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Gerald G. Ashdown

DISTORTING DEMOCRACY: CAMPAIGN LIES IN THE 21ST CENTURY

Gerald G. Ashdown*

INTRODUCTION

By now, nearly everyone in the legal community has heard of *Caperton v. A.T. Massey Coal Co., Inc.*,[1] a case in which the United States Supreme Court held that a state supreme court justice should have recused himself as a matter of due process.[2] At the state level, *Caperton* involved an appeal of a $50 million judgment against a company whose chief executive officer (CEO) had contributed $3 million dollars to the justice's election campaign.[3] What most are not aware of, however, is the lies and distortions directed at the justice's incumbent opponent in order to defeat his reelection. Don Blankenship, Massey's CEO at the time, was the primary investor in a political organization formed under § 527 of the Internal Revenue Code[4] named "And For The Sake Of The Kids."[5] The organization was instrumental in the 2004 campaign for Justice Warren McGraw's seat on the West Virginia Supreme Court of Appeals, the highest court in the state.[6] The group made many inflammatory claims

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* James H. "Buck" Harless and June M. Harless Professor of Law, West Virginia University College of Law.

[1] 129 S. Ct. 2252 (2009).

[2] *Id.* at 2265 ("We find that Blankenship's [Massey's chairman and CEO] significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true. On these extreme facts the probability of actual bias rises to an unconstitutional level." (internal quotation marks omitted)). In its analysis the Court

> conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Id. at 2263–64.

[3] *See id.* at 2257.

[4] I.R.C. § 527 (2006).

[5] *Caperton*, 129 S. Ct. at 2257.

[6] *Id.*

in advertisements, including the claim that Justice McGraw let "child rapists" go free.[7] This claim stemmed from the 2004 per curiam decision in *State v. Arbaugh*.[8] The *Arbaugh* case was far from letting a rapist go free. Mr. Arbaugh himself was the victim of long, systematic sexual abuse at the hands of two adult family members and one of his teachers.[9] As a result, he acted out sexually against his younger half-brother, and a delinquency petition was filed when he was fifteen years old.[10] He was transferred to adult court and pled guilty to one count of first-degree sexual assault.[11] The *Arbaugh* case in question arose a few years later, when the West Virginia Supreme Court of Appeals ruled that the trial court had abused its discretion in not reducing Mr. Arbaugh's sentence to probation so he could pursue a private rehabilitation program.[12] More problematic regarding the truth of the political ad was the fact that Mr. Arbaugh had been previously placed on probation, although it had been revoked at the time of his petition.[13]

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[7] *See* Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html?pagewanted=1&_r=1 ("Voters in West Virginia saw a surprisingly similar advertisement recently . . . . 'He sexually molested multiple West Virginia children,' the announcer says. 'Liberal Judge Warren McGraw cast the deciding vote to set this reprehensible criminal free.'"); *see also* DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 4 (2005), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf ("[Announcer]: Supreme Court Justice Warren McGraw voted to release child rapist Tony Arbaugh from prison.").

[8] 595 S.E.2d 289 (W. Va. 2004) (per curiam).

[9] *Id.* at 290–91 ("He endured a long history of sexual assault at the hands of two of his adult male family members, beginning when he was seven or eight years old. These assaults included oral sex, sodomy, mutual masturbation, and 'dry humping.' Mr. Arbaugh was also sexually assaulted by one of his teachers for a period of four years." (citing Arbaugh v. Bd. of Educ., 591 S.E.2d 235, 238 (W. Va. 2003))).

[10] *Id.* at 291 n.2 ("While Mr. Arbaugh was [fifteen] when the petition was filed, the petition covered conduct of Mr. Arbaugh from when he turned [fourteen].").

[11] *Id.* at 291.

[12] *Id.* at 294.

[13] In September 1997, at fifteen years old, Mr. Arbaugh was sentenced "to an indeterminate term of fifteen to thirty-five years and restitution. The court, however, suspended sentence due to Mr. Arbaugh's age and his enrollment in the Chestnut Ridge Treatment Center." *Id.* at 291. He was ordered to reside in a secure juvenile facility until he was eighteen years old. *Id.* After Mr. Arbaugh turned eighteen, he was transferred to a facility to complete the youthful offender program. *Id.* He successfully completed the program and was placed on five years probation. *Id.* In December 2000, Mr. Arbaugh's probation was revoked after he admitted to "having used marijuana and alcohol, failing to obtain ongoing counseling, and failing to pay his five dollar a month probation fee." *Id.* In February 2001, the trial court denied Mr. Arbaugh's motion "to reduce his sentence by granting him probation to pursue another rehabilitation program." *Id.* It was from this ruling that Mr. Arbaugh sought relief from the Supreme Court of Appeals of West Virginia. *Id.* at 292.

Blankenship admitted that his real objections to Justice McGraw were his rulings against corporate defendants.[14]

> "Being the street fighter that I am," he said, he had instructed his aides to find a decision that would enrage the public. When they returned with an unsigned opinion in the sex abuse case, which Justice McGraw had joined, [he] said he knew he had hit pay dirt. "That killed him," [he] said of Justice McGraw, smiling.[15]

This case is an example of the abuse of money in politics; but more particularly, it represents the evils of lying in political campaigns, which can have a very distorting effect on election outcomes. Unfortunately, it seems to be that because of the *New York Times Co. v. Sullivan*[16] line of cases, requiring proof of actual malice in the form of knowledge of falsity or reckless disregard for the truth,[17] there is virtually no remedy for this kind of deliberate deception. Perhaps legally this should not be so. I have argued elsewhere for the use of a negligence standard, at least in the case of media defendants.[18] But even if this is not possible in the political arena because of core First Amendment values, there is still room for *New York Times* liability. In the Blankenship campaign against Justice McGraw, for example, Blankenship was certainly malicious in the subjective, emotional sense of the term. It also can be argued on a number of fronts that he was malicious in terms of *New York Times* actual malice. First, Mr. Arbaugh was himself a juvenile at the time of his offense, and thus was not an adult "child rapist."[19] Second, he had already been placed on probation by the trial court, but it had been revoked because of the consumption of drugs and alcohol at the time of his petition.[20] Third, Mr. Arbaugh did not exactly "go free"; he was placed on tightly controlled supervision.[21] And fourth, Justice McGraw did not independently grant him relief; the justice was simply part of an unsigned three-judge ruling.[22] Although potentially true in some very narrow, technical sense, Blankenship's calculated distortion on behalf of "And For The Sake Of

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[14] Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 15, 2009, http://www.nytimes.com/2009/02/15/washington/15scotus.html?ref=washington.

[15] *Id.*

[16] 376 U.S. 254 (1963).

[17] *Id.* at 279–80; *see also* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989) (quoting *N.Y. Times*, 376 U.S. at 279–80).

[18] *See* Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739 (2006); Gerald G. Ashdown, *Whither the Press: The Fourth Estate and the Journalism of Blame*, 3 WM. & MARY BILL RTS. J. 681 (1994).

[19] *See supra* note 10 and accompanying text.

[20] *See supra* note 13 and accompanying text.

[21] State v. Arbaugh, 595 S.E.2d 289, 294 (W. Va. 2004) (per curiam).

[22] *Id.* at 290.

The Kids" was arguably reckless disregard for the truth. The name of the organization implies as much.

There are more, starker examples of outright lying in political campaigns. Given the development of so-called "527 groups"[23]—which amass contributions to make large independent expenditures on behalf of particular candidates—and the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*,[24] which authorized the spending of even more massive sums of corporate money, the situation is likely to get much worse. Past experience in political campaigns and the future potential for even more extravagant abuse obviously signal a need for legal vigilance. That vigilance, however, may run counter to First Amendment freedom of expression. Regardless of how First Amendment speech values are characterized—the contenders are: (1) the creation of knowledge through the marketplace of ideas,[25] (2) individual autonomy,[26] and (3) democratic self-government[27]—political campaign speech is right at the core. This quite clearly was the foundation of *New York Times* and its analogy to seditious libel. Statements and claims made during the course of a campaign are at the heart of protected constitutional values regarding decisionmaking in a self-governing democracy. Thus, we must first consider the difficulties in regulating outright lies and calculated distortions made during political campaigns, even though they may drastically distort what otherwise would be electoral choices.[28] My contention is that the best we can hope for is a vigorous application of the *New York Times* regime in favor of candidates in a way that would encourage plaintiffs to sue for libel both opposing candidates and the media who disseminate false claims. Next, an examination of some of the reported instances of campaign lies will be examined to expose how they can satisfy the actual malice requirement (and some of the additional

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[23] I.R.C. § 527 (2006).

[24] 130 S. Ct. 876 (2010).

[25] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011) ("There are presently three major candidates for such values: (1) the creation of new knowledge; (2) individual autonomy; and (3) democratic self-government."); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 502 (2011) ("[A]nother popular candidate for a fundamental norm underlying the American free speech principle is the search for knowledge and 'truth' in the marketplace of ideas.").

[26] *See* Post, *supra* note 25, at 478; Weinstein, *supra* note 25, at 502 ("[T]he core First Amendment value resides among the cluster of norms comprising individual autonomy, self-expression, or self-fulfillment.").

[27] *See* Post, *supra* note 25, at 478; Weinstein, *supra* note 25, at 500 ("While I do believe that the individual right to participate in the speech by which we govern ourselves is the only core norm, I do not contend that this is the only value that informs free speech doctrine. Indeed, the core participatory interests that I have just described do not even exhaust the democracy-based interests served by the First Amendment.").

[28] *See infra* Part II.

restrictions that may limit recovery).[29] Lastly, I will offer a caveat created by the Supreme Court's questionable decision in *Citizens United* respecting the future viability of libel actions in the context of campaign speech.[30]

I. COUNTERVAILING ARGUMENTS ON REGULATING CAMPAIGN SPEECH

Of course, the first argument against regulating even false campaign speech is that it conflicts with core First Amendment values.[31] The entire basis of *New York Times* was that even inaccurate political speech needs breathing space to survive.[32] The notion was that ready liability for libel regarding statements made about public officials would deter publication of even truthful, yet not completely verifiable, material—the so-called "chilling effect."[33] The *New York Times* case and its expansion to remarks about public figures[34] and matters of public interest[35] did not even involve cases related to political campaigns, where the potential for derogatory falsehoods is much higher and the First Amendment values are more profound. The tumultuous and frenzied nature of campaigning lends itself to the slinging of unverified attacks on opponents. If the positions of many contemporary First Amendment

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[29] *See infra* notes 99–136 and accompanying text.

[30] *See infra* notes 158–77 and accompanying text.

[31] *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that a canon of judicial ethics adopted by the Minnesota Supreme Court, which prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues, violated the First Amendment).

[32] *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[33] *Id.* ("Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."). In his concurring opinion, Justice Goldberg refers to this as the "chilling effect." *Id.* at 300–01 (Goldberg, J., concurring).

[34] *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). Although there was no majority opinion, five members of the Court agreed that the *New York Times* standard should apply to public figures. *Id.* at 155. In subsequent opinions, the Court has recognized that this was the holding of the case. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974).

[35] *Gertz*, 418 U.S. at 351 ("In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."). *But see* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (citing *Gertz* and holding that the respondent was not a public figure because "[r]espondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it").

scholars are accepted—that participation in democratic self-government is the principal value protected by freedom of expression—statements made during the heat of a political campaign deserve expansive protection.[36]

The second major First Amendment concern is government involvement in the regulation of campaign speech. This has both a major and minor premise. The major premise is that under our constitutional free speech regime, government has no business in deciding what speech can be censored as false. The accuracy of speech within democratic self-government should be left to the electorate without official intermeddling. Government involvement in this type of officiating can take either of two forms—statutes that directly sanction deliberately or recklessly false statements made during the course of a political campaign,[37] or actions for defamation, which utilize the machinery of the courts in an effort to prove actual malice.[38] A number of states have the former type of statute, which conforms to the *New York Times* standard,[39] and at least one court has held such a statute unconstitutional because it permitted government involvement in monitoring the accuracy of campaign speech.[40] Presumably, all states would permit a libel action with *New York Times*

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[36] Regardless of the theory of free speech, including the marketplace of ideas and fostering personal autonomy, political speech deserves the highest protection. *See supra* notes 25–27 and accompanying text.

[37] Similar to Wisconsin, at least seventeen other states have enacted election laws that subject persons to misdemeanor charges for making, publishing, or causing others to make or publish false campaign statements intending to injure or defeat a candidate. Most of these statutes incorporate the language from *New York Times*, requiring that the false statements be intentionally made or made with actual malice (knowingly false or with reckless disregard for truth or falsity).

Terri R. Day, *"Nasty as They Wanna Be" Politics: Clean Campaigning and the First Amendment*, 35 OHIO N.U. L. REV. 647, 659 (2009) (citations omitted); *see also infra* note 65 and accompanying text.

[38] *See, e.g.*, Anderson v. Augusta Chronicle, 619 S.E.2d 428, 431 (S.C. 2005) (ruling that a political candidate who filed a libel action against a newspaper that published an editorial stating that the candidate had falsely claimed to have served in the National Guard presented circumstantial evidence that the newspaper recklessly disregarded the truth, which created a jury question as to actual malice).

[39] *See, e.g.*, OR. REV. STAT. ANN. § 260.532(1) (West 2011) ("No person shall cause to be written, printed, published, posted, communicated or circulated, any letter, circular, bill, placard, poster, photograph or other publication, or cause any advertisement to be placed in a publication, or singly or with others pay for any advertisement, with knowledge or with reckless disregard that the letter, circular, bill, placard, poster, photograph, publication or advertisement contains a false statement of material fact relating to any candidate, political committee or measure.").

[40] Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 827 (Wash. 2007) (finding state statute "proscrib[ing] sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a candidate for public office" unconstitutional

actual malice as the measure of liability. Although this is not a direct state prohibition on the false campaign speech as in the case of the statutes mentioned above, it certainly involves a state-sanctioned form of regulation.

This leads to the minor premise. The involvement of government actors in determining what is unprotected false campaign speech is subject to partisan political abuse. To the extent that either commissions or courts participate in resolving issues regarding allegations of lies in political campaigns, they are likely either to be elected, or otherwise have political affiliations that may have the tendency to bias their judgment one way or another. I suppose it is fair to say that this is always true when decisions are made by governmental actors, but it has especial significance when core First Amendment speech is involved. Ideological factors here have the capacity to skew or limit debate. It is no answer to argue that the determination of falsity generally, or even always, takes place after the campaign speech has occurred because findings of falsity and whatever consequences go with it have the ability to deter speech in the first instance. It is, of course, this potential chilling effect that lies at the heart of the *New York Times* line of cases.

The third First Amendment problem, as Professor William Marshall points out, is that regulating campaign speech allows governmental entities to be used as swords, as well as shields.[41] In other words, instead of seeking vindication for the circulation of false information, a candidate could use a defamation action as a weapon to attempt to "inflict[ ] political damage."[42] Even in the case of basically accurate information, the target might file a lawsuit to distract the public and the media from the allegations. A lawsuit is pretty strong medicine and is sure to gain the attention of the public as a profound statement that one's opponent is lying.[43] A lawsuit also has staying power. Its effects are likely to linger long after the election cycle, continuing

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on its face). The court stated, "The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment." *Id.* The court in *Rickert* found that the Washington statute did not survive strict scrutiny because protecting candidates and preserving the integrity of elections are not compelling government interests and the statute was not narrowly tailored to further those interests. *Id.* at 830–32. The Washington legislature has since enacted a statute regulating such activity as "constituting libel or defamation per se." WASH. REV. CODE ANN. § 42.17A.335 (West 2011).

[41] William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 300 (2004). Marshall also discusses other problems with the regulation of false campaign speech: the arguments for regulation "may overstate the harms"; "restricting campaign speech, including even false campaign speech, is in tension with basic free speech principles"; and "authorizing the government to decide what is true or false in campaign speech opens the door to partisan abuse." *Id.* at 297–99.

[42] *Id.* at 300.

[43] *Id.* ("In this respect, the lawsuit itself can be a weapon of substantial political force. It is dramatic (and therefore likely to generate news coverage), and it gives the perception of gravity to the candidate-complainant's claim of misfeasance.").

to call into question the candidate's (or newly elected official's) honesty and thus dogging him or her into the future.[44] Additionally, whether elected or not, defending a suit takes time and energy and is sure to distract the defendant from his life, job, or newly elected office. Unless dismissed early in the process, the case is likely to keep on giving for the plaintiff, leaving smoldering political damage in its wake.

Although the arguments for regulating false campaign speech have been made before,[45] they bear repeating. First, and most significantly, false campaign speech distorts democracy.[46] Democratic self-government is based on informed voters making choices about what is in their best interests and the best interests of the country.[47] If they are told lies about issues and candidates, these decisions get skewed. A good example of this phenomenon is the one mentioned above. Don Blankenship spent $3 million to unseat Justice Warren McGraw by convincing voters that he released a child rapist.[48] The result was the election of a Justice to the West Virginia Supreme Court of Appeals who was much more friendly to corporate interests, potentially at the expense of some of the voters who elected him.[49] This hardly represents an effectively running democracy.

Second, false campaign advertising and political attack ads deflect and reduce the quality of electoral debate.[50] Ideally candidates should be discussing their understanding of, and ability to handle, the issues affecting their constituents. Negative attack ads divert this process into a cycle of personal attack and response that has nothing to do with the substantive issues in the campaign or the legitimate fitness of the candidates for office.[51] Once this process of falsifying information about an opponent begins, it requires the other side to respond, either filtering time and money

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[44] *Id.* ("The post-election legal proceedings can keep the story of the alleged falsehood in the news and minds of the voters, and the litigation can distract the defendant–office holder from carrying out her responsibilities."). For a classic example, see *Clinton v. Jones*, 520 U.S. 681 (1997).

[45] Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 895–97 (2008); Marshall, *supra* note 41, at 293–96.

[46] *See* Goldman, *supra* note 45, at 895; Marshall, *supra* note 41, at 294.

[47] *See* Goldman, *supra* note 45, at 895; Marshall, *supra* note 41, at 294.

[48] *See* Liptak, *supra* note 7.

[49] *See* Liptak, *supra* note 14.

[50] Goldman, *supra* note 45, at 895 ("False advertising, usually negative, lowers the quality of political discourse and debate. Campaign strategists realize that they must focus their resources on responding to false advertising or engage in their own negative advertising against opponents. . . . Resources spent responding to attack ads are no longer available to discuss substantive issues. Rather than a debate on the issues, the campaign, encouraged by a media that relies upon the thirty-second sound bite, becomes little more than catchphrases, exaggerations, and damning images.").

[51] *See id.*

away from the true campaign, or running the risk of being "Willie Hortoned"[52] or "Swift-boated."[53]

Third, the perceived deception of voters[54] and negative campaigning leaves voters cynical, alienated, and distrustful.[55] The result is that citizens refuse to vote.[56] When voter turnout is reduced, elections have the potential to become illegitimate in a self-governing democracy because the results reflect the preferences of only a portion of those eligible to vote.[57] There is additional damage from voter distrust. When

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[52] Attack ads proved especially effective as George Bush aggressively challenged Michael Dukakis on prison furloughs . . . . Furloughs were the subject of the most controversial ad of the election. "Willie Horton" told the story of a prisoner furloughed from Massachusetts who committed a heinous crime in another state. The ad used a menacing mug shot of an African-American criminal[, Willie Horton,] and was widely denounced as appealing to racial prejudices. The ad was also controversial because it was not produced by the Bush campaign. A political action committee not affiliated with Bush paid for the ad in an early example of outside groups using ads to effect an election.

The :30 Second Candidate, Historical Timeline, 1988, PBS, http://www.pbs.org/30secondcandidate/timeline/years/1988.html (last visited May 1, 2012).

[53] During the 2004 presidential election between John Kerry and then-President George W. Bush, the group Swift Boat Veterans for Truth attacked John Kerry's military record. The *New York Times* said of the attack ads,

> Swift Boat Veterans for Truth is one of the so-called 527 committees, named for a provision in the tax code that created them. Federal law allows such groups to raise unlimited donations and run advertisements so long as they do not expressly call for the election or defeat of a federal candidate. . . . In the advertisement, running on stations in Ohio, West Virginia and Wisconsin, men who served on Swift boats say Mr. Kerry "is no war hero" and "lied to get his Bronze Star." The spot opens with some of the men saying "I served with John Kerry." None of the men served with Mr. Kerry on his Swift boat but claim to have served on boats that were often near his.

Jim Rutenberg, *Anti-Kerry Ad Is Condemned by McCain*, N.Y. TIMES, Aug. 6, 2004, http://www.nytimes.com/2004/08/06/us/anti-kerry-ad-is-condemned-by-mccain.html.

[54] *See* Goldman, *supra* note 45, at 896 n.48 ("[I]t is not inconsistent to suggest that voters do not believe campaign ads and that voters are misled. If seven out of ten voters do not trust political ads, three out of ten can be misled. Misleading 30% of the voters is more than enough to skew an election.").

[55] *Id.* at 895 ("The diminution of the public debate leaves voters distrustful.").

[56] *Id.* at 896. According to one survey, in 1960, an estimated 63.1% of the voting-age population turned out to vote in federal elections, while only 37.8% did so in 2010. *National Voter Turnout in Federal Elections: 1960–2010*, INFOPLEASE, http://www.infoplease.com/ipa/A0781453.html (last visited May 1, 2012).

[57] *See* Marshall, *supra* note 41, at 295 ("When a majority of citizens do not participate in the democratic process, the resulting political decisions represent only the preferences of

voters are cynical about campaign statements, they may tend to distrust even honest, truthful statements[58] and will disrespect politicians generally.[59] This cannot be a good fate for a system based on participatory and representational government. What must be emphasized here is that voter alienation and withdrawal undermines the foundation of the First Amendment protection for freedom of expression. If the heart of free speech is to foster participation in the making of policy choices in a self-governing system,[60] then something is terribly misguided when the process actually discourages such involvement and engagement.

Lastly, false campaign statements and negative ads not only do harm to the reputations of candidates; there is collateral damage as well. Running for office is already a tremendously time consuming and enervating process. This, and the further realization that their character is likely to be attacked by claims only marginally linked to the facts, is likely to prevent some otherwise qualified candidates from running for office.[61] The public suffers not only the loss of a potential public servant, but reputational harm is done to the democratic process as well.[62] The continual disparagement of political candidates creates distrust and cynicism, which undermine the faith on which democracy is based.[63]

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the few, arguably negating the democratic premise. For this reason, some theorists have contended that democratic decision making is illegitimate unless there is significant voter turnout.") As Marshall points out, however, "some have argued . . . that the concerns about low voter turnout are overstated" and may actually represent satisfaction with the political process. *Id.* at 295 n.45.

[58] *See* Goldman, *supra* note 45, at 895–96 ("[V]oters become distrustful of campaign advertising that is in fact truthful. In a USA TODAY/Gallup Poll, seven out of ten persons 'said they believed "not much" or "nothing at all" of what they heard in political ads.'" (quoting Susan Page, *Nasty Ads Close Out a Mud-Caked Campaign*, USA TODAY, Nov. 2, 2006, at 11A)).

[59] *Id.* at 896 ("As Ed Rollins explains, 'If . . . every carrier in the airline industry ran commercials about how many people were killed in competitors' plane crashes—and the competition responded in kind—nobody would feel safe driving or flying anywhere. That's not much different from what's happening in politics today.'" (quoting ED ROLLINS WITH TOM DEFRANK, BARE KNUCKLES & BACK ROOMS: MY LIFE IN AMERICAN POLITICS 350 (1996))).

[60] *See supra* notes 25–27 and accompanying text.

[61] *See* Goldman, *supra* note 45, at 896 ("The level of discourse and disrespect for politicians also discourages qualified candidates from seeking office.").

[62] *See* Marshall, *supra* note 41, at 296 ("[F]alse statements against an opponent's character can inflict reputational and emotional injury upon the attacked individual. These harms may be serious enough outside the campaign context, but in the case of political campaigns, the harms inflicted may affect more than just the disparaged candidate. . . . [T]he constant and unchecked derogation of political actions can harm the integrity of true democratic community." (footnotes omitted)).

[63] *See id.* at 294 ("Democracy is premised on an informed electorate. Thus, to the extent that false ads misinform the voters, they interfere with the process upon which democracy is based.").

II. ADDITIONAL REMEDIES

The arguments on both sides of the issue of regulating false campaign speech are compelling, but for the reasons that follow I think the chance of any additional remedy beyond a *New York Times* defamation action based on actual malice is remote (and even the availability of this action may be fading). In the first place, as Marshall notes, the reasons advanced for controlling campaign speech may overstate the case.[64] The public views campaign claims with a certain amount of suspicion to begin with, and the opponent stands at the ready to correct erroneous statements.[65] This means that false assertions will not float around in public debate unchallenged. There is obviously a built-in incentive for refutation.[66] Additionally, any further remedy for falsification is not likely to have an effect on the particular election cycle in which it is made.[67] Adjudication of falsity, with or without a damages remedy or other sanction,[68] takes time and will outlive the election results. Unless filing the complaint itself does the job, the remedy is likely to be superfluous to the election. The charge and countercharge are likely to do at least as much good in informing the public about the candidates and generating interest in the election, encouraging voter interest and turnout instead of depressing it.[69] "False statements, and their

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[64] *See id.* at 297.

[65] *Id.* Marshall cites two examples of overstated harms. First, "the regulatory concern of preventing candidates from deceiving voters may miss the point that voters often do not believe what they hear in campaigns anyway." *Id.* Second, "the threat to truth posed by false or deceptive campaign statements may not be as great as in other areas because in the context of a campaign there is always a very heavily motivated party set to expose the candidate's deceptions, i.e., the candidate's opponent." *Id.*

[66] As Marshall points out, "misstatements in a political campaign are unlikely to ever go unanswered." *Id.* Marshall extends this further, arguing that "false statements may actually serve to make the public more informed. Voters may learn much about their candidates in the context of a battle over whether a campaign statement was true or not." *Id.*

[67] "For one, adjudicating false speech claims is likely to take far longer than the election cycle, so a formal decision on the truth or falsity of a campaign claim likely will not happen until it is too late." *Id.*

[68] Some have suggested that creating an action for determinations of falsity without a damages remedy would speed up the process. *See, e.g.*, Thomas Kane, Note, *Malice, Lies, and Videotape: Revisiting* New York Times v. Sullivan *in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755 (1999). Recognizing that "*New York Times* was about money," Kane argues that a court sitting in equity could create "an equitable cause of action for 'campaign slander.' In essence, the defamed candidate would be asking the court to make a factual finding that the publication in question was inaccurate, and to enter that finding into the public record." *Id.* at 769, 791. As a former candidate for public office, Kane knew firsthand "what it [was] like to be on the wrong end of a defamatory falsehood fabricated in the heat of a political campaign." *Id.* at 755 n.†.

[69] *See* Marshall, *supra* note 41, at 297–98. Marshall states that "although negativity can at times suppress voter turnout, the charges and countercharges over purported false statements can paradoxically serve to generate voter interest." *Id.*

resulting controversies, may infuse a campaign with a drama and urgency that it otherwise lacks."[70] Thus, the arguments for additional remedies may not be as compelling as supposed.

More importantly, the Supreme Court has considered the opposing interests and has categorically staked out the law in *New York Times* and its progeny. In a series of decisions beginning with that case the Court has created a multifaceted legal regime which would seem to foreclose other inconsistent remedies.[71] Although state statutes that sanction false campaign speech if made with *New York Times* actual malice are generally valid,[72] other suggested additional remedies—e.g., using a negligence standard,[73] judicial decree of falsity without damages,[74] limiting recovery to actual economic loss[75]—are suspect.

Although the *New York Times* case concerned statements regarding public officials and the proximity to seditious libel and chilling core First Amendment values, the protection was later extended more broadly to statements about public figures,[76]

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[70] *Id.* at 298.

[71] *See infra* notes 76–80 and accompanying text.

[72] *See, e.g.*, ALASKA STAT. ANN. § 15.56.012 (West 2011); COLO. REV. STAT. ANN. § 1-13-109 (West 2011); FLA. STAT. ANN. § 104.271 (West 2011); LA. REV. STAT. ANN. § 18:1463(c) (West 2011); MASS. GEN. LAWS ANN. ch. 56, § 42 (West 2011); MINN. STAT. ANN. § 211b.06 (West 2011); MISS. CODE ANN. § 23-15-875 (West 2011); MONT. CODE ANN. §§ 13-35-301, 302 (West 2011); N.C. GEN. STAT. ANN. § 163-274(a)(8) (West 2011); N.D. CENT. CODE ANN. § 161-10-04.1 (West 2011); OHIO REV. CODE ANN. § 3517.21(b) (West 2011); OR. REV. STAT. ANN. § 260.532 (West 2011); TENN. CODE ANN. § 2-19-142 (West 2011); UTAH CODE ANN. § 20A-11-1103 (West 2011); W. VA. CODE ANN. § 3-8-11(c) (West 2011); WIS. STAT. ANN. § 12.05 (West 2011). *But see* Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 827, 830–32 (Wash. 2007) (holding that a Washington statute "proscrib[ing] sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a candidate for public office" was unconstitutional on its face because it was not narrowly tailored to a compelling governmental interest); State v. Jude, 554 N.W.2d 750, 753–54 (Minn. Ct. App. 1996) (holding that a Minnesota statute that imposed criminal liability on those who disseminated false campaign material with only "reason to believe" that material was false was unconstitutional because it imposed liability for statements not made with "actual malice").

[73] *See, e.g.*, Goldman, *supra* note 45, at 914–20 (suggesting the adoption of a statutory negligence standard for false or misleading campaign advertising).

[74] *See, e.g.*, Kane, *supra* note 68. Kane recognizes that a possible argument against these types of actions is that they are unconstitutional because they could chill valuable speech. *Id.* at 798–99. According to Kane's analysis, however, both variations of this idea fail. *Id.* First, the idea that litigation costs would "have the same chilling effect as large monetary awards" fails because "potential costs of litigation have never been thought to chill protected speech." *Id.* at 799–800. Second, Kane dismisses the idea that campaign speech should be treated differently because of special attributes, stating, "candidates would not have to self-censor in order to avoid campaign slander actions." *Id.* at 803.

[75] *See* Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of* New York Times v. Sullivan, 32 CUMB. L. REV. 519, 561–62 (2002).

[76] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

private persons involved in matters of public interest,[77] actions involving invasion of privacy,[78] and suits for the intentional infliction of emotional distress.[79] The foundation of all of this constitutional lawmaking is that the discussion of public people and events lies at the heart of free expression to be protected in a self-governing democracy. It is participation in learning about public matters, participating in the formation of public opinion, and the making of governmental decisions that the Court rightly cares about. Any legal device that discourages this engagement threatens to undermine democracy. Legal rules that inhibit this process must therefore be curtailed. The Supreme Court's recent First Amendment jurisprudence seems to employ this principle with a vengeance.[80] It would seem clear, then, that statements or claims made by political candidates, whether incumbents or challengers, are at the height of First Amendment free expression interests, deserving of the most serious solicitude to prevent the chilling of political dialogue.

III. THE *NEW YORK TIMES* ACTION

In terms of regulating false campaign speech, we seem to be left with the *New York Times* regime and the need to prove knowledge of falsity or reckless disregard for the truth in order to penalize it, either through a defamation action or state statutory sanction. The criticism of this method of regulating campaign lies is both that it comes too late after the election is over[81] and, given the applicable standards, it is hard for a plaintiff to prevail.[82]

The after-the-fact argument is not entirely persuasive. Even if the action is filed after the election—as opposed to during the election when it surely is likely to draw media and public attention—a successful lawsuit is likely to have considerable impact, not only because of the effect of a large damage award on the defendant, but more profoundly due to the deterrent impact that such a reward will have on the temptation to make future false—or even wildly exaggerated—campaign claims about an opponent.

Thus, the viability of a *New York Times* suit in controlling campaign lying about an opponent seems to depend on its likelihood of success. It is to this that I will now

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[77] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[78] *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

[79] *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[80] *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011) (holding that speech of church members who picketed near the funeral of a military service member killed in the line of duty in Iraq with signs such as "Thank God for Dead Soldiers" and "God Hates the USA/Thank God for 9/11," was of public concern and entitled to special protection under the First Amendment); Citizens United v. FEC, 130 S. Ct. 876 (2010) (holding that under the First Amendment, the government may not suppress political speech on the basis of the speaker's corporate identity).

[81] *See supra* note 67 and accompanying text.

[82] *See* Ashdown, *Journalism Police*, *supra* note 18, at 755 ("[T]he common law of libel[ ] was virtually eliminated by the *New York Times* line of cases.").

turn. First, *New York Times* does not prevent recovery.[83] The plaintiff candidate must prove that the statement or publication was made with actual malice, defined as knowledge of falsity or reckless disregard for the truth.[84] The Supreme Court later refined this to mean "that reckless conduct [was] not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," but rather, by whether "[t]here [was] sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[85] Actual malice is thus a subjective test of "an awareness . . . of the probable falsity of [the] statement."[86]

In the case of *Herbert v. Lando*, however, the Court held that a plaintiff was entitled to inquire into the editorial process of a media defendant, in the face of a claim of editorial privilege, in order to attempt to discover proof of whether that standard was met.[87] This likewise would seemingly allow a defamed candidate to obtain discovery into the means by which a publisher of alleged campaign lies came about his information and any strategic distortions that were planned.

Along with the actual malice requirement, the Court has ruled that there can be no recovery for statements that are mere hyperbole[88] or opinions that are not provably false.[89] Another substantive limitation on recovery was created by § 315(a) of the Federal Communications Act,[90] and the Supreme Court decision in *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*[91] In *WDAY*, the Court ruled that because § 315(a) denies a station the power of censorship over material broadcast—e.g., political advertisements—by legally qualified candidates for public office, the section grants a licensee a federal immunity from liability for libelous statements so broadcast.[92] Thus, a radio or television station that runs a false political

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[83] *See, e.g.*, Sprouse v. Clay Commc'n, Inc., 211 S.E.2d 674, 681 (W. Va. 1975) (affirming a jury's award of $250,000 in actual damages to an unsuccessful gubernatorial candidate who brought libel suit and striking, as a matter of law, the award of $500,000 in punitive damages). Although the suit was filed against a newspaper, and not an opposing candidate, the court determined that the newspaper in question "foreswore its role as an impartial reporter of facts and joined with political partisans in an overall plan or scheme to discredit the character of a political candidate." *Id.* at 680. In finding actual malice under *New York Times*, the court stated, "that once an overall plan or scheme to injure has been established, an unreasonable deviation between headlines and the remainder of the presentation is in and of itself evidence of actual malice, which, along with other evidence, supports a jury verdict for libel." *Id.* at 680–81.

[84] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[85] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[86] *Id.* at 732–33.

[87] 441 U.S. 153 (1979).

[88] Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[89] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

[90] 47 U.S.C. § 315(a) (2006).

[91] 360 U.S. 525 (1959).

[92] *Id.* at 535.

advertisement cannot be made a party defendant.[93] This apparently does not apply to regular news coverage by broadcast licensees[94] or the print media who are not subject to § 315(a),[95] and certainly does not apply to the author of the ad him or herself.

Justice Brennan's majority opinion in *New York Times* also has been interpreted to require proof of actual malice by clear and convincing evidence,[96] which makes summary judgment for a defendant easier to obtain.[97] Another procedural protection available to defendants in defamation cases in which the *New York Times* rule applies

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[93] *Id.*

[94] Because news coverage is not deemed to be "use of a broadcasting station" within the meaning of § 315, it is only logical that a licensee has the power of censorship and, thus, no federal immunity from libelous statements so broadcast. In part, the statute states:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That *such licensee shall have no power of censorship over the material broadcast under the provisions of this section*. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide *newscast*,
> (2) bona fide *news interview*,
> (3) bona fide *news documentary* (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) *on-the-spot coverage* of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> *shall not be deemed to be use of a broadcasting station within the meaning of this subsection*.

§ 315(a) (emphasis added).

[95] > It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority . . . .

Id. § 301 (2006).

[96] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964). After reviewing the evidence, Justice Brennan concluded that "[a]pplying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands."

[97] *See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) ("When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence. Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.").

is the doctrine of "independent judicial review" of lower court findings of actual malice.[98] All of these procedural restrictions on defamation actions are, of course, designed to substantially raise the bar to recovery in order to avoid the potential inhibiting effect on speech that damages awards might create.

Because of the foregoing, cases in which recovery has been denied for false campaign speech claims are plentiful.[99] This does not mean, however, that candidates cannot sue for defamation and prevail. A few examples are in order. In *Harte-Hanks Communications, Inc. v. Connaughton*, Connaughton was the challenger for an elected municipal judge's seat in Hamilton, Ohio.[100] The petitioner's newspaper, the *Journal News*, supported the election of Connaughton's incumbent opponent.[101] About a month before the election, "the incumbent's Director of Court Services resigned and was arrested on bribery charges," and a grand jury investigation was in progress.[102] During the investigation, "the Journal News ran a front-page story quoting . . . a grand jury witness, as stating that Connaughton had used 'dirty tricks' and offered her and her sister jobs and a trip to Florida 'in appreciation' for their help in the investigation."[103]

Connaughton filed a federal diversity action for libel, claiming "that the article was false, that it had damaged his personal and professional reputation, and that it had been published with actual malice."[104] The district court denied the defendant's motion for summary judgment, concluding that the evidence raised a genuine issue of fact on actual malice.[105] The jury returned a verdict of $5,000 in compensatory damages and $195,000 in punitive damages, and the court of appeals affirmed after an "independent examination on the entire record."[106] After a lengthy and detailed review of the evidence, in an opinion by Justice Stevens, the Supreme Court concluded that the finding of actual malice was justified.[107] The newspaper had interviewed five witnesses who contradicted the charges, had failed to listen to a tape recorded interview available to them of the grand jury witness who had originally made the claims, and refused to interview a key witness with knowledge of their accuracy, all of which tended to prove or could have proven the bribery claims false.[108]

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[98] *N.Y. Times*, 376 U.S. at 284–85; Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 510–11 (1984).

[99] *See, e.g.*, George v. Fabri, 548 S.E.2d 868 (S.C. 2001) (ruling that the trial court properly decided that there was insufficient evidence of actual malice in statements made by opposing candidate on website and campaign materials).

[100] 491 U.S. 657 (1989).

[101] *Id.* at 660.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 661, 662.

[107] *Id.* at 693.

[108] *Id.* at 682–85, 691–92.

Justice Stevens was careful to note that a failure to investigate alone would not establish actual malice, but concluded that there was a deliberate effort to avoid discovering the truth.[109] This suggests that a candidate with knowledge of, and ready access to, information that would either prove or dispel a claim about one's opponent may be guilty of actual malice if it amounted to "the purposeful avoidance of the truth."[110]

Another case in which an appellate court concluded that there existed evidence of actual malice is *Boyce & Isley, PLLC v. Cooper*.[111] In the 2002 election for North Carolina Attorney General, Cooper ran an ad that stated that the law firm of his opponent, Boyce, had sued the state and charged $28,000 an hour in legal fees to the taxpayers.[112] The ad also claimed that the judge had said that the damages award "shock[ed] the conscience" and alleged that "[the] law firm wanted more than a police officer's salary for each hour's work."[113] The lawsuit referred to by Cooper's ad was a civil class action seeking refunds on a North Carolina intangibles tax that had allegedly been illegally imposed.[114] After the court entered judgment on behalf of the class of protesting taxpayers, the Boyce firm requested a fee of $23 million dollars, and the judge responded that "'would yield . . . a windfall payment of over $28,174.00 per hour' and that such a request 'shocks the conscience of the Court.'"[115]

Cooper filed an action for defamation, contending that the plaintiffs never "charged" the state $28,000 per hour, but rather only "sought" attorney's fees based on the amount of recovery.[116] The North Carolina Court of Appeals reversed the trial court's dismissal of the defamation claim, concluding that the language about "charging" the fee was both false and defamatory because it conveyed a drastically different meaning than that the fee was merely "sought."[117] The appellate court said that the word "sought" indicates only that a fee was submitted to the court and not that it was received, whereas the term "charged" suggests that it was actually received at taxpayers' expense.[118] The court felt that the average person would not understand that attorneys' fees in class action lawsuits had to be approved by the court.[119] The court was also concerned that the ad did not mention that the case involved was a large class-action lawsuit, or explain the term "contingency fees,"

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[109] *Id.* at 692–93.
[110] *Id.* at 692.
[111] 568 S.E.2d 893 (N.C. Ct. App. 2002).
[112] *Id.* at 896–97.
[113] *Id.* at 897.
[114] Marshall, *supra* note 41, at 288 (citing Smith v. State, No. 95CVS6715 (N.C. Super. Ct. Nov. 20, 1997)).
[115] *Id.* (quoting *Smith*, No. 95CVS6715, slip op. at 67–68).
[116] *Boyce & Isley*, 568 S.E.2d at 898–99.
[117] *Id.* at 899.
[118] *Id.*
[119] *Id.*

and without this additional information the claim made by the defendant against the plaintiffs could not be properly evaluated.[120]

The claim that the plaintiff's case in *Boyce & Isley* cannot withstand the actual malice standard is not easily argued. The standard requires proof that the false statements were either knowingly made or made with reckless disregard for the truth.[121] Cooper, an attorney,[122] had to know the difference between fees being charged and fees being sought, especially in the context of contingency fees in a class-action lawsuit. The North Carolina Court of Appeals seems correct in concluding that the average person would conclude that the defendant's ad indicated that the exorbitant fees were, in fact, paid at the taxpayer's expense.[123] This is exactly what the defendant Cooper was trying to convey and it was knowingly false. If that analysis is correct, it would seem to mean that when a candidate purposely dissembles or distorts the truth to disparage an opponent—and that is exactly the goal of false, negative campaigning—a case of actual malice would be made for jury consideration. Unfortunately, due no doubt to solicitude for First Amendment interests, many appellate courts, as mentioned above, ignore the countervailing free speech interests on the other side of the ledger,[124] and fail to do a careful analysis of whether the facts satisfy the *New York Times* test, including considering whether there has been a deliberate attempt to avoid learning the truth, as in *Harte-Hanks Communications*,[125] or a distortion of the facts that amounts to a deliberate falsification, as in *Boyce & Isley*.[126] It is this conscientious analysis under the actual malice test that I would urge, in order to avoid the distortion of democracy by categorically applying the *New York Times* regime to dismiss libel actions based on false campaign speech.

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[120] *Id.*

[121] *See supra* notes 84–86 and accompanying text.

[122] *Boyce & Isley*, 568 S.E.2d at 896.

[123] *Id.* at 899 ("Without this vital information to lend context to the facts as portrayed in the advertisement, the average viewer could not properly evaluate the claims being made by defendants against plaintiffs. Instead, the average viewer was left solely with the following information about plaintiffs: that they (1) sued the State; (2) charged (and therefore received) $28,000 per hour to taxpayers to do so; (3) that this sum represented more than a policeman's annual salary; and (4) that a judge had pronounced that plaintiffs' behavior 'shocked the conscience.'").

[124] *See, e.g.*, Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 827, 830–32 (Wash. 2007) (holding that a Washington statute "proscrib[ing] sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a candidate for public office" was unconstitutional on its face because it was not narrowly tailored to a compelling governmental interest); State v. Jude, 554 N.W.2d 750, 753–54 (Minn. Ct. App. 1996) (holding that a Minnesota statute that imposed criminal liability on those who disseminated false campaign material with only "reason to believe" that material was false was unconstitutional because it imposed liability for statements not made with "actual malice")

[125] Harte-Hanks Commc'n v. Connaughton, 491 U.S. 697 (1989); *see also supra* notes 100–10 and accompanying text.

[126] *Boyce & Isley*, 568 S.E.2d 893; *see also supra* notes 111–20 and accompanying text.

One further example helps to establish how actual malice can be proven. In *Anderson v. Augusta Chronicle*,[127] a dispute arose between the plaintiff, Anderson, a candidate for the South Carolina House, and a reporter for defendant's newspaper over whether Anderson had said in an interview that he quit campaigning in an earlier race because he was called to duty in the National Guard, or had said that he was working for the National Flood Insurance Program after Hurricanes Fran and Bertha, as Anderson claimed.[128] The newspaper ran two articles alleging that Anderson had falsely said he was called up to the National Guard.[129] After Anderson disputed the claim, the newspaper ran an editorial a month before the election entitled, "Let the Liar Run."[130] The editorial again referred to Anderson as a liar for claiming to have served in the National Guard and suggested that he had dishonored himself, but should not withdraw from the election if that was the best that the Democrats had to offer because "[w]e are confident that an informed electorate won't vote into office a proven prevaricator."[131] After the trial court granted the defendant's motion for a directed verdict, the court of appeals reversed and the South Carolina Supreme Court affirmed the reversal.[132] The court recognized that circumstantial evidence can be relied upon to establish actual malice because "a plaintiff will rarely find success in proving awareness that a statement is false 'from the mouth of a defendant himself.'"[133] The court primarily relied on three sets of facts from which a jury could have found actual malice. First, the defendant newspaper had run a third article, between the first two and the editorial, in which a different reporter had confirmed Anderson's denial and his contention that he had worked for the National Flood Insurance Program.[134] Second, prior to the editorial, Anderson had sent documentation to another employee of the newspaper that confirmed his work for the National Flood Insurance Program.[135] Third, another paper had previously run two stories

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[127] 619 S.E.2d 428 (S.C. 2005).

[128] *Id.* at 429.

[129] *Id.* ("On April 6, 1997, just days after Bray interviewed Anderson, the Chronicle published an article about Anderson being called to serve in the National Guard during the 1996 campaign. On June 3, 1997, the Chronicle published a second article in which Bray wrote that Anderson 'felt cheated for being called away to the National Guard' in the middle of his campaign.").

[130] *Id.* at 430.

[131] *Id.*

[132] *Id.* at 429.

[133] *Id.* at 431 (quoting Herbert v. Lando, 441 U.S. 153, 171–72 (1979)). It should be noted that occasionally it is possible to prove actual malice from the defendant's own mouth. For example, in *Libbra v. City of Litchfield*, 893 F. Supp. 1370 (C.D. Ill. 1995), the defendant admitted under oath that he had no knowledge or information about claims that he made that various people were child molesters, gay, had AIDS, or used cocaine.

[134] *Anderson*, 619 S.E.2d at 432.

[135] *Id.*

covering Anderson's break in the earlier campaign to help process claims for hurricane damage under the National Flood Insurance Program.[136]

Although *Anderson* is closer to *Harte-Hanks Communications*—a deliberate attempt to avoid learning the truth[137]—than it is to *Boyce & Isley*—distortion of facts amounting to deliberate falsification[138]—it is different in the sense that it involves a failure to consider contradictory information actually in the speaker's hands, which amounts to more than a failure to investigate. This suggests that one strategy available to a defamed candidate is to make contradictory evidence available to the opponent. If the countering evidence is reliable, and the opponent afterwards repeats the false claim again, it would seem to satisfy the *Harte-Hanks Communications* and *Anderson* deliberate distortion showing of actual malice. The fact that these two cases involve media defendants and not falsifying candidates is not material because the standard for recovery is the same in each instance—knowledge of falsity or reckless disregard for the truth. Additionally, it indicates the vulnerability of another category of defendant, the print media (or the broadcast media publishing a story as opposed to running an ad).

At this stage, this Article posits two conclusions. One, the *New York Times* actual malice standard is the only legally viable means of regulating false campaign speech, and two, satisfaction of the standard is reachable, and should be so recognized by courts in the course of libel and slander litigation concerning campaign inaccuracies or severe distortions. Refusing to consider information knowingly available or ignoring contradictory evidence in one's possession is evidence of actual malice sufficient for a jury determination of liability. Likewise, a distortion of facts amounting to deliberate falsification should be sufficient to get to a jury. If courts were simply to recognize these evidentiary standards of liability, honoring the First Amendment interests of government in honest elections, instead of exclusively focusing on the countervailing interests in free expression, much could be done to deter false campaign speech. Nonetheless, I have a lingering sense that the stage has not yet been fully set on this issue. It is on this uneasiness that I will now focus.

IV. CORPORATE CAMPAIGN EXPENDITURES AND FALSE CAMPAIGN SPEECH

In 1998, the Washington Supreme Court in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*[139] held that a state statute that prohibited

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[136] *Id.* at 432–33.

[137] 491 U.S. 657 (1989).

[138] 568 S.E.2d 893 (N.C. Ct. App. 2002).

[139] 957 P.2d 691 (Wash. 1998). The suit arose during the course of a campaign against an initiative up for vote in the November 1991 election. *Id.* at 693.

> The State of Washington . . . brought suit against the 119 Vote No! Committee, its executive director and its treasurer. The State allege[d] the Committee published political advertising contrary to [WASH. REV.

false political advertising in an initiative campaign violated the First Amendment, even though the statute required that actual malice be shown.[140] The court viewed government involvement in the regulation of political speech as contrary to core free speech values.[141] The electorate was entitled to be the final arbiter of truth or falsity.[142] This ruling, of course, goes beyond *New York Times Co. v. Sullivan* in protecting even deliberately false campaign speech to guard a robust political debate and keep government out of its regulation. If this analysis is sound, it suggests that even calculated campaign lies are beyond state sanctions. Although *119 Vote No! Committee* involved direct state statutory regulation, defamation actions enabled by state law are not that far removed.[143]

> CODE §] 42.17.530(1)(a) during the course of its campaign in opposition to Initiative 119, the so-called "Death with Dignity Act." *Id.* The advertising in question was a one-page printed advertisement, which stated in part:
>
> > Initiative 119: Vote No
> > IT WOULD LET DOCTORS END PATIENTS' LIVES WITHOUT BENEFIT OF SAFEGUARDS . . .
> >
> > • No special qualifications—
> > your eye doctor could kill you.
> > • No rules against coercion—
> > Nothing to prevent "selling" the idea to the aged, the poor, the homeless.
> > • No reporting requirements—
> > No records kept.
> > • No notification requirements—
> > Nobody need tell family members beforehand.
> > • No protection for the depressed—
> > No waiting period, no chance to change your mind.
> > INITIATIVE 119 . . . IS A DANGEROUS LAW
> > VOTE NO ON INITIATIVE 119

Id. at 693 n.1.

[140] *Id.* at 699.

[141] *Id.* at 695–96 ("[T]he First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of government itself. . . . 'For speech concerning public affairs is more than self-expression; it is the essence of self government.'" (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))).

[142] *Id.* at 695 ("[T]he First Amendment operates to insure [sic] the public decides what is true and false with respect to governance.").

[143] For example, in making its ruling, the Supreme Court of Washington quoted *New York Times* for the proposition that no one but the public has the power to decide the truth and falsity in a political debate.

> This claim presupposes the State possesses an independent right to determine truth and falsity in political debate. However, the courts have "consistently refused to recognize an exception for any test of

Thus, it is necessary to explore the validity of the Washington Supreme Court's conclusion. This is where campaign finance regulation enters the picture. If William Marshall is right that the First Amendment interests in protecting corporate campaign expenditures and protecting false campaign speech, and the corresponding state interests in the regulation of both, are comparable, then the campaign expenditure jurisprudence has much to say about regulation of calculated campaign falsity.[144] Without reviewing Marshall's analysis in detail, he suggests that the free expression interests are similar because both in the case of corporate campaign money and campaign lies political speech is at the core of First Amendment values, and in both cases regulation is subject to political abuse.[145] Likewise, he accurately observes that the state's interest in regulation—preventing distortion and voter alienation—is largely the same.[146] As such, a review of the developed law on the regulation of campaign finance is in order to detect the degree to which campaign lies and distortion can be controlled by the state. If the interests on both sides of the First Amendment equation are roughly the same, if one is beyond any kind of state regulation, the other may also be, even through the law of libel.

In 1976, in *Buckley v. Valeo*, the Supreme Court invalidated much of the Federal Election Campaign Act.[147] The Court struck down the limits on independent expenditures, expenditures not coordinated with a candidate's campaign, on the theory that money equals speech—i.e., in our contemporary culture, it is necessary to spend money to effectively communicate.[148] However, the Court upheld the contribution limits due to the government's interest in preventing corruption or the appearance of corruption,[149] both in the form of quid pro quo corruption and the ability of contributors

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> truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker."

Id. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)).

[144] *See* Marshall, *supra* note 41, at 302–03 ("Most obviously, the First Amendment interests at stake in both deceptive campaign speech and corporate expenditure regulations are similar. In both circumstances, core First Amendment concerns are implicated because the activity sought to be regulated is political. Less obviously, the key state interests underlying both regulatory matters are also closely parallel.").

[145] *Id.* at 301–05.

[146] > According to the Court, restrictions on corporate expenditures are supported by the need to preserve the individual citizen's confidence in government and to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government. Seen as such, the anticorruption rationale reflects virtually the exact same antialienation concern that supports regulating campaign speech.

Id. at 304 (footnotes and internal quotation marks omitted).

[147] 424 U.S. 1 (1976).

[148] *Id.* at 39–51.

[149] *Id.* at 23–36.

to exercise "undue influence on an officeholder's judgment, and the appearance of such influence."[150] The *Buckley* Court also felt that associational rights were protected by the ability to make contributions within the statutory limits.[151]

In *Austin v. Michigan Chamber of Commerce*[152] and *McConnell v. Federal Election Commission*,[153] the Supreme Court enlarged the corruption rationale to take on an entirely new meaning. In upholding restrictions on corporate campaign expenditures, the Court identified the corruption rationale as not only contributors purchasing access, influence, and special benefits, but also as the potential for large expenditures of corporate and union cash to overly influence political debate and decisionmaking.[154] The corruption rationale was expanded to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated through the help of the corporate form that have little or no correlation to the public's support for the corporation's political ideas."[155] In *McConnell*, the Court also expressed a concern for voter alienation when it stated that restrictions on corporate expenditures are justified to protect "the individual citizen's confidence in government" and to preserve "the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government."[156] Consequently, the interest in preventing voter alienation is present in both campaign spending and campaign deception issues. Likewise, the distortion concern relied upon in *Austin* and *McConnell* to justify restrictions on corporate campaign spending is virtually identical to the interest in preventing distortion created by false campaign speech; the only difference being the source of the distortion—money or lies. If the First Amendment interests in protecting campaign speech and campaign expenditures and the countervailing interests in state regulation of both are roughly equivalent,[157] then regulation of one should permit regulation of the other, and, equally, if regulation of one is not constitutionally permitted, neither would regulation of the other be permitted.

It is here that things get interesting because in *Citizens United v. Federal Election Commission*, the Supreme Court overruled *Austin* and *McConnell*, rejecting the distortion and alienation rationales in the context of independent corporate campaign

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[150] McConnell v. FEC, 540 U.S. 93, 150 (2003) (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001)).

[151] *Buckley*, 424 U.S. at 36–51.

[152] 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

[153] 540 U.S. 93 (2003), *overruled by Citizens United*, 130 S. Ct. 876.

[154] *See Austin*, 494 U.S. at 660 ("We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.").

[155] *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660).

[156] *Id.* at 206 n.88 (citations and internal quotation marks omitted).

[157] Marshall, *supra* note 41, at 302–03; *see also supra* text accompanying note 144.

spending.[158] At this stage, if the Court's analysis in *Citizens United* is applicable to campaign deception as well as corporate expenditures, then regulating false campaign speech through any kind of governmental controls, including *New York Times* libel actions, may be impermissible.

Regarding the government's interest in preventing distortion, Justice Kennedy's majority opinion largely ignores the capacity of corporate expenditures to distort public debate, except for references to small corporations, who cannot distort,[159] and to large media corporations, which can distort but are exempted.[160] His analysis focuses almost exclusively on the other side of the First Amendment ledger—the value and protected nature of political speech or speech in the political marketplace. Rather than focusing on the potential distorting effects of the aggregation of corporate wealth and spending, Justice Kennedy views the issue from the other perspective—the censorship of valuable speech in the political arena. Some quotes from his majority opinion best tell this tale:

> Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[161]

> The rule that political speech cannot be limited based on the speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.[162]

> *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment. . . . It permits the Government to ban the political speech of millions of associations of citizens.[163]

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[158] *Citizens United*, 130 S. Ct. at 904–08.

> This protection for speech is inconsistent with *Austin*'s antidistortion rationale. *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace. But *Buckley* rejected the premise that the Government has an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. *Buckley* was specific in stating that the skyrocketing cost of political campaigns could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's financial ability to engage in public discussion.

Id. at 904 (citations and internal quotation marks omitted).

[159] *Id.* at 906–07.

[160] *Id.* at 905–06.

[161] *Id.* at 904 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)).

[162] *Id.* at 905.

[163] *Id.* at 906–07 (citations omitted).

> The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[164]

> The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinion to the public. This makes *Austin*'s antidistortion rationale all the more an aberration.[165]

I reference this language, which comes mostly from previous dissenting opinions in corporate spending restriction cases,[166] simply to make it clear that the majority in *Citizens United* refused to consider the potential distortion of political debate caused by the infusion of corporate wealth. Justice Stevens's partial dissenting opinion[167] makes this point both in terms of the anticorruption[168] and antidistortion[169] rationales. Rather, the majority's analysis invalidating § 441b's restriction on independent corporate expenditures is aimed at the value of speech in the political marketplace.[170] This has ominous overtones for any attempts to regulate false campaign speech, including actual malice defamation actions. If the antidistortion justification loses influence in favor of an emphasis on the value of political speech, then calculated campaign distortion can hold its own with corporate expenditures. After all, the reasons for limiting restriction on campaign claims is to avoid the chilling of debate in the political marketplace, the soul of freedom of expression. Solid here are the First Amendment interests protecting even false speech—the volatile and raucous nature of campaigning, the notion that the people and not government entities are to decide truth or falsity,[171] and potential political abuse of any regulation.

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[164] *Id.* at 907 (citations and internal quotation marks omitted).

[165] *Id.*

[166] *See id.* at 904–07 (citing Supreme Court cases, including *Bellotti*, 435 U.S. 765, and McConnell v. FEC, 540 U.S. 93 (2003)).

[167] *Id.* at 929–82 (Stevens, J., concurring in part and dissenting in part).

[168] *Id.* at 961–70.

[169] *Id.* at 971–77.

[170] *See supra* notes 159–65 and accompanying text.

[171] Justice Kennedy mentions this factor on a couple of different occasions in his majority opinion. *Citizens United*, 130 S. Ct. at 904, 907 (majority opinion).

Also in *Citizens United*, Justice Kennedy's majority opinion gave short shrift to the antialienation rationale.[172] Although directed primarily at the corruption argument regarding influence over, or access to, elected officials, Justice Kennedy concludes that independent expenditures not coordinated with a candidate are political speech designed to persuade voters and that corporations make such expenditures "presupposes that the people have the ultimate influence over elected officials."[173] "This is inconsistent with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional political speech made by a corporation or any other speaker."[174] In other words, voters will not be alienated by open political speech designed to persuade them of the speaker's position. They remain the ultimate decisionmaker. Here, it can be said that voters will not be turned off by the mass infusion of corporate wealth into political campaigns because they know it is only intended to persuade and can be ignored. The same can be said about calculated distortions because voters know candidates lie and manipulate the truth, and they ultimately get to decide what and whom to believe.

Justice Kennedy's majority opinion in *Citizens United*, rejecting the distortion and voter alienation arguments, can thus be seen as undermining even use of the *New York Times* actual malice standard to regulate false campaign speech. Nonetheless, the analogy should be rejected for a couple of reasons. First, the dissemination of false information in an election has a direct impact on the distortion of the facts. Irrespective of voter determination of truth and falsity, many false statements will be insufficiently rebutted to avoid polluting accurate and effective political decisionmaking. The effect of mass expenditures, on the other hand, is subliminal. The concern for distortion by over-communication of the message is still present, but it does not have the same intense political effect as deliberately misinforming the electorate. In the case of calculated campaign lies, the antidistortion rationale within democratic self-government simply cannot be ignored, as the majority opinion in *Citizens United* did in the context of corporate expenditures. Much of the same can be said about voter alienation. Exposed calculated distortion, or even competing claims about the accuracy of campaign statements, can have an immediate and direct impact on voter attitudes about the political process. In contrast, mass spending on political ads is not as immediately offensive. Justice Kennedy's quick disposal of the alienation rationale in *Citizens United* presumed the good faith of the message. In other words, lying, like death,[175] is different.

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[172] *Id.* at 910.

[173] *Id.*

[174] *Id.* (quoting McConnell v. FEC, 540 U.S. 93, 144 (2003)).

[175] Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.").

Second, the combination of unrestricted corporate spending in political campaigns and false campaign speech can result in double-distortion. There is nothing in *Citizens United* to suggest that First Amendment protection would not be available to the mass distribution of campaign lies. The more money available to disseminate calculated misinformation, the greater the distortion. One need look no further than the Willie Horton campaign against Michael Dukakis and the Swift-boating of John Kerry to understand this point.[176] Again, Justice Kennedy's majority opinion in *Citizens United* presumed the good faith of the corporate speaker. To leave completely unregulated, on First Amendment grounds, the amassing of wealth, corporate or otherwise, to disseminate false campaign information is contrary to any theory of free speech, whether based on personal autonomy, the marketplace of ideas, or political participation.[177] Some false speech may deserve protection to ensure breathing space for political debate, but the mass distribution of calculated misinformation surely does not. Because we cannot devise legal rules based on the extent of the distribution, campaign statements made with *New York Times* actual malice—those made with knowledge of their falsity or with reckless disregard for the truth—should not be protected under any First Amendment regime. *Citizens United* should not be imported into *New York Times*.

CONCLUSION

Deliberate campaign lies damage our political process, but, nevertheless, inaccuracies deserve substantial, but not unlimited, protection. The premise of the *New York Times* line of cases is that dialogue about political officials or public figures and public events requires restriction on the legal avenues of relief for misstatements made in the course of this kind of public discourse. Irrespective of the various theories of free expression, speech in this realm is at the heart of First Amendment protection.

Although *Citizens United* has something to say about the regulation of political speech, its emphasis is on the speech's value, and not the state's interest in regulation. This is where the difference between corporate campaign expenditures and deliberate campaign distortion is most pronounced. The premise of *Citizens United* is not that distortion is always protected, rather it is based on the right to engage in political speech; the more political discourse the better. The assumption is that the speakers are basically honest and are attempting to disseminate viewpoints in their interest. When this is not the case, government intervention through regulation is necessary, if not imperative, to prevent the distortion of democracy. However, given the carefully wrought lines drawn by *New York Times* and its

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[176] *See supra* notes 52–53.

[177] *See supra* notes 25–27 and accompanying text.

progeny, additional restrictions on statements and claims made during political campaigns seem legally troublesome. Nevertheless, that leaves plaintiffs with the availability of actual malice libel actions against falsifying candidates, their organizations and those who carry their message, including the print media when they run candidate ads or repeat the falsification in news coverage, and the broadcast media when they do the latter.[178] Mere repetition is no defense.[179]

Courts should be vigilant in applying the *New York Times* knowledge or recklessness standard—and not overemphasize its limitations—in order to plumb the facts to detect actual malice. Another case, briefly mentioned earlier, decided only ten years after the *New York Times* decision is illustrative.[180] In the 1968 gubernatorial election in West Virginia, the defendant newspaper, the *Charleston Daily Mail*, with the help of the campaign of the plaintiff's opponent, Arch Moore, Jr., ran newspaper articles two weeks before the election with oversized headlines.[181] The stories questioned the plaintiff's integrity by implying that the plaintiff, Democratic candidate Jim Sprouse, had engaged in real estate transactions in West Virginia, earning enormous profits as a result of inside information he had acquired through his Democratic Party affiliation.[182] Although the court viewed the body of the articles as generally accurate, portraying innocuous behavior, they concluded that several oversized headlines—e.g., PENDLETON REALTY BONANZA BY JIM SPROUSE EXPOSED, MOORE ASKS FEDERAL PROBE IN SPROUSE'S LAND GRAB, WHERE GOVERNOR CANDIDATE "CLEANS UP"—were sufficient evidence of actual malice to support the jury's verdict.[183] This is the kind of

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[178] By virtue of the Federal Communications Act, the broadcast media are immune from liability when they run candidate advertising. *See* Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 532 (1959); *see also supra* notes 94–95 and accompanying text.

[179] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 841 (5th ed. 1984).

[180] *See* Sprouse v. Clay Commc'n, Inc., 211 S.E.2d 674 (W. Va. 1975); *see also supra* note 83 and accompanying text.

[181] *Sprouse*, 211 S.E.2d at 680.

[182] *Id.* at 683.

[183] *Id.* at 685. The plaintiff, James Sprouse, was later appointed to the United States Court of Appeals for the Fourth Circuit. *See Judges of the Fourth Circuit, Since 1801*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WEBSITE, http://www.ca4.uscourts.gov/pdf/HistoryJudges.pdf (last visited May 1, 2012). His opponent, Arch Moore, Jr., who won the election, was later convicted of and sent to prison on federal extortion charges. *See* Lawyer Disciplinary Bd. v. Moore, 591 S.E.2d 338, 341 (W. Va. 2003) ("On May 8, 1990, [Arch Moore, Jr.] entered a guilty plea to a five-count federal indictment charging him with mail fraud, filing false tax returns, extortion and obstruction of justice. . . . As a result of his conviction, [Arch Moore, Jr.] served a period of thirty-three months incarcerated in federal prison."). Arch Moore, Jr. had been the subject of several other criminal investigations, *id.* at 341, but he was sent to federal prison for using $100,000 to illegally influence voters during the 1984 campaign for governor; extorting a coal operator, claiming he could secure

careful analysis, exposing reckless disregard for the truth, in which courts must engage to police calculated campaign distortion. This is the only, and needful, way—consistent with the First Amendment interest in public debate—to control false campaign speech in the twenty-first century. Candidates need to be encouraged to file suit, even after the election is over, to penalize campaign lying and deter this kind of behavior in the future. Concomitantly, trial judges and appellate courts should meticulously scrutinize the facts to determine if there is evidence of knowing or reckless falsity instead of precipitously deferring to *New York Times* protection.

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a refund from the state's black lung fund for the operator, as governor elect in 1984 and governor in 1985; filing false tax returns in 1984 and 1985; and

> engag[ing] in a series of acts in late 1989 and 1990 designed to prevent the federal grand jury sitting . . . in Charleston from learning of the nature of his criminal offenses, and . . . attempt[ing] to do so by giving false testimony to agents of the federal government and by influencing other witnesses to do the same.

Id. at 342–43.