.org*, www.factcheck.org (accessed Oct. 31, 2012).

5. Glenn Kessler, *4 Pinnochios for Obama's Newest Anti-Romney Ad*, Washington Post, http://www.washingtonpost.com/blogs/fact-checker/post/4-pinocchios-for-obamas-newest-anti-romney-ad/2012/06/20/gJQAGuvx6qV_blog.html (June 21, 2012).

claiming there was an "Obama plan" to weaken federal welfare law and issue welfare checks to people who do not work.[6]

Romney's campaign seemed to bear more of the brunt from the fact-checking enterprise. Based solely upon Kessler's subjective assessment of truth, the *Washington Post* fact checker rated Romney ads and statements with an average of 2.40 Pinocchios to Obama's 2.11.[7] Perhaps the greatest media attack on the truthfulness of Romney's campaign came in response to the acceptance speech of Romney's running-mate, Representative Paul Ryan, which the *New York Times* described as containing "a number of questionable or misleading claims."[8]

Whether campaigns are resorting to lies and distortion more often than in previous elections and, if so, why are interesting questions beyond that which I can explore in this brief Article. False and misleading speech may be increasing thanks to the proliferation of the internet and a decline in uniform trustworthy sources of news, such as the national news networks and major newspapers. Political polarization also may play a role, with partisans egged on to believe unsupported claims by the modern day partisan press, in the form of FOX News, MSNBC, and liberal and conservative blogs and websites.

Fact check operations also are controversial to journalists, who always have been in the business of resolving conflicting factual claims as part of the news gathering process. Some journalists take issue with the effectiveness of fact checkers. Media critic Jack Shafer declares, "Give [candidates] a million billion Pinocchios and they'll still not behave."[9] Others defend the "fact check" process but see it losing its effectiveness.[10]

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6. Glenn Kessler, *Spin and Counterspin in the Welfare Debate*, Washington Post, http://www.washingtonpost.com/blogs/fact-checker/post/spin-and-counterspin-in-the-welfare-debate/2012/08/07/61bf03b6-e0e3-11e1-8fc5-a7dcf1fc161d_blog.html (Aug. 8, 2012). The Obama campaign scored only 3 Pinocchios for arguing that "Romney sought the same sort of [welfare law] waiver authority when he was governor, when there is little evidence that is the case." *Id.*

7. Washington Post, *Fact or Fiction?*, http://www.washingtonpost.com/wp-srv/special/politics/fact-checker-fact-or-fiction/ (statistics as of Nov. 18, 2012).

8. Cooper, *supra* n. 1 ("The cycle [of disregarding fact-checkers when one's side is attacked] was on display at the Republican convention when Mr. Romney's running mate, Representative Paul D. Ryan of Wisconsin, made a number of questionable or misleading claims in his speech. Even before he stopped speaking, some of his claims were being questioned on Twitter. Soon fact-checkers were highlighting some of the misleading statements. More partisan sites rushed to Mr. Ryan's defense with posts finding fault with the first round of fact checks."). *See also* Michael Cooper, *Facts Take a Beating in Acceptance Speeches*, New York Times, http://www.nytimes.com/2012/08/31/us/politics/ryans-speech-contained-a-litany-of-falsehoods.html (Aug. 31, 2012).

9. Jack Shafer, *Looking for Truth in All the Wrong Places*, Reuters, http://blogs.reuters.com/jackshafer/2012/08/31/looking-for-truth-in-all-the-wrong-places/ (Aug. 31, 2012).

10. Dan Balz, *President Obama, Mitt Romney Running a Most Poisonous Campaign*, Washington Post, http://www.washingtonpost.com/politics/a-most-poisonous-campaign/2012/08/15/16715a08-e6e7-11e1-8f62-58260e3940a0_story_1.html (Aug. 15, 2012) ("News organizations instituted fact-checking and ad watches in reaction to earlier campaigns, when candidates were getting away with half-truths and

In 2012, fact checking itself came under attack from the right, with some advancing the claim that fact checkers are a biased part of the "liberal media."[11] Conservatives disagreed, for example, that Romney made a false statement about Obama's welfare policies.[12] Neil Newhouse, the Romney campaign's pollster, proclaimed that "[w]e're not going to let our campaign be dictated by fact-checkers."[13] Some Democrats viewed this as a statement that Republicans did not care about facts, while Republicans saw this as a statement that the fact-checkers were biased. As this controversy shows, in 2012 even statements about fact checking were subject to divergent interpretations.

In this highly charged partisan atmosphere, in which each side cannot agree upon the basic facts, mudslinging has become terribly common, and the media are not able to meaningfully curb candidates' lies and distortions, it is tempting to consider federal and state legislation to deter and punish false campaign speech. Why not let courts or commissions sort out truth from fiction? Indeed, a number of states already have laws in place that provide some government sanction for false campaign speech.

Consider these recent alleged campaign lies: that a state supreme court justice running for reelection let a child rapist go free;[14] that a local candidate was taking bribes;[15] that a judicial candidate who used to be a judge but was no longer a judge was the incumbent;[16] and that an assisted suicide ballot measure would allow doctors to take people's lives "without safeguards."[17]

False campaign speech might trick voters into voting for the "wrong" candidate or voting the "wrong" way on a ballot measure. (By "wrong," I

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worse, with little accountability. These have become robust and increasingly comprehensive. But they are not providing much of a check on the campaigns' behavior."). *See also* Brendan Nyhan, *Ignored Fact Checks and the Media's Crisis of Confidence*, Columbia Journalism Review, http://www.cjr.org/swing_states_project/ignored_factchecks_crisis_of_confidence.php?page=all (Aug. 30, 2012); and Brendan Nyhan & Jason Riefler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 Political Behavior 303 (2010), http://www.springerlink.com/content/064786861r21m257/fulltext.html (Mar. 30, 2010).

11. James Taranto, *The "Pinocchio Press:" The Bizarre Rise of "Fact-Checking" Propagandists*, Wall Street Journal, http://online.wsj.com/article/SB10000872396390444301704577631470493495792.html (Sept. 4, 2012); *Fact Checking the Fact Checker (cont.)*, The Weekly Standard, http://www.weeklystandard.com/articles/fact-checking-fact-checkers-cont_652907.html (Oct. 1, 2012).

12. Mark Hemingway, *Obama's Palace Guard*, Weekly Standard, http://www.weeklystandard.com/articles/obama-s-palace-guard_652895.html (Oct. 1, 2012).

13. Cooper, *supra* n. 1.

14. Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century,* 20 Wm. & Mary Bill of Rts. J. 1085, 1085–1086 (2012).

15. *McKimm v. Ohio Elections Commn.*, 729 N.E.2d 364 (Ohio 2000), *cert. denied*, 531 U.S. 1078 (2001).

16. *Treas. of the Comm. to Elect Gerald D. Lostracco v. Fox,* 389 N.W.2d 446 (Mich. 1986).

17. *Wash. ex rel Pub. Disclosure Commn. v. 119 Vote No! Comm.*, 957 P.2d 691, 711 (Wash. 1998) (Talmadge, J., concurring).

mean that voters would be voting inconsistently with how they would vote if they did not hear campaign lies.) Laws regulating false campaign speech could assist voters to make informed decisions about which candidate or ballot measure to support. Similarly, false election speech might trick voters into making a disenfranchising error, such as showing up at the wrong place to vote. Laws barring false election speech, such as false statements about where and when to vote, protect the right to vote and the integrity of the electoral process.

But laws regulating false election and campaign speech raise a host of potential problems, most importantly the possibility that these laws will be the subject of manipulation by government authorities who want to favor one side or the other in an election. The government also might make mistakes in ferreting out the truth and ironically lead voters to make wrong decisions. Finally, we depend upon the campaigns themselves to allow voters to separate truth from lies and decide how to vote in line with voters' preferences. Laws targeted at false campaign speech regulate political speech at the core of the First Amendment and run the risk of doing more harm than good. The key is to achieve an appropriate balance.

For many years, courts have divided on the constitutionality of laws regulating false campaign speech, with some courts upholding some false campaign speech laws and other courts striking them down. This past June, however, the Supreme Court issued an opinion in *U.S. v. Alvarez*,[18] a case which no doubt will cause courts to reconsider the constitutionality of such laws. Although *Alvarez* did not involve campaign speech, the Supreme Court discussed the general question whether the Constitution protects knowing lies in the context of a federal law barring false statements about military honors. The Court issued no majority opinion, but all of the opinions had something to say about laws regulating false speech generally, and Justice Breyer's opinion (for himself and Justice Kagan) cast serious doubt on the constitutionality of many laws regulating false campaign (and possibly false election) speech. The result of *Alvarez* is that laws regulating false campaign speech are in even more constitutional trouble than they were before, and any attempts to regulate such speech will have to be narrow, targeted, and careful in their choice of remedies.

Part II of this Article briefly describes the pre-*Alvarez* split in the lower courts on the regulation of false campaign and election speech and the arguments that had been advanced for and against the constitutionality of regulating false campaign speech. Part III describes the Supreme Court's fractured opinion in *U.S. v. Alvarez*. Part IV discusses how *Alvarez* may affect the constitutional calculus in the false campaign speech arena and

18. *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012), discussed *infra* pt. III.

argues that, in light of *Alvarez*, courts should hold unconstitutional most broad state laws barring false speech in campaigns. But courts should reject challenges to narrower laws that, under an actual malice/clear and convincing evidence standard, (1) bar false (though not misleading) election speech about the mechanics of voting, such as false statements about the date and time of voting; (2) give a government election authority the power to reject false campaign speech submitted for official ballot materials; and (3) allow a jury to punish defamatory speech about candidates made with actual malice. Each of these proposed laws is consistent with the plurality's and Justice Breyer's opinions in *Alvarez*, although the defamation issue is somewhat in question.

The hardest case is whether the government has authority to enjoin or punish non-defamatory false campaign speech made with knowledge of falsity (actual malice) that has the potential to trick or defraud voters into changing their votes. Consider, for example, the false statement of a judicial candidate on a campaign poster that she is an incumbent judge, or a statement that the president has endorsed her for office. While the case is close, I argue that, following *Alvarez*, courts are likely to conclude that the risks of allowing the government to punish or enjoin false campaign speech outweigh the benefits of providing voters with truthful information. Further, the narrower solution to the problem of this type of false campaign speech is counterspeech from opposing candidates and the media, as well as potentially the use of a government "truth commission" with the power to declare, before the election but subject to judicial review, that campaign speech is false.

Government proclamations of truth, like journalistic fact checks, might be ignored or attacked by the campaigns. But such proclamations will focus voter attention on the issue of the veracity of questionable campaign speech. Under the First Amendment, we have to trust voters to do their best with such information. Truth commissions pose risks as well as harms, and it may be that counterspeech is the best we can do consistent with the First Amendment and the risks of the alternatives.

II. Constitutional Analysis of False Campaign Speech Laws Before *U.S. v. Alvarez*

This Part briefly reviews some of the major cases considering the constitutionality of laws regulating false campaign speech. The section is brief because others have covered this ground very well in great detail[19] and any

19. *See e.g.* Ashdown, *supra* n. 14; William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. Pa. L. Rev. 285 (2004); Becky Kruse, Student Author, *The Truth in Masquerade:*

new analysis of these issues will have to take into account the Supreme Court's new decision in *U.S. v. Alvarez*.

The Supreme Court has not spoken directly on the constitutionality of laws barring false campaign speech. The closest the Court has come to the issue is the case of *Brown v. Hartlage*,[20] in which the Court rejected an attempt to declare an election result void after the election winner was accused of violating a Kentucky law that barred a candidate from certain corrupt practices.[21] The candidate had promised not to take a salary if elected, and Kentucky courts had earlier held that promises not to take a salary violated the statute and could be grounds for voiding the election.[22]

The Supreme Court explained, "When 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, and that the restriction operate without unnecessarily circumscribing protected expression."[23] It held that applying this law to the candidate's statement and voiding his election violated the First Amendment for three reasons.

First, the Court held that Kentucky could not penalize general comments like this one made in a campaign: "a candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayers, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection."[24] Second, the Court rejected the idea that Kentucky could impose such a law on grounds 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."[25] Third, although the Court agreed that "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements,"[26] there was no evidence in this case that the candidate made the statement in anything other than good faith. He also withdrew the statement after learning it could violate state law.[27]

This statement in *Brown* about lesser protection for false speech, which the Supreme Court analogized to its treatment of defamation law, gave some credence to the idea that states could regulate false campaign

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Regulating False Ballot Proposition Ads through State Anti-False Speech Statutes, 89 Cal. L. Rev. 129 (2001); Carlton F.W. Larson, Student Author, *Bearing False Witness*, 108 Yale L.J. 1155 (1999).

20. *Brown v. Hartlage*, 456 U.S. 45 (1982).
21. *Id.* at 62.
22. *Id.* at 47–48.
23. *Id.* at 53–54.
24. *Id.* at 58–59.
25. *Id.* at 59–60.
26. *Brown*, 456 U.S. at 60.
27. *Id.* at 61–62.

speech. On the other hand, the rest of the Court's opinion extolled the virtues of free and robust campaign speech, in which candidates could engage in unfettered discussion of political issues. Perhaps unsurprisingly, courts since *Brown* had divided on the constitutionality of regulating false campaign speech.

In *Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee*,[28] the Supreme Court of the state of Washington divided sharply on the constitutionality of a law barring any person from sponsoring with "actual malice" a political advertisement containing a false statement of material fact. The statement would have to be material, and proof of a violation required "clear and convincing evidence." The term "actual malice" means that the statement was made either with knowledge of its falsity or reckless disregard as to its truth or falsity.[29]

The case arose out of a claim that opponents of a ballot measure concerning assisted suicide made false claims about what the ballot measure would do, including that the measure would allow doctors to take patients' lives "without safeguards." The Washington State Public Disclosure Commission referred the complaint to prosecutors, asking that the Committee and individual defendants be fined up to $10,000 plus costs, attorney fees, and treble damages. The trial court held that the advertisement criticizing the ballot measure did not contain material false statements. The intervener, the American Civil Liberties Union, sought a declaration that the statute was invalid. The trial court denied the relief, holding the statute constitutional.[30]

On appeal, the state Supreme Court divided bitterly, issuing four opinions. Justice Sanders, speaking for himself and two other Justices, held that the law violated the First Amendment of the United States Constitution, which protects freedom of speech. Justice Sanders stressed that the First Amendment has its "fullest and most urgent application" in political campaigns.[31] He rejected the idea that the State has "an independent right to determine truth and falsity in political debate."[32] Even the high standard of proof contained in the statute would not prevent "the chilling effect of possible government sanction."[33] Justice Sanders recognized that the state may have an interest in punishing malicious *defamatory* speech about a candidate but held the law went more broadly than simply targeting such defamatory speech. "Ultimately, the State's claimed compelling interest to shield

28. *119 Vote No! Comm.*, 957 P.2d 691.
29. *Id.* at 703 (Talmadge, J., concurring).
30. *Id.* at 693–694 (majority).
31. *Id.* at 694 (quoting *Brown*, 456 U.S. at 53).
32. *Id.* at 695.
33. *Id.* at 696.

the public from falsehoods during a political campaign is patronizing and paternalistic . . . . It assumes the people of the 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 this void."[34]

Justice Madsen, speaking for herself and one other Justice, agreed with the majority that the Constitution forbids laws punishing false speech concerning ballot measures, which the Justice saw as pure political speech. But relying upon U.S. Supreme Court cases holding it constitutional to award damages for defamatory statements made about public officials with actual malice, Justice Madsen concluded there was no constitutional impediment to broader laws covering false campaign speech concerning candidates.[35]

Justice Guy, speaking for himself and one other Justice, agreed that the advertisement at issue in the case did not violate the statute but disagreed strongly about the constitutionality of the Washington law on its face. "Calculated lies are not protected political speech. The elected representatives of the people have the right to pass laws which make malicious lying illegal in political campaigns; we have no constitutional duty to strike down such laws."[36]

Justice Talmadge, speaking for himself and one other Justice, issued a blistering opinion concurring in the judgment but disagreeing with the court on the constitutionality of the statute. Calling the Court "the first Court in the history of the Republic to declare First Amendment protection for calculated lies,"[37] he criticized the "sweep" of the majority's "encompassing" rhetoric. He accused the majority of being "shockingly oblivious to the increasing nastiness of modern American political campaigns" with their "'win-at-any-cost' attitude involving vilification of opponents and their ideas."[38] Justice Talmadge rejected the argument that the statute would chill political speech, saying it would only stop "malicious prevarication, not honest, robust political debate."[39] Relying on a number of Supreme Court and Washington state precedents, Justice Talmadge concluded that the First Amendment did not protect maliciously false statements. He concluded the state had a compelling interest in preserving the "sanctity of the electoral process."[40] He agreed with the majority only on the point that the trial court was correct in concluding that the challenged statement did not

34. *119 Vote No! Comm.*, 957 P.2d at 698–699.

35. *Id.* at 700 (Madsen, J., concurring).

36. *Id.* at 699 (Guy, J., concurring).

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

38. *Id.*

39. *Id.* at 701–702.

40. *119 Vote No! Comm.*, 957 P.2d at 707–708.

involve a deliberate lie, but instead contained "traditional political hyperbole."[41]

The Washington Supreme Court divided once again on the question of the constitutionality of laws barring false campaign speech in the 2007 case *Rickert v. Washington Public Disclosure Commission*.[42] In light of the *119 Vote No!* case, the Washington legislature had modified the statute to cover only false statements about a candidate in a campaign, but not false statements a candidate made about herself. In this case, unlike *119 Vote No!*, there seemed no question that someone, in this case a candidate, made a deliberately false statement. The candidate claimed that her opponent, an incumbent state Senator, voted to close a facility for the developmentally disabled.[43]

Four Justices wrote an opinion holding that the statute failed to survive strict scrutiny analysis under the First Amendment. Aside from the same arguments made by the plurality in the *119 Vote No!* case, the majority found this statute not narrowly tailored because it did not cover false statements made by a candidate about himself or herself. The remedy for the false speech was more speech:

> In the case at bar, Ms. Rickert made knowingly false or reckless statements about Senator Sheldon, a man with an outstanding reputation. Senator Sheldon and his (many) supporters responded to Ms. Rickert's false statements with the truth. As a consequence, Ms. Rickert's statements appear to have had little negative impact on Senator Sheldon's successful campaign and may even have increased his vote.[44]

Four Justices, in an opinion by Justice Madsen reiterating the points in her earlier *119 Vote No!* opinion, dissented, stating that the Constitution gave the state of Washington the right to punish false campaign speech aimed at candidates.[45] Chief Justice Alexander, writing only for himself in a controlling opinion, held in a single-paragraph concurrence that the new false political speech law was unconstitutional because it covered non-defamatory false statements about candidates. But Justice Alexander stated that a law aimed solely at defamatory false political speech would be constitutional.[46]

False campaign speech laws fared somewhat better in Ohio. In *Pestrak v. Ohio Elections Commission*,[47] the United States Court of Appeals for the Sixth Circuit upheld a portion of Ohio's law allowing a state board

41. *Id.* at 710.
42. *Rickert v. Wash. Pub. Disclosure Commn.*, 168 P.3d 826 (Wash. 2007).
43. *Id.* at 827.
44. *Id.* at 832.
45. *Id.* at 833 (Madsen, J., dissenting).
46. *Id.* at 833 (Alexander, C.J., concurring).
47. *Pestrak v. Ohio Elections Commn.*, 926 F.2d 573 (6th Cir. 1991).

to reprimand candidates for false campaign speech statements made with actual malice but struck down provisions allowing the board to impose fines and cease and desist orders. "[Supreme Court] cases indicate that false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."[48] But the fines were being imposed by a commission and not a court, without any guarantee that the commission would use a "clear and convincing" evidence standard. The cease and desist orders were an unconstitutional prior restraint of speech.[49]

The court upheld the "truth declaring" reprimand function of the Commission:

> What is happening in this case, with regard to the 'truth declaring' function of the Commission, is that the Commission is making judgments, and publicly announcing those judgments to the world, as to the truth or falsity of the actions and statements of candidates and others intimately involved in the political process. These activities are closely comparable to those now carried on by many agencies of government.[50]

Following *Pestrak*, the Ohio Supreme Court in *McKimm v. Ohio Elections Commission*[51] upheld the reprimand of a candidate who published a cartoon depicting his opposing candidate holding a bundle of cash underneath a table along with accompanying words that the court held connoted to the reasonable reader that the candidate had taken a bribe or kickback.[52]

Most recently, in *281 Care Committee v. Arneson*,[53] the Eighth Circuit rejected a number of procedural arguments against a challenge to a Minnesota law that made it a crime to engage in false campaign speech with actual malice. Three groups opposed to school board funding initiatives sought a declaration striking down the Minnesota law after a number of the groups' opponents allegedly threatened litigation under the statute for allegedly false statements the groups made in earlier campaigns.[54]

The court rejected the argument that false speech was entitled to no constitutional protection under the First Amendment, and it held that false campaign speech was quintessential political speech at the core of the First Amendment:

> We do not, of course, hold today that a state may never regulate false speech in this context. Rather, we hold that it may only do so when it satisfies the

48. *Id.* at 577.
49. *Id.* at 578.
50. *Id.* at 579.
51. *McKimm*, 729 N.E.2d 364.
52. *Id.* at 366.
53. *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012).
54. *Id.* at 625–626.

> First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.[55]

It remanded the case for a consideration of whether the Minnesota law satisfied strict scrutiny.[56] After deciding *U.S. v. Alvarez*, the Supreme Court denied certiorari in the *281 Care Committee* case, leaving open the possibility that the case could return to the Supreme Court after further proceedings in the lower courts.

What to make of these cases? First, the judges hearing these cases seem to agree that any law regulating false campaign speech must—at the very least—be targeted at speech made with actual malice[57] and probably be decided under a heightened evidentiary standard, such as a clear and convincing evidence standard. Prior restraints—or injunctions barring false statements—appear to be off the table. Beyond that, the judges have disagreed on whether false speech generally is entitled to any protection and, if it is, how to strike the First Amendment balance. Further, the kinds of cases that come before the judges are anything but clear-cut on the facts; it may be hard to tell fact from opinion and to know when innuendo is close enough to a lie to count under a state's false campaign speech statute.

The clear message from the collection of cases seems to be that there are important interests on both sides of the equation and that judges and others have struck the balance differently. Professor Bill Marshall canvassed the area, identifying four arguments in favor of laws regulating false campaign speech. "First, and most obviously, false statements can distort the electoral process."[58] "Second, false statements can serve to lower the quality of campaign discourse and debate."[59] "Third, false statements can lead or add to voter alienation by fostering voter cynicism and distrust of the political process."[60] "Fourth, false statements against an opponent's character can inflict reputational and emotional injury upon the attacked individual."[61]

Professor Marshall also identified four arguments against enactment of false campaign laws. "First, as an introductory matter, the arguments in favor of regulation may overstate the harms. For example, the regulatory

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55. *Id.* at 636.

56. *Id.*

57. *See e.g. Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122 (D. Haw. 2001). *But see* Lee Goldman, *False Campaign Advertising and the Actual Malice Standard*, 82 Tul. L. Rev. 889 (2008) (arguing instead for liability under a "negligence" standard for false campaign speech).

58. Marshall, *supra* n. 19, at 294. Marshall based his anti-distortion arguments on a line of campaign finance cases that have since been overturned by the Supreme Court in *Citizens United v. Fed. Election Commn.*, 129 S. Ct. 2893 (2009). *But see Ashdown*, *supra* n. 14, at 1104–1111 (arguing that anti-distortion interest survives *Citizens United*).

59. Marshall, *supra* n. 19, at 294.

60. *Id.* at 295.

61. *Id.* at 296.

concern of preventing candidates from deceiving voters may miss the point that voters often do not believe what they hear in campaigns anyway."[62] "Second and more importantly, restricting campaign speech, including even false campaign speech, is in tension with basic free speech principles. The discussion of political affairs lies at the heart of the First Amendment."[63] "Third, authorizing the government to decide what is true or false in campaign speech opens the door to partisan abuse."[64] "Fourth, regulating campaign speech is problematic because it allows the courts and/or other regulatory bodies to be used as political weapons."[65]

With strong arguments on both sides, it is no surprise that courts had divided on the constitutionality of false campaign speech laws. As we shall see, however, last June in *U.S. v. Alvarez* the Supreme Court put a thumb on the First Amendment side of the scales, making it much harder to sustain the constitutionality of many false campaign speech laws in the future.

III. A Quick Review of *U.S. v. Alvarez*

While some of the false campaign speech cases described in the last Part raise debatable questions about whether a statement really was a false statement of fact, falsity was not in question when it came to Defendant Xavier Alvarez's lie about winning the Congressional Medal of Honor. As Justice Kennedy explained in the Supreme Court's plurality opinion in *U.S. v. Alvarez*: "Lying was his habit. [Alvarez] lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, [Alvarez] ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005."[66] Justice Kennedy described Alvarez's statement:

> In 2007, [Alvarez] attended his first public meeting as a board member of the Three Valley Water Board District. . . . He introduced himself as follows: 'I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.' None of this was true. For all the record shows, respondent's statements were a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.[67]

62. *Id.* at 297.
63. *Id.* at 298.
64. *Id.* at 299.
65. Marshall, *supra* n. 19, at 300.
66. *Alvarez*, 132 S. Ct. at 2542 (plurality opinion). Citing 18 U.S.C. § 704, Justice Kennedy noted that "Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning." *Id.* at 2543.
67. *Id.* at 2542 (citation omitted).

The Ninth Circuit held that the Stolen Valor Act violated the First Amendment, but the Tenth Circuit, in a separate case, upheld it.[68] The Supreme Court granted certiorari to resolve the split. But the Court split badly in its decision, 4–3–2, issuing no majority opinion.

Justice Kennedy's opinion for four Justices rejected the argument that the First Amendment categorically did not protect false statements, the way the First Amendment categorically does not protect other types of speech, such as obscenity and fighting words. "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[69]

Justice Kennedy's opinion distinguished cases upholding liability for fraud or defamation against First Amendment challenge, as well as laws prohibiting false statements to the government. As to fraud and defamation, Justice Kennedy stressed that the Court on First Amendment grounds had imposed additional important limits on liability, including the actual malice standard.[70] As to false speech made to the government, and laws that prohibit impersonating a government officer, Justice Kennedy said these laws "protect the integrity of Government processes, quite apart from merely restricting false speech."[71] Laws barring false testimony under oath were justified on a similar basis.[72]

Justice Kennedy declared that the Stolen Valor Act did not implicate the interests at issue in these other kinds of cases. It barred false speech which was not made "to effect a fraud or secure money or other valuable considerations, say offers of employment."[73] The law also was quite broad;[74] the Court held it was not narrowly tailored to protect the "integrity of the military honors system."[75] "There must be a direct causal link between the restriction imposed and the injury to be prevented."[76] "The Government has not shown, and cannot show, why counterspeech would not

68. *Id.* at 2542 (citing *U.S. v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), 638 F.3d 666 (9th Cir. 2011) (seven Ninth Circuit judges dissenting from denial of rehearing en banc), and *U.S. v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012)).

69. *Alvarez*, 132 S. Ct. at 2544–2545 (rejecting the government's reliance on earlier cases that appeared to hold to the contrary).

70. *Id.* at 2545.

71. *Id.* at 2546.

72. *Id.*

73. *Id.* at 2547–2548.

74. *Id.* at 2547 ("The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.").

75. *Alvarez*, 132 S. Ct. at 2549.

76. *Id.*

suffice to achieve its interest."[77] Justice Kennedy suggested that public ridicule might be enough, as well as the government creating a database of medal recipients.[78]

Justice Breyer, writing for himself and Justice Kagan, rejected the plurality's "strict categorical analysis."[79] Instead, Justice Breyer said that in evaluating a law barring false speech it was necessary to engage in balancing, taking into account:

> the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve these objectives, and whether there are other, less restrictive ways of doing so. Ultimately, the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.[80]

Justice Breyer then applied what he termed "intermediate scrutiny" to determine whether the Stolen Valor Act was constitutional. He agreed with the three dissenting Justices that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech."[81] He pointed to laws "restricting false statements about philosophy, religion, history, the social sciences, [and] the arts."[82] He stated that the danger is lower when the regulations "concern false statements about easily verifiable facts that do not concern such subject matter."[83] Further "[f]alse factual statements can serve useful human objectives."[84]

Like the plurality, Justice Breyer stressed that laws regulating some false speech are narrower and tend to require "proof of specific harm to identifiable victims."[85] Fraud statutes require proof of materiality, defamation focuses on statements which are likely to harm reputation, perjury focuses on materiality and a subset of statements made under oath.[86] Statutes

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77. *Id.*

78. *Id.* at 2550–2551.

79. *Id.* at 2551 (Breyer, J., concurring in judgment).

80. *Id.* at 2551–2552.

81. *Alvarez*, 132 S. Ct. at 2551–2552 (quoting dissent at 2564). But Justice Breyer never directly explains why he fails to apply strict scrutiny to a content-based restriction.

82. *Id.* at 2552.

83. *Id.*

84. *Id.* at 2553 ("False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.").

85. *Id.* 2554.

86. *Id.*

prohibiting lying to the government are limited to "particular and specific harm by interfering with the functioning of a government department."[87]

Justice Breyer then turned to the statute at hand. He found its breadth fatal: "As written, it applies in family, social or other private contexts, where lies will often cause little harm. It also applies in political contexts where although such lies are likely to cause harm, the risk of censorious selectivity by prosecutors is also high."[88] He suggested a "more finely tailored statute," perhaps aimed at only a subset of military awards, might be constitutional.[89]

Justice Breyer then added the following paragraph, which is most pertinent to the issue in this Article:

> 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. See, *e.g., United We Stand America, Inc. v. United We Stand, America New York, Inc.,* 128 F.3d 86, 93 (C.A.2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox,* 150 Mich. App. 617, 389 N.W.2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). 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. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.[90]

Justice Alito, for the three dissenters, voted to uphold the Stolen Valor Act's constitutionality. He wrote that laws prohibiting false statements have "no intrinsic First Amendment value"[91] and that "[l]aws prohibiting fraud, perjury and defamation . . . were in existence when the First Amendment was adopted, and their constitutionality is beyond question."[92] Justice Alito cited these laws as well as laws barring false statements to govern-

87. *Alvarez*, 132 S. Ct. at 2554.
88. *Id.* at 2555.
89. *Id.* at 2555–2556.
90. *Id.* at 2556 (citation omitted).
91. *Id.* at 2560 (Alito, J., dissenting).
92. *Id.* at 2561.

ment officials as consistent with the general right of the government to punish false speech about military honors. Justice Alito rejected the idea that the law was overbroad and criticized both the plurality opinion and Justice Breyer's opinion for failing to offer any meaningful way that the statute might be narrowed.[93]

Importantly for our purposes, the dissenters talked about the circumstances under which laws barring false speech could create an unconstitutional chill. When it comes to matters of public concern, Justice Alito explained, the First Amendment required the Court to impose the actual malice requirement on defamation claims and tort claims for intentional infliction of emotional distress.[94] Justice Alito also relied upon that part of *Brown v. Hartlage*,[95] in which the Supreme Court rejected the voiding of an election based upon a statement where there was no proof of actual malice.[96] He stated:

> These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection. On the contrary, there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth . . . .
>
> Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, see *R.A.V. v. St. Paul,* 505 U.S. 377, 384–390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech), the potential for abuse of power in these areas is simply too great.[97]

Concluding that the Stolen Valor Act had no potential to create such a chill, Justice Alito would have upheld the Act and the instant prosecution.[98]

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93. *Alvarez*, 132 S. Ct. at 2565. The dissenters also claimed the government did not have the information to create an accurate database of medal holders.

94. *Id.* at 2563.

95. *Brown*, 456 U.S. at 61–62.

96. *Alvarez*, 132 S. Ct. at 2563 (Alito, J., dissenting).

97. *Id.* at 2564.

98. *Id.*

IV. What Can and Should Be Done with False Campaign and Election Speech Laws after *U.S. v. Alvarez*?

The Supreme Court's decision in *U.S. v. Alvarez* no doubt will be the central case in future court proceedings considering First Amendment challenges to false campaign and election speech laws. Gone is the argument, accepted by some courts before *Alvarez*, that false speech (including false campaign or election speech) is entitled to no constitutional protection and in a category with obscenity and fighting words. In its place is a regime in which broad laws targeting false speech stand little chance of being upheld regardless of the topic. A court undoubtedly would strike down a broad statute prohibiting false campaign statements made in any place and at any time.

Although the Court's decision in *Alvarez* is badly fractured, there seems unanimous skepticism of laws targeting false speech about issues of public concern and through which the state potentially could use its sanctioning power for political ends. Especially dangerous are criminal laws punishing false speech that could lead to selective criminal prosecution. Thus, at the very least it seems that to survive constitutional review, any false campaign speech law would have to be narrow, targeted only at false speech made with actual malice, and likely proven under an elevated level of proof, such as clear and convincing evidence. Although not directly discussed in *Alvarez*, the Court would be unlikely to accept any law which allowed an injunction to bar the utterance of false campaign speech, viewing that as an unconstitutional prior restraint of speech.

Beyond these points, it is much harder to determine how the Court would address specific laws targeting false campaign speech. Justice Breyer's opinion in particular noted both the significant harm of false campaign speech (leading voters to make the wrong decision) as well as the dangers of campaign speech laws, including selective prosecution motivated for political reasons and government censorship.

Justice Breyer cited two false campaign speech cases. In one case, a court upheld a trademark infringement case against the offshoot of 1992 Presidential candidate Ross Perot's "United We Stand" group. Donors confused by the similar names might have donated to the wrong political group.[99] In the other case, a court upheld a First Amendment challenge to a law barring someone from misrepresenting himself as an incumbent judge.[100] The candidate had previously served as a judge, and campaigned

99. *Id.* at 2556 (Breyer, J., concurring in judgment) (citing *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 93 (2d Cir. 1997)).

100. *Alvarez*, 132 S. Ct. at 2556 (citing *Treas. of the Comm. to Elect Gerald D. Lostracco*, 389 N.W.2d at 449).

using phrases such as "Elect Judge Bruce A. Fox to Circuit Court." After citing these cases, Justice Breyer then cast doubt upon them by stating: "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."[101]

While the other Justices did not speak as directly on the issue of false campaign speech, it would not be surprising to find all of the Justices agreeing with Justice Breyer on this point—both the plurality, which applied a strict approach to considering the constitutionality of laws barring false campaign speech, and the dissenters, who expressed doubts about false speech laws aimed at matters of public concern in which laws barring false speech could chill legitimate and protected speech.

But deciding exactly where to draw the line between permissible and impermissible laws aimed at false campaign and election speech is hard. Right after the Court's decision in *Alvarez,* First Amendment scholar Eugene Volokh wrote of his uncertainty. He opined that some laws targeting false campaign speech by a candidate might be upheld because they involve candidates using a falsehood to get a job, and therefore in a sense they are "closer to financial fraud." Further, he wrote that the government's interest in preventing voter deception is "quite strong," likely to pass Justice Breyer's "intermediate scrutiny test," although he noted that Justice Breyer also expressed concern about selective prosecutions.[102]

Professor Volokh added:

> My guess is that general bans on lies in election campaigns would be struck down, because they cover a wide range of territory in which the truth may be hard to uncover, and in some measure in the eye of the beholder. But narrower bans on, say, knowingly false statements about when or where people should vote, knowingly false claims that some person or organization has endorsed you, knowingly false claims that you are the incumbent (see, *e.g.*, *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, 389 N.W.2d 446 (Mich. Ct. App. 1986)), knowingly false claims about your own job experience—including military experience—and the like might be constitutional. It's just hard to tell, given both the limited scope of the opinions and the 4-2-3 split.[103]

I agree with part, although not all, of Professor Volokh's analysis, as will be clear from my analysis below of four types of election-related false

101. *Id.*

102. Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, The Volokh Conspiracy, http://www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/ (June 28, 2012). Professor Volokh also co-wrote an amicus brief in the *Alvarez* case arguing that false speech is not deserving of constitutional protection. *See* Br. of Profs. Eugene Volokh & James Weinstein as *Amici Curiae* in Support of Petr., *U.S. v. Alvarez*, 2011 WL 6179424, also available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-210_petitioneramcu2profs.authcheckdam.pdf.

103. Volokh, *supra* n. 102.

speech laws. For each type, I assume that a state (or Congress) has imposed in its law an actual malice requirement and required proof by a heightened evidentiary standard, such as clear and convincing evidence.

A. Laws Barring False (But Not Deceptive) Election Speech

The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters. While a senator, President Obama introduced just such a bill, the Deceptive Practices and Voter Intimidation Act of 2007.[104] Consider the false statement that "Republicans vote on Tuesday, Democrats vote on Wednesday." A state should have the power to criminalize such speech. The law would be justified by the government's compelling interest in protecting the right to vote. Such speech, which could be distributed in the days before the election, could be very difficult to counter with truthful speech about election rules. Following the *Alvarez* dissenters, there is no conceivable chill of legitimate speech that such a law would deter.[105] The risk of selective prosecution for false election speech seems relatively low, and the falsity of such speech would be easily verifiable. Courts are likely to uphold narrowly drawn false campaign speech laws.

Along similar lines, a state should be able to stop a person from falsely representing identity in an election context with the aim of defrauding donors of their money. For example, a group cannot falsely claim it is raising money for a candidate's campaign but then use the money for a different purpose.[106] Falsely representing yourself as a representative of a candidate, party or committee for financial gain seems well within the type of anti-financial fraud law that it appears all on the Court accept as constitutionally permissible.

In contrast, a law targeted at "deceptive" or "misleading" election speech would face greater constitutional hurdles, in part because such a law could chill legitimate speech given the elasticity of the terms "deceptive"

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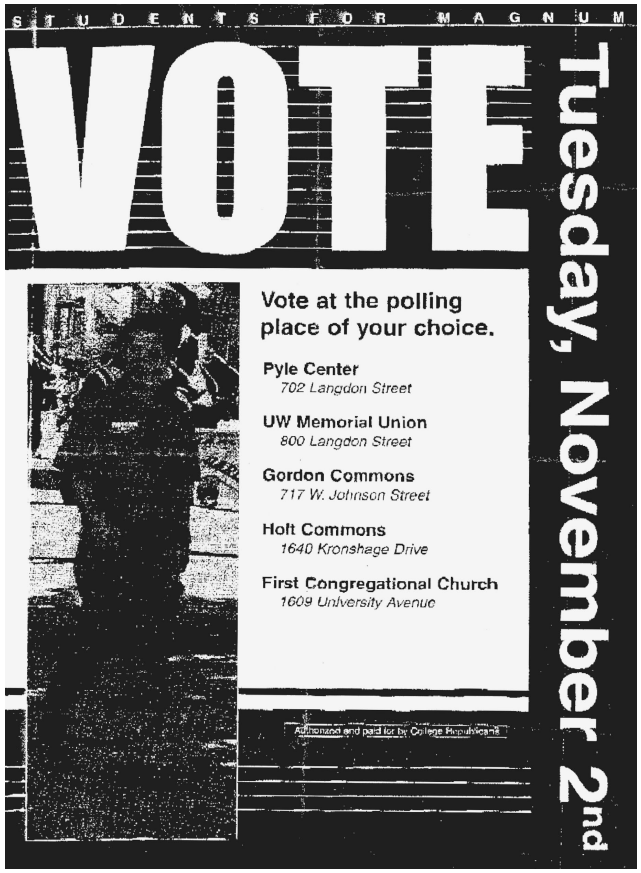
104. Sen. 453, 110th Cong., 1st session, available at http://www.opencongress.org/bill/110-s453/text (Jan. 31, 2007). The bill also targeted false endorsements, an issue I return to below. On the topic of false and deceptive election speech, see Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 Harv. Civ. Rights-Civ. Liberties L. Rev. 1 (2009) and Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343 (2010).

105. Of course, anyone who negligently gave incorrect information about the casting of a ballot would not be subject to liability thanks to the actual malice requirement.

106. *See* Shane Goldmacher, *Look-Alike Sites Funnel Big Money to Mystery PAC*, National Journal, http://www.nationaljournal.com/daily/look-alike-sites-funnel-big-money-to-mystery-pac-20120909?page=1 (Sept. 11, 2012).

and "misleading."[107] Consider, for example, a statement such as "bring identification with you to the polls" made in a state that does not have a voter identification requirement. While such speech could be misleading, suggesting to some voters that identification is required and perhaps deterring voters without the right i.d. from voting, what counts as "misleading" is unconstitutionally vague and in the eyes of the beholder. A statute aimed at barring such misleading speech would open up prosecutorial discretion and the potential for political gamesmanship beyond that which the courts likely would tolerate.

Some cases will no doubt be close to the line. Consider this poster circulated in student dorms at the University of Wisconsin:[108]



Election flyer, University of Wisconsin–Madison, 2004

107. Despite the name of Obama's bill, *see supra* n. 104, it targeted only knowingly false statements made with the intent to prevent someone from exercising the right to vote in an election and not merely "deceptive" speech.

108. The flyer is reprinted in Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 94 (Yale Univ. Press 2012).

A vote in the wrong precinct would be a vote cast via a provisional ballot, which would not count. Is the statement "vote at the polling place of your choice" literally false, or only misleading? It might be literally false because one cannot "vote" a ballot that will count (one can cast a provisional ballot that will not count) at the wrong polling place. Or the statement merely might be misleading because it does not describe the consequences of voting in the polling place of one's choice.

B. Laws Allowing the Government to Reject False Campaign Speech in Official Ballot Materials from the State

Even if, as I suggest below, the state might be powerless to stop a candidate from falsely claiming to be an incumbent or from having received the endorsement from someone else, the state is not required to print ballot materials that contain false statements. In *Alvarez*, all of the Justices agreed that laws barring false statements made to the government were constitutional. Such laws ensure that government processes continue and that the government provides accurate information to the public. The government has its own interest in assuring the accuracy of information it issues. For example, when the state allows candidates to list a profession on the ballot, the state should have the authority to vet those statements and to reject false statements. Further, the Court in *Alvarez* indicated that laws barring false speech to the government are constitutional, and providing false information for purposes of government election materials should be no different.

To be sure, giving the government this power does create a risk of censorship and political manipulation that does not seem present in laws outlawing false election speech. However, the possibility of pre-election judicial review, as is common with fights over the accuracy of ballot materials submitted in California, assures that a judge protective of the First Amendment will have ultimate control over any state decision to reject campaign speech as false.

C. Laws Barring Defamatory Campaign Speech

All of the Justices in *Alvarez* agree that general laws punishing defamation survive the First Amendment, provided they meet the heightened First Amendment rules created by the Supreme Court, such as the actual malice requirement. The question is whether defamatory statements *made in the context of a campaign* might be treated differently and be unconstitutional despite the general constitutionality of defamation laws otherwise meeting Supreme Court standards.

Courts are likely, but by no means certain, to uphold the constitutionality of defamation laws used in the context of political campaigns. On the

one hand, candidates like anyone else should have the right to a reputation not ruined through malicious lies. Further, post-election civil damage suits for defamation do not present the risk of selective prosecution, which might come in pre-election civil actions. On the other hand, the law of defamation could have some chilling effect on robust debate during intense election periods. Further, as the saying goes, "politics ain't beanbag." Anyone running for office today in the rough-and-tumble world of politics perhaps assumes the risk of being defamed or at least regularly insulted. It would be unsurprising if courts go further and bar even defamation suits arising out of statements made in candidate elections.

D. Laws Regulating False Public Statements about Candidates or Ballot Measures

The hardest case under *Alvarez* is whether the government has authority to enjoin or punish non-defamatory malicious false campaign speech, such as a statement by a candidate that she is the incumbent or has been endorsed by the President. Professor Volokh wrote that such laws as applied to candidates might be constitutional on grounds that a candidate would be making the false statement for financial or tangible gain—to keep (or obtain) her own job. As in *Alvarez*, where the plurality distinguished laws punishing fraud for financial gain, which survived First Amendment challenge, with laws punishing fraud for non-financial or non-tangible reasons, which did not, false candidate speech might be seen as false speech made for financial gain.

To begin with, I am not so sure that it is right to conceive of candidates as running for office primarily for financial or tangible gain. Many candidates have political rather than financial motivations of running for office. It is not clear from *Alvarez* if political motivations fall closer to financial motivations or motivations to achieve affection, or how to deal with mixed motive cases.

Further, the speech of a "campaign" is not simply the speech of the candidate: it is the speech of the group of individuals associated with the campaign. Many people associated with the campaign would not be making the false statements for financial gain but rather to see their candidate prevail in the election. For this reason, a law barring only false speech made maliciously by the candidate himself (and not his campaign) at best would be partially effective. It would be underinclusive, pushing false campaign speech to independent individuals and groups who would make the false claims on the candidate's behalf. It would also not apply to false statements made by independent groups in candidate election or made in ballot measure campaigns.

Most importantly, even given a candidate's financial or tangible incentives to run for office, a law targeting malicious false candidate speech still could be unconstitutional. Political speech remains at the core of the First Amendment, and candidate speech is the *most likely* type of speech to prompt selective prosecution as well as political manipulation of government authorities.

One possible way to save the constitutionality of a law aimed at false campaign statements would be to limit it to statements made directly by candidates that are easily verifiable, such as a statement about whether a candidate is an incumbent. (Even that is problematic: is a person who used to be a judge referring to himself as a "Judge" in an ad making a false statement?) Excluded would be murkier statements such as whether a candidate supports tax increases. Sticking to verifiable statements limits the amount of prosecutorial discretion. But it is a double-edged sword: if the allegedly false statements are easily verifiable, then there is less of a need for the state to come in and punish such speech. As Justice Kennedy explained in *Alvarez*, the better remedy for easily-checked false speech might be counterspeech, or a database of truthfulness. Thus, even if there is a constitutional right to lie[109] in campaigns, the remedy is for opponents of a lying candidate to credibly call that candidate a liar.[110]

While the matter is unclear, there are substantial arguments that state laws barring or punishing false malicious campaign speech even by candidates violates the First Amendment after *Alvarez*. Professor Marshall's constellation of interests supporting false campaign speech laws—preventing "distortion" of election outcomes, a lower quality of election content, voter alienation—is unlikely to trump the courts' concerns about censorship and partisan manipulation of these processes in speech at the core of the First Amendment.[111]

If the state likely cannot ban or punish false campaign speech, it probably still could establish a "truth-declaring" commission as in Ohio. The Sixth Circuit in *Pestrak* upheld such a commission structure before *Alvarez*. Its reasoning seems to survive *Alvarez*. A government statement declaring that a candidate has lied is a narrower alternative to the state barring or

109. Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA Journal, http://www.abajournal.com/news/article/the_first_amendment_and_the_right_to_lie (Sept. 5, 2012).

110. The majority may be overly optimistic about the chances that counterspeech could change minds, especially given evidence that voters—even informed voters—respond to emotional appeals in campaign advertising. *See* Daniel H. Lowenstein, Richard L. Hasen, & Daniel P. Tokaji, *Election Law—Cases and Materials* 536–537 (5th ed., Carolina Academic Press 2012).

111. There is no doubt some tension here with the position of Justice Breyer on this issue and on the issue of the constitutionality of campaign finance regulation. *See* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Alfred A. Knopf 2005). In the campaign finance arena, Justice Breyer has recognized First Amendment concerns on both sides of the issue.

punishing the lie directly; indeed, the government statement is somewhat equivalent to the "database" of military medal winners that Justice Kennedy discussed in *Alvarez.* Like the database, a government statement provides a source of government information that at least a portion of the public is likely to view as objective. The truth commission differs from the database in that government officials must exercise a subjective judgment about truth and falsity.

Although a truth commission is likely constitutional, it is not clear that it is a desirable approach to the problem of false campaign speech. A government truth-declaring function is subject to selective enforcement and political manipulation. In Ohio, prosecutions are rare,[112] opponents bring claims to the commission for political gain, and the results of commission findings may be haphazard.

Consider a recent Ohio hearing over whether the Ohio Republican Party lied in a Republican mailer about a pending redistricting initiative. The bipartisan panel split 2-2 along party lines regarding the alleged falsity of two statements in the mailer, but agreed 4-0 that there was probable cause to believe that one statement in the mailer—that members of a proposed redistricting commission would be chosen in secret—was false.[113] No doubt supporters of the initiative can use the Ohio commission's findings of probable cause that the Ohio Republican Party made a false statement to try to influence voters in the weeks before the election. In some ways, the cure of injecting the government into the political process right during the elections may be worse than the disease.

V. Conclusion

It is disheartening to think that the Constitution contains within it a right to lie in political campaigns. In an era in which it appears that political consultants have no compunction about running campaigns filled with

112. Aaron Marshall, *Despite laws against lying, tall tales have become the norm on the campaign trail, experts say,* Cleveland Plain Dealer, http://www.cleveland.com/open/index.ssf/2012/10/despite_laws_against_lying_tal.html (Oct. 27, 2012) ("While most observers see lying in campaigns on the upswing, [Ohio Elections Commission Executive Director Philip] Richter said that complaints about alleged campaign falsehoods are actually down this year compared to previous years with just 38, compared to as many as 98 in 2010. . . . Records supplied by Richter show the commission has heard 176 complaints involving allegations of false and misleading statements in the past three years and found violations in 14 cases—which is 8 percent of the time. . . . But the punishments barely redden a wrist. In 13 of the 14 cases, the commission just let the violation stand as the only penalty in the matter. The only fine levied in the past three years came in a 2010 case against a township trustee candidate whose complaint the board considered to be 'frivolous' and rang up a $5,775 fine.").

113. Joe Guillen, *Does GOP campaign literature contain a false statement? Ohio Elections Commission to decide,* Cleveland Plain Dealer, http://www.cleveland.com/open/index.ssf/2012/09/state_elections_commission_fin.html (Sept. 20, 2012).

lies,[114] and in which the media's descriptions of campaign falsity are themselves attacked as biased, it is tempting to think of a legal solution to this political problem. The Supreme Court's decision in *U.S. v. Alvarez*, while fractured, points out the dangers of this approach, especially the dangers of censorship and political manipulation.

Narrow laws aimed at stopping maliciously false speech about the conduct of elections and those laws targeting defamatory false statements about candidates likely would survive constitutional challenge. The state also does not have to be a party to false campaign statements: it has the power to bar false statements from official ballot materials and probably to establish a "truth-declaring" commission to make pronouncements about campaign lies. Even if the commissions are constitutional, they may not be desirable.

After *Alvarez*, the state may no longer have the power to ban or punish malicious false campaign speech, whether made by candidates or others. The result of this conclusion is that we are likely to see more false campaign speech in elections, including some brazen lies. With candidates' pants increasingly on fire, and with the wooden noses of campaign consultants growing ever longer, the question is whether counterspeech—from opposing candidates, the media, and perhaps the government—will be enough to give voters the tools they need to make intelligent choices. I take solace in Jack Shafer's depressing observation that most voters don't expect honesty from their politicians,[115] and therefore they are less likely to be misled by them.

114. *See* Jill LePore, *Lie Factory: How Politics Became a Business*, The New Yorker, http://www.newyorker.com/reporting/2012/09/24/120924fa_fact_lepore?currentPage=all (Sept. 24, 2012) (tracing history of political consultants).

115. Shafer, *supra* n. 9.