FALSE CAMPAIGN SPEECH AND THE FIRST AMENDMENT

WILLIAM P. MARSHALL[†]

Although campaign reformers may believe otherwise, it is not only the money in campaigns that is problematic. Campaign speech can also threaten the integrity of the electoral process. It can be misleading, manipulative, offensive, defamatory, and, in the case of judicial campaigns, unethical. It can distort the issues, distract the voters from making informed decisions, inhibit voter turnout, and alienate the citizenry. Its effects on the political system can be as corrosive as the worst campaign finance abuses.

Currently, a number of legal sanctions are available, at least in theory, to redress excesses in campaign speech. These sanctions include individual defamation and privacy actions for damages and state unfair campaign practice restrictions that directly penalize the dissemination of false and misleading campaign speech. In addition, there are other types of extant or proposed campaign regulations, such as those requiring certain types of disclosure for so-called negative ads, or those requiring the candidate herself to appear on her campaign's paid advertising, aimed at improving the content of campaign speech. As with campaign finance regulations, however, restrictions on campaign speech raise difficult constitutional issues.

Thus far, the Supreme Court's approach to campaign speech regulation has been erratic at best. Some cases suggest that First Amendment review in this area should be especially stringent. As the Court has stated, the First Amendment has its "fullest and most urgent application [in] campaigns for political office."[1] Other cases, however, suggest precisely the opposite, i.e., that the role of the First Amendment is less complete in its application to campaign speech restrictions than it is in other areas.[2] Accordingly, the Court has at times

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[†] Kenan Professor of Law, University of North Carolina. I am grateful to all the participants in this Symposium and to the participants of the faculty workshop at Boston University for their helpful remarks and comments. Special thanks go to Rick Hasen and Sam Issacharoff for their valuable insights. Finally, I would like to thank Seth Turner and Marc Wilson for their research assistance.

[1] Brown v. Hartlage, 456 U.S. 45, 53 (1982) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[2] As Heather Gerken wrote in reference to the restriction on write-in protest votes

upheld restrictions on campaign speech where comparable prohibitions on noncampaign speech would have been struck down.[3]

This inconsistency, while certainly not laudable, is at least understandable. The concerns on both sides of the campaign speech restriction debate are particularly powerful. On one side, unchecked excesses in campaign speech can threaten the legitimacy and credibility of the political system. On the other, regulating campaign speech is problematic because of the serious dangers and risks in allowing the government and the courts to interfere with the rough and tumble of political campaigns. Courts and commentators are therefore to be excused if they cannot find easily discernible solutions to this conflict.

Undeterred, this paper nevertheless examines the constitutional issues surrounding campaign speech regulation. The inquiry is timely. *McConnell v. FEC*,[4] the Court's most recent foray into the constitutionality of campaign finance regulation, should have a significant impact on issues pertaining to the regulation of campaign speech.[5] At the same time, the debate over campaign speech restrictions may also have implications for *McConnell*. One of the more intriguing aspects of the *McConnell* decision is the extent to which it relies on rationales equally applicable to campaign speech regulation as to campaign fi-

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upheld in *Burdick v. Takushi*, 504 U.S. 428 (1992), "it is difficult to imagine that an activity with such obviously expressive dimensions would have been so easily dismissed under traditional First Amendment doctrine." Heather K. Gerken, *Election Law Exceptionalism? A Bird's Eye View of the Symposium*, 82 B.U. L. REV. 737, 739-40 (2002).

[3] Gerken, *supra* note 2, at 739-40 (discussing cases in which the Supreme Court treated election law differently in a First Amendment analysis). *Compare* Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (striking down an ordinance that allowed only labor picketing near a school on the grounds that such a subject-matter distinction was impermissible under the First Amendment), *with* Burson v. Freeman, 504 U.S. 191 (1992) (upholding a restriction on the distribution of campaign literature near a polling place despite the claim that singling out campaign literature for unfavorable treatment constituted an impermissible subject matter distinction).

[4] 540 U.S. 93, 124 S. Ct. 619 (2003).

[5] Indeed, section 311 of the Bipartisan Campaign Reform Act (BCRA) is, in effect, a campaign speech regulation in that it requires each candidate to "stand by her ad" by confirming that she has approved the ad's message. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, sec. 311, § 318, 116 Stat. 81, 105-06 (2002) (codified at 2 U.S.C. § 441d (2004)). The Court in *McConnell* upheld section 311 without serious discussion. 124 S. Ct. at 710. Of similar effect is BCRA section 305, because it denies a candidate the benefit of reduced advertising rates unless the candidate certifies that the ad does not refer to another candidate for the same office or, if it does so, that it clearly indicates that the candidate approves of the ad. *See id.* sec. 305, § 315(b), 116 Stat. at 100-02 (codified at 47 U.S.C. § 315(b) (2004)) (requiring that broadcasters sell a candidate advertising time at the "lowest unit charge"). Although the constitutionality of section 305 was challenged in *McConnell*, the Court did not reach the issues because of justiciability concerns. 124 S. Ct. at 707-08.

nance restrictions. Analyzing the issues surrounding the regulation of campaign speech may then be as useful in assessing the wisdom of *McConnell* as it is in evaluating the merits of the campaign speech issue itself.

In order to provide focus, this Article will concentrate on a particular type of campaign speech regulation, specifically restrictions that sanction the dissemination of false campaign speech. Generally, deliberately false statements have been held not to raise First Amendment concerns,[6] while the dissemination of false statements has been considered to be exceptionally damaging to the integrity of the electoral system.[7] The regulation of deliberately false campaign statements thus presents the case for the regulation of campaign speech in particularly stark form.

Part I of this Article introduces the subject by discussing a recent case in which a candidate was sued for running a campaign advertisement that purportedly included a false assertion of fact.[8] Part II presents the legal and policy issues underlying the question of whether deceptive campaign speech should be regulated. Part III compares the reasons for and against the regulation of deceptive campaign speech with the arguments for and against a particular type of campaign finance regulation, the prohibition of corporate campaigns expenditures,[9] and contends that the differences are not so substantial as to justify a different result in the constitutional balance. Accordingly, the section suggests that because *McConnell* upheld restrictions on corporate expenditures, its implication, for better or worse, is that restrictions on deceptive campaign speech would also be upheld. Part IV offers a brief conclusion.

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[6] *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (holding that deliberate falsity is not protected under the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing that a public official cannot recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"). *But see* State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 693 (Wash. 1998) (holding unconstitutional a state statute that prohibited "any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact").

[7] *See Garrison*, 379 U.S. at 75 (holding that the use of known falsity in public debate is at odds with democratic principles).

[8] Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893 (N.C. Ct. App. 2002).

[9] The reason for focusing specifically on corporate campaign expenditures is that the state interests supporting its regulation are the most analogous to those that support deceptive campaign speech regulation. *See infra* notes 85-90 and accompanying text.

I. DECEPTIVE CAMPAIGN SPEECH AND THE CASE OF *BOYCE & ISLEY, PLLC V. COOPER*

In his 2000 race for North Carolina Attorney General, Roy Cooper ran the following ad:

> I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.
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> . . . .
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> Dan Boyce—his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.
>
> The Judge said it shocks the conscience.
>
> Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.
>
> Dan Boyce, wrong for Attorney General.[10]

The lawsuit referred to in Cooper's ad was *Smith v. State*,[11] a civil action that challenged the constitutionality of a state intangibles tax and sought refunds totaling approximately $150,000,000 for intangibles taxes paid. The specific allegation contained in the ad referred to the fact that the plaintiffs' counsel in the case requested a fee of $23,000,000 after the court had entered a judgment on behalf of a class of protesting taxpayers. Responding to this request, the presiding judge in the case stated that the amount "would yield Class Counsel a windfall payment of over $28,174.00 per hour" and that such a request "shocks the conscience of the Court."[12]

Cooper's ad triggered a legal response of its own in the form of both a defamation action[13] and a complaint before the North Carolina Board of Elections alleging that Cooper had violated a state provision which prohibited any person from publishing derogatory reports with respect to any candidate, knowing the report to be false or in reckless disregard of its truth, when the reports are meant to hurt the candidate's chances for election.[14] Both actions were predicated upon one

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[10] *Boyce & Isley*, 568 S.E.2d at 897.

[11] No. 95 CVS 6715 (N.C. Super. Ct. Nov. 20, 1997).

[12] *Id.*, slip op. at 67-68. While not explicitly referencing the salaries of police officers, the presiding judge added that the hourly rate requested was "more than the annual salary paid to a starting school teacher." *Id.* at 68.

[13] The plaintiffs in the defamation action were the law firm of Boyce & Isley and its member attorneys Dan Boyce, Eugene Boyce, Laura Isley, and Philip Isley. *Boyce & Isley*, 568 S.E.2d at 896.

[14] *Id.* (quoting N.C. GEN. STAT. § 163-274(8) (2001)).

key false statement in the campaign ad.[15] The plaintiffs contended that the firm never "charged" the state $28,000 per hour, per the defendants' advertisement; rather, the taxpayers' counsel merely "sought" attorneys' fees from the state based on the amount of the recovery obtained.[16]

The trial court dismissed the case on grounds that the facts as alleged did not state a valid claim for defamation, and the Board of Elections dismissed the complaint on grounds that it was true and published in good faith.[17] The North Carolina Court of Appeals held that the trial court erred in dismissing the defamation claim.[18] According to the appellate court, the claim that attorneys "charged" the state $28,000 per hour was both false and defamatory.[19] While conceding that an ad claiming that the law firm "sought" the fee would not be defamatory, the appellate court nevertheless concluded that the allegation that the law firm "charged" the fee had a different meaning altogether. As the court explained:

> Defendants' advertisement did not state that plaintiffs *sought* a very large fee—it stated that plaintiffs *charged* a very large fee. There is an important distinction between these two words, of which defendants, in crafting the text of their advertisement, were undoubtedly aware. The word "sought" or "seeking" indicates that plaintiffs submitted their request for compensation to the court. The fact that plaintiffs *sought* extraordinary compensation, moreover, does not imply that plaintiffs actually *received* such compensation. In contrast, the term "charged" or "charging" suggests that, not only did plaintiffs actually receive such compensation at the taxpayers' expense, they did so without deference to the court. Contrary to defendants' argument, we do not believe the average layperson to be so familiar with the intricacies of class-action lawsuits as to know that the courts must approve of attorney compensation in such suits.

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[15] A second "false" statement in the ad was also relevant to the litigation. Although the ad claimed that Dan Boyce's law firm sued the state, the reality was that his firm (Boyce & Isley) was not formed until 1999, while the *Smith* litigation was brought in 1997. In fact, Dan Boyce was not even the counsel of record in the *Smith* case. Rather, the litigation was conducted by his father, Eugene Boyce. Dan Boyce, however, claimed involvement in the *Smith* case as a campaign issue to demonstrate his commitment to fight for North Carolina taxpayers. In the subsequent defamation action, Cooper tried to argue that Dan Boyce's law firm did not exist at the time of the *Smith* litigation in order to sustain his defense that the ad could not be construed as "of and concerning" the current members of the firm (other than Dan Boyce), as required under North Carolina defamation law. The appellate court, however, rejected this argument. *Boyce & Isley*, 568 S.E.2d at 900.

[16] *Id.* at 898-99.

[17] *Id.* at 897, 903.

[18] *Id.* at 901.

[19] *Id.* at 899.

> Further, defendants' advertisement did not indicate that the case for which plaintiffs purportedly "charged" the taxpayers exorbitant fees was a large class-action lawsuit. Nor did it mention the term "contingency fees." 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."[20]

Cooper's ad, in short, was actionable.[21]

From the perspective of fostering an informed electorate, the appellate court decision has much to say in its favor. Certainly, the voters would have been more informed if Cooper's ad had pointed out that *Smith v. State* was a class action, or that any request for attorneys' fees would have to be approved by a court. They would also have been better informed if Cooper's ad had explained contingency fees and how such fees are normally determined. And perhaps, armed with all this extra knowledge, the voters might have been in a better position to evaluate whether Dan Boyce was "wrong for Attorney General."

For anyone who has ever been involved in a political campaign, however, the result in *Boyce & Isley* has to be disconcerting. By contemporary standards, Cooper's ad was relatively tame both in terms of the subject matter addressed and the rhetoric used.[22] Nor was the ad unique in its failure to fully and fairly explain the background facts upon which it was based. For better or worse, such niceties are not a part of modern campaigning. Rather, modern political advertisements are not intended to be particularly informative in the sense of offering

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[20] *Id.*

[21] The appellate court went on to conclude that the false statements were also defamatory. *Id.* at 899-900.

[22] Consider the following television ad run by an organization calling itself Citizens for Reform in a closely contested 1996 Montana House race between Republican Rick Hill and Democrat Bill Yellowtail: "Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's explanation? He 'only slapped her.' But her nose was broken." *See* DEBORAH BECK ET AL., ANNENBERG PUB. POL'Y CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 4, 22 (1997) (quoting the ad), *available at* http://www.annenbergpublicpolicycenter.org/03_political_communication/issueads/REP16.pdf (last visited Sept. 20, 2004). The ad "was cited by political analysts as tipping a tight race to Hill, who eventually won with 52[%] of the vote." *Id.* at 4.

in-depth discussions of the issues.[23] They are generally less than thirty seconds long, designed primarily to elicit emotional response rather than convey rational persuasion, and purposefully one-sided and manipulative.[24] Rewriting those ads consistent with the instructions of the appellate court's decision would dramatically change the nature and tone of modern political engagement, particularly because campaign ads are currently the most important and commonly used forms of political communication.[25]

Still, even if at odds with contemporary campaign practices, it is not clear that the decision is wrong as a matter of constitutional law. Cooper's most obvious constitutional claims were that the ad was not published with "actual malice" as required under *New York Times Co. v. Sullivan*,[26] and that the ad was mere hyperbole, requiring that the complaint be dismissed under *Hustler Magazine, Inc. v. Falwell*.[27] Neither contention is easily supported by the facts of the case. The actual malice requirement protects the defendant in circumstances where she does not know that her statements are false and does not act with reckless disregard for the truth.[28] In this case, Cooper likely knew that

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[23] *See* Helen Desfosess, *Voters Must Reclaim the Democratic Process*, TIMES UNION (Albany, N.Y.), Dec. 13, 1998, at E1 ("[A]ds rarely cover the issues, or provide only the briefest of glimpses.").

[24] Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 666-72 (1992).

[25] The relative dominance of broadcast advertisement over other forms of political advertisements was well documented in the *McConnell* litigation. As the record in the case established, short broadcast ads are the favored tool of political communication in contemporary politics. McConnell v. FEC, 251 F. Supp. 2d 176, 569-73 (D.D.C.), *aff'd in part and rev'd in part*, 121 S. Ct. 619 (2003). Moreover, in addition to being the political advertisers' vehicle of choice, broadcast ads may also be the most important source of information to voters. Moran, *supra* note 24, at 665 n.6. For a more in-depth discussion of the importance of paid advertising to political campaigns, see William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 361-66 (2000).

[26] 376 U.S. 254 (1964).

[27] 485 U.S. 46 (1988); *see also* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (holding that there is no liability for statements that are "merely rhetorical hyperbole"); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (holding that "rhetorical hyperbole" is not actionable as defamation).

[28] *Sullivan*, 376 U.S. at 279-80. In any event, the actual malice standard would not apply to the plaintiffs in *Boyce & Isley* who were only private figures, i.e., the members of Boyce's firm other than Dan Boyce himself. Under *Sullivan* and its progeny, only public officials or public figures have to show actual malice. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

the plaintiffs had "sought" and not "charged" the attorneys' fees (at least in the sense of how the appellate court interpreted those words). His defense, rather, was that the purported difference in meaning between "sought" and "charged" was too insignificant to be actionable.[29] The hyperbole defense, in turn, would be triggered only if the statement, by its very outrageousness, would not be believable by the viewers.[30] In this respect, although perhaps a close call, the statement that a lawyer is "charging" $28,000 per hour may not be so unbelievable as to fall within constitutional protection.

The court of appeals could have been more deferential to the First Amendment concerns at stake, given that the case arose out of a political campaign. It might have held, for example, that because campaign ads are often hyperbolic (and perceived as such),[31] the Constitution demands greater latitude in the definition of hyperbole in the campaign speech context. Alternatively or additionally, the appellate court might have adopted a more expansive view of actual malice or required an "innocent construction rule" in election speech cases.[32] Indeed, the appellate court could have held that the First Amendment should be construed to prohibit the banning of false statements of fact in political campaigns, as the Supreme Court of Washington recently held in the context of a ballot initiative.[33]

To this point, the United States Supreme Court has not sent a clear signal that greater sensitivity to First Amendment concerns in cases involving campaign speech is in order. Indeed, it is not at all clear under existing precedent that even if the Court were to treat

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Even the private figure plaintiffs in *Boyce & Isley*, however, would have to show actual malice under the state campaign practices law. N.C. GEN. STAT. § 163-274(8) (2001).

[29] Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893, 899 (N.C. Ct. App. 2002).

[30] The test for hyperbole announced in *Hustler* was whether the speech "could not reasonably have been interpreted as stating actual facts." 485 U.S. at 50.

[31] *See* Republican Party of Minn. v. White, 536 U.S 765, 780 (2002) ("[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment . . . .").

[32] Innocent construction rules require that a statement that can be read to have both a defamatory and nondefamatory meaning must be interpreted as nondefamatory. *See* Babb v. Minder, 806 F.2d 749, 757 (7th Cir. 1968) (describing Illinois' common law innocent construction rule). Oregon employs a variation of this rule in the election speech context. *See, e.g.*, Comm. of One Thousand to Re-Elect State Senator Walt Brown v. Eivers, 674 P.2d 1159, 1163 (Or. 1983) (requiring that a statement that can be interpreted as factually correct or as opinion must be interpreted as such even though it could also be interpreted as factually incorrect).

[33] State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 697-99 (Wash. 1998). *119 Vote No! Committee* did not hold, however, that defamatory false statements of fact could not be proscribed. *Id.*

campaign speech as distinct from speech in other contexts, its solution would be to demand greater constitutional protection for the former. Justices Scalia[34] and Breyer,[35] for example, have separately suggested that because of the state's interests in fostering an informed electorate and in protecting the integrity of the political process are so strong, the state may have greater power to regulate election speech than speech in other areas.[36] Moreover, regulating false campaign speech may be seen as uncontroversial because it has been held that there is no First Amendment value in false statements of fact.[37] In any event, whether the Constitution demands greater latitude for campaign speech than for speech in other areas remains an open question. Resolution of this issue, however, requires some investigation into the competing values at stake. It is to this project we now turn.

II. REGULATING DECEPTIVE CAMPAIGN SPEECH

A. *The Arguments in Favor*

Although the contention that false campaign ads trigger regula-

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[34] As Justice Scalia noted in dissent in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995):

> The . . . question is whether protection of the election process justifies limitations upon speech that cannot constitutionally be imposed generally. . . . Our cases plainly answer that question in the affirmative—indeed, they suggest that no justification for regulation is more compelling than protection of the electoral process. Other rights, even the most basic, are illusory if the right to vote is undermined. The State has a compelling interest in preserving the integrity of its election process. So significant have we found the interest in protecting the electoral process to be that we have approved the prohibition of political speech *entirely* in areas that would impede that process.

Id. at 378-79 (Scalia, J., dissenting) (internal quotation marks and citations omitted).

[35] *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002) ("[I]mportant First Amendment-related interests lie on both sides of the constitutional equation, and . . . a First Amendment presumption hostile to government regulation, such as 'strict scrutiny,' is consequently out of place.").

[36] The question of whether election speech should be treated differently from other categories of speech has produced some particularly excellent commentary. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1776-80 (1999) (arguing that a special category of election speech could be recognized under the First Amendment); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1803-05 (1999) (discussing whether a special category of election speech should be recognized); *see also* Gerken, *supra* note 2, at 739-40 (summarizing the election law exceptionalism case history).

[37] Gertz v. Robert Welch, Inc., 418 U.S 323, 340 (1974); *see also supra* notes 26-28 and accompanying text (discussing the "actual malice" exception to the constitutional defense).

tory concerns is anything but controversial, it is still worthwhile to examine some of the specific harms that they can engender. First, and most obviously, false statements can distort the electoral process. 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.[38] After all, if a campaign statement convinces voters that by voting for candidate *A*, they will elect someone who supports policy *Z*, when the truth is that candidate *A* opposes policy *Z*, the result of the election is distorted. As the Court stated in *Garrison v. Louisiana*, "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[39]

Second, false statements can serve to lower the quality of campaign discourse and debate.[40] Campaign attack ads often force opponents to respond to the specific attack or engage in similar tactics themselves.[41] The result is that campaigns degenerate into cycles of attack and denial rather than serious engagement on major issues.[42] Moreover, even if a candidate decides not to engage in similar tactics, except to "correct" a misimpression created by an opponent, the result may be only to distract the voters from substantive issues. Consider the ad at issue in *Boyce & Isley*. If Boyce wanted to correct what

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[38] *See* Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 863 (1987) (arguing that misinformation allows elections to "turn on rumors, innuendo, and outright fabrication, in effect defeating the entire electoral process").

[39] 379 U.S. 64, 75 (1964).

[40] Deceit in political advertising "lowers the level of political conversation." Martha M. Hamilton, *Cleaning Up the Mudslinging: Ad Executive Proposes Self-Regulating Body to Police Political Commercials*, WASH. POST, July 30, 1996, at C1 (quoting Burt Manning, former chairman of the American Association of Advertising Agencies).

[41] A candidate may choose not to respond to a misrepresentation but that strategy poses its own risks. Unanswered charges tend to gain resonance and credibility particularly with the passage of time. One instance where failing to answer a campaign ad proved to be a serious miscalculation is the recent Georgia Senate race between Saxby Chambliss and Max Cleland. Chambliss ran a series of ads using an image of Osama bin Laden in attacking Cleland's refusal to back President Bush's homeland security proposal. The ad implied that in failing to vote for the President's proposal, Cleland was effectively giving support to terrorists. Cleland did not respond and in the end lost an election that he had been heavily favored to win. Andrea Stone, *Long Shot Played to Pro-Military Voters*, USA TODAY, Nov. 7, 2002, at 5A.

[42] *See* Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 187 (1992) (arguing that negative attacks trigger a negative attack response, "thereby fueling an escalating 'arms race' of attack advertisements").

he believed was misinformation in the ad, he would have had to devote resources to informing the electorate as to the difference in meaning between the terms "sought" and "charged." This, in turn, might have led to a response from Cooper contending that his original ad was perfectly accurate. Whether the voters would be better informed in their electoral choices if the campaign were to devolve into this sort of debate is doubtful.

Third, false statements can lead or add to voter alienation by fostering voter cynicism and distrust of the political process.[43] Voter alienation is problematic in a number of respects, not the least of which is that it decreases voter turnout.[44] When a majority of citizens do not participate in the democratic process, the resulting political decisions represent only the preferences of 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.[45] Additionally, suppressed voter turnout imposes collateral harms on the individual and on her relationship to her political community. If voting, as Pamela Karlan suggests, "is a way of declaring one's full membership in the political community,"[46] then

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[43] Michael Kimmel, *A Proposal to Strengthen the Right of Response to Negative Campaign Commercials*, 49 CATH. U. L. REV. 89, 90 (1999).

[44] The fact that negative attacks can suppress voter turnout, STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 9 (1995), and at times are *designed* to suppress voter turnout, Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L. REV. 1539, 1540 (1997) (citing ANSOLABEHERE & IYENGAR, *supra*, at 9), is well documented. For an opposing view, see Martin P. Wattenburg & Craig Leonard Brians, *Negative Campaign Advertising: Demobilizer or Mobilizer?*, 93 AM. POL. SCI. REV. 891, 893 (1999) (arguing that negative advertising increases voter turnout).

[45] *See* Robert H. Salisbury, *Research on Political Participation*, 19 AM. J. POL. SCI. 323, 326-27 (1975) (referring to political participation as a "legitimizing act"). Some have argued, however, that the concerns about low voter turnout are overstated. According to this view, low voter turnout may more accurately represent satisfaction with the political process than abdication of political choice. *See, e.g.*, Charles Krauthammer, *In Praise of Low Voter Turnout*, TIME, May 21, 1990, at 88 (stating that "[l]ow voter turnout is a leading indicator of contentment"). *But see* FRANCIS FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 113-21 (1988) (criticizing the view that not voting is an endorsement of the status quo). One study, in fact, suggests that the political positions of those who do not vote are not significantly different from the positions of those who do. Stephen E. Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AM. J. POL. SCI. 771, 777-87 (1990). Nonvoters, however, are generally less informed. *See* JACK C. DOPPELT & ELLEN SHEARER, NONVOTERS: AMERICA'S NO-SHOWS 25-27 (1999) (arguing that nonvoters are less interested in political or public policy news than those who vote).

[46] Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting*

campaign tactics that discourage the individual from voting interfere with this connection. Moreover, even beyond concerns with low voter turnout, a healthy democracy depends upon an involved electorate for the simple reason that in a democratic system it is the citizenry that is entrusted with making political decisions.[47] An electorate that becomes so turned off and disengaged from the political process is both unable to fulfill its democratic function and rife for manipulation. As Justice Brandeis once famously observed, "the greatest menace to freedom is an inert people."[48]

Fourth, false statements against an opponent's character can inflict reputational and emotional injury upon the attacked individual.[49] 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. For one, a regulatory regime that allows unrestricted campaign attack ads can deter qualified individuals from seeking political office.[50] In addition, the constant and unchecked derogation of political actors can harm the integrity of the democratic community. As Robert Bellah has argued, the reputation of political leaders is, in effect, a "public good" that reinforces community identity and hegemony.[51] Damaging the reputation of political leaders thus harms the community as well as the leaders themselves.[52]

Rights System, 80 VA. L. REV. 1455, 1465 (1994).

[47] *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788-91 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (discussing the importance of an involved citizenry in ensuring the viability of the American model of self-governance); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 249 (1993) (noting that "the American conception of sovereignty [puts] governing authority in the people themselves").

[48] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[49] For an outstanding account examining the harms incurred by defamation, see Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

[50] May, *supra* note 42, at 186-87.

[51] Bellah noted that

> [t]o a considerable degree the reputation of a community is reflected in the reputation of its representative figures. Indeed, it is the founders and heroes of a community that to a considerable extent give it its identity, and it is the memory of the sufferings and achievements of exemplary figures that constitutes a community as a community of memory and keeps that community alive.

Robert H. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 745 (1986).

[52] In this sense, the defamation of political actors reinforces the citizen alienation discussed above, *supra* notes 43-48 and accompanying text.

B. *The Arguments Against*

Despite the strength of the case in favor of restricting false campaign statements, the arguments in favor are not one-sided. First, as an introductory matter, the arguments in favor of regulation may overstate the harms. For example, 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.[53] As one commentator has observed, "[i]t is, after all, a basic tenet of American folk wisdom that politicians' utterances are virtually never inhibited by considerations of truthfulness or accuracy."[54] Moreover, 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. For this reason, misstatements in a political campaign are unlikely to ever go unanswered.[55]

Moreover, sanctioning false campaign speech may not, in any event, be an effective way of informing the public. 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.[56] In addition, 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. The sponsoring candidate must prove to the voters that she can defend her assertion. The candidate alleging falsity, in turn, must demonstrate she is not unfairly crying foul. Indeed, although negativity can at times suppress voter turnout, the charges and countercharges over purported false

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[53] Winsbro, *supra* note 38, at 859.

[54] *Id.*

[55] *See* Brown v. Hartlage, 456 U.S. 45, 62 (1982) ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent."). This assumes, of course, that the erring candidate's opponent has the resources to respond to the attack.

[56] The remedy of judicial invalidation of the election in which a false statement has been uttered is, of course, possible. *See, e.g.*, *id.* at 55 (noting that "*some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty"). Professor Issacharoff also informs me that some other countries invalidate elections if a candidate has violated campaign speech laws. *See, e.g.*, Prabhoo v. Kunte, A.I.R. 1996 S.C. 1113, 1130 (India) (interpreting an Indian statute as requiring elections to be "free from the unhealthy influence of appeals to religion, caste, community, or language," with the penalty for a candidate's transgressions being the voidance of her election to office).

statements can paradoxically serve to generate voter interest. False statements, and their resulting controversies, may infuse a campaign with a drama and urgency that it otherwise lacks.

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.[57] As the Supreme Court stated in *Republican Party of Minnesota v. White*,[58] "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges."[59] Accordingly, allowing government to regulate speech in this area, even with respect to false statements alone, raises strong First Amendment concerns.[60] Moreover, even if falsity itself has no inherent value, sanctioning false statements in the context of a political campaign can be particularly harsh. Battling one's opponent is what campaigning is all about.[61] Campaigns involve a constant give and take between opposing candidates, and the possibility that candidates will say something false and derogatory about their opponents is not insignificant. Subjecting statements made in the heat of a campaign to potential sanctions can therefore have a particularly powerful chilling effect.[62] Additionally, proscribing false

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[57] Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

[58] 536 U.S. 765 (2002).

[59] *Id.* at 781 (internal quotation marks omitted).

[60] As the Court stated in *Brown v. Hartlage*: "Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. But erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . to survive." 456 U.S. at 60 (internal quotation marks and citations omitted, ellipses in original).

[61] For this reason, it is not surprising that one of the Court's most speech-protective defamation decisions arose in the context of a political campaign. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Court held that a defendant had no duty to investigate the falsity of her statements in order to avoid liability for defamation under the actual malice standard. *Id.* at 733. In *St. Amant*, a candidate was sued for remarks he made about the plaintiff in a televised campaign speech. *Id.* at 728. In that speech, the candidate suggested that the plaintiff engaged in criminal conduct although he had no knowledge of this fact and his only information on the subject came from a third person. *Id.* at 728-29. Nevertheless, the Court found that the defendant had not acted with reckless disregard for the truth. Although the Court itself recognized that its decision might be thought to place "a premium on ignorance and [to] encourage[] the irresponsible publisher not to inquire," *id.* at 731, it nevertheless found its result to be required under the First Amendment. *Id.* at 732.

[62] *But see* 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, 801 (1999) (dismissing the argument that sanctioning false statements will overly chill

political speech is constitutionally problematic because it empowers the government to decide what is true and false in politics. Theoretically, in a democracy, the people and not the government are the arbiters of political truth. Removing the truth-finding function from the people, who as voters are entrusted with that power, offends this constitutional ideal. In the words of the Court, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."[63]

Third, authorizing the government to decide what is true or false in campaign speech opens the door to partisan abuse. After all, determining what is true and false in political campaigns can be notoriously difficult[64] given that in politics, in the Court's own words, "the tenets of one man may seem the rankest error to his neighbor."[65] Accordingly, the question of whether a statement will be viewed as true or false, as fact or hyperbole, might depend largely on the perspective and/or the motivation of the decision maker. Whether courts or administrative agencies are sufficiently insulated from political pressure to decide these cases fairly is therefore a legitimate concern.[66]

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campaign speech). Kane argues that the chilling effect is overstated because campaign speech is similar to commercial speech in that it shares the latter's durability—i.e., since campaign speech, like commercial speech, must be disseminated in order for the candidate to achieve her goals, she is unlikely to be chilled from presenting her position. *Id.* at 810-11.

[63] Meyer v. Grant, 486 U.S. 414, 419-20 (1988) (internal quotation marks omitted). Indeed, relying primarily on this rationale, the Supreme Court of Washington recently held that a state statute prohibiting any person from sponsoring a political ad with a false statement of material fact was unconstitutional with respect to statements made in the context of a public initiative campaign, even though the statute predicated liability upon the advertiser publishing with actual malice. State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 699 (Wash. 1998). For the Washington court, the State had no "independent right to determine truth and falsity in political debate. . . . Rather, the First Amendment operates to insure the public decides what is true and false with respect to governance." *Id.* at 695. The court, however, suggested that the law might be upheld with respect to defamatory false statements because of the state's legitimate interest in protecting individuals' reputations. *Id.* at 697.

[64] *See* Winsbro, *supra* note 38, at 868 ("[I]t is indubitable that the peculiar and unique features of campaign speech require that it receive the utmost protection. In no other area, except perhaps that of religion, is there likely to be less unanimity, among 'experts' or otherwise, as to whether a given statement is 'true' or 'false.'").

[65] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

[66] *See generally* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 676 (2002) (noting that judges, like politicians, may be motivated by partisan concerns in their redistricting decisions).

Fourth, regulating campaign speech is problematic because it allows the courts and/or other regulatory bodies to be used as political weapons. Bringing defamation or campaign practices actions against a candidate who has purportedly disseminated false statements is not always only about correcting the record or remedying injury to reputation. It is often also about inflicting political damage.[67] In this respect, the lawsuit itself can be a weapon of substantial political force.[68] 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.[69] Moreover, the legal action can inflict political harm on the candidate-complainant's opponent that extends well beyond the election cycle, even if the opponent ultimately prevails in the election. 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. Perhaps this would be beneficial if the defendant-office holder gained elective office by deceptive tactics, but the possibility also exists that the lawsuit itself may turn out to be the dirty trick. In any case, the availability of a lawsuit could become as much a partisan campaign tactic as the problem it is designed to address.

III. CAMPAIGN SPEECH AND CAMPAIGN FINANCE

The constitutional assessment of campaign finance regulation also involves a weighing of strong competing interests. On the side of sustaining campaign finance regulations, these include eliminating corruption and/or the appearance of corruption,[70] promoting political

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[67] *See* BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER 14 (3d ed. 2002) (noting the use of judicial actions to damage political opponents).

[68] One needs no better example than *Clinton v. Jones*, 520 U.S. 681 (1997), to establish this point irrefutably.

[69] At the same time, the candidate-complainant is relatively insulated from negative repercussions if the complaint is nonmeritorious. First of all, a motion to dismiss seldom generates as much news coverage as the original complaint, and even a request for Rule 11 sanctions is unlikely to attract much attention. Second, any actual decision on the merits is unlikely to be made until after the campaign is finished, so any electoral damage done to the defendant would be long over.

[70] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per curiam) ("To the extent that large contributions are given to secure a political quid pro quo' from current and potential office holders, the integrity of our system of representative democracy is undermined."); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989) (describing the practice of paying "money to bias the judgment or sway the loyalty of persons holding positions of public

equality,[71] limiting the demands on candidate time and resources,[72] and improving campaign discourse.[73] Meanwhile, on the other side, concerns include restricting core First Amendment activity,[74] creating the risk of legislative entrenchment by empowering those enacting such measures to adopt rules that might potentially favor incumbents,[75] creating the risk that those charged with enforcing these rules may use their authority in a partisan manner,[76] and providing the candidates with yet another and potentially distracting political weapon—

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trust" as "corrupt").

[71] *See, e.g.*, Edward B. Foley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (advocating for an "equal-dollars-per-voter" approach that would "guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot," thereby fostering the equality of each voter's voice); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 23 (discussing the political inequalities between rich and poor that are fostered by the campaign finance system).

There are actually four subsets to the political equality interest. The first is reducing the electoral advantages of wealthy candidates. The second is promoting the equal ability of individuals and groups to influence elections. The third is limiting the advantage of campaign donors to access elected officials and thereby influence the products of legislation in their favor. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 28-35 (1996). The fourth is protecting against the ability of wealthy interests to distort electoral decision making in their favor by flooding the avenues of political communication. John C. Bonifaz et al., *Challenging* Buckley v. Valeo*: A Legal Strategy*, 33 AKRON L. REV. 39, 60 (1999).

[72] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282-83 (1994) (arguing that a primary goal of campaign finance reform should be "to protect the time of elected representatives and candidates for office"). This concern may also be related to the interest in not deterring qualified candidates from seeking elective office.

[73] *See* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 898-99 (1998) (stating that campaign finance reform may lessen the legislator's incentive to serve contributors rather than constituents, thus improving the quality of political decision making (discussing J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994)).

[74] *See Buckley*, 424 U.S. at 14 ("[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.").

[75] Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 536-38 (1997) (noting the problems of incumbent self-dealing that attend campaign finance regulation); *see also* Robert F. Bauer, *When "the Pols Make the Calls":* McConnell*'s Theory of Judicial Deference in the Twilight of* Buckley, 153 U. PA. L. REV. 5, 19 n.84 (2004) (arguing that the Court only gave "summary attention" to the critique that BCRA was an incumbent protection plan).

[76] *See* McConnell v. FEC, 124 S. Ct. 619, 637 (2003) (noting the plaintiffs' argument that restrictions on "coordinated" campaign expenditures could trigger "intrusive and politically motivated [enforcement] investigations").

the accusation that one's opponent has violated campaign finance laws.[77] Moreover, as with campaign speech regulation, there is a fair argument to be made that regulating campaign finance may be counterproductive. Limiting the amount of money in politics, for example, may adversely affect the interest in fostering an informed electorate,[78] while subjecting political campaigns to complex regulatory requirements only increases the financial barriers to prospective candidacies.

Unlike campaign speech, however, campaign finance has generated a relatively developed jurisprudence. Reference to that jurisprudence, therefore, may be helpful in sorting out the campaign speech issues, particularly because the competing interests on both sides of the campaign finance and campaign speech debates closely parallel each other. Indeed, as we shall see, the correlation between the competing interests present in campaign finance and campaign speech regulation is virtually identical in the case of the constitutionality of restrictions on corporate and labor union campaign expenditures (corporate expenditures).[79] For this reason, comparing campaign speech issues with the Court's corporate campaign expenditure decisions may be an optimum point to begin our discussion.

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

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[77] The claim that President Clinton violated campaign finance laws in his 1996 reelection campaign resulted in numerous investigations of his administration. *See generally* LANNY J. DAVIS, TRUTH TO TELL: TELL IT EARLY, TELL IT ALL, TELL IT YOURSELF (1999) (discussing the partisan investigations of President Clinton's campaign fundraising in the 1996 election).

[78] *See, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1061 (1996) (arguing that campaign finance restrictions may limit the amount of campaign information available to the electorate); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 695 (1997) (arguing that campaign finance restrictions would impair politicians' ability to reach large masses of the electorate).

[79] For purposes of brevity, I will use the term "corporate expenditures" to refer to political expenditures by both corporations and labor unions. In upholding the restrictions on campaign expenditures by corporations and labor unions, the Court in *McConnell* relied on its earlier decision in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which upheld limits on political expenditures by corporations only. The extension of *Austin* to include expenditures by labor unions was not explained by the Court. However, as will be discussed *infra* note 121, the Court's move to treat labor expenditures and corporate expenditures similarly has significant doctrinal implications.

obviously, the key state interests underlying both regulatory matters are also closely parallel. In the corporate expenditure context, the announced state interest upon which the Court has primarily relied[80] is the state interest in preventing corruption and/or the appearance of corruption.[81] Critically, this anticorruption interest, as interpreted by the Court, encompasses the state's interests in combating voter alienation and campaign distortion—the two key state interests that also underlie campaign speech regulation. Because the tie between the anticorruption rationale and the concerns of preventing voter alienation and campaign distortion may not be immediately clear, however, a word of explanation is in order.

The government's interest in preventing corruption or the appearance of corruption has proven to be a highly elastic concept. As applied to provisions limiting campaign contributions, for example, the Court has made clear that this interest does not end with eliminating quid pro quo corruption.[82] It also includes curbing the ability of contributors to exercise "undue influence on an officeholder's judgment, and the appearance of such influence."[83] The interest even extends, after *McConnell*, to include the state interest in restricting contributions designed only to assure access to public officials.[84]

More significantly for our purposes, the Court has expanded the anticorruption rationale to take on a different meaning entirely. No longer is the anticorruption interest seen as only a concern with donors purchasing access or influence or otherwise seeking and receiving special benefits. Rather, it includes "a different type of corruption,"[85] namely the prevention of campaign distortion caused by the

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[80] The Court has upheld disclosure provisions based upon the government's combined interest in "providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering the data necessary to enforce more substantive electioneering restrictions . . . ." *McConnell*, 124 S. Ct. at 635. The Court has also upheld some campaign finance provisions on grounds that they serve to prevent circumvention of otherwise valid restrictions. *Id.* at 696 (citing FEC v. Beaumont, 539 U.S. 146, 155 (2003)).

[81] *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) ("These interests directly implicate the integrity of our electoral process, and . . . the responsibility of the individual citizen for the successful functioning of that process.").

[82] *McConnell*, 124 S. Ct. at 665 & n.48.

[83] *Id.* at 664 (citing FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001)).

[84] *McConnell*, 124 S. Ct. at 746 (Kennedy, J., dissenting) (claiming that "[t]he Court . . . in effect interprets the anticorruption rationale to allow regulation . . . of any conduct that wins goodwill from or influences a Member of Congress").

[85] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990).

infusion of corporate and labor wealth into the political system in a manner that skews public debate.[86] The Court has been explicit on this point. To the Court, the anticorruption interest includes combating the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of corporate forms that have little or no correlation to the public's support for the corporation's political ideas."[87] The only difference is that in campaign speech regulation, the concern is with the skewing effects of deception whereas in the corporate expenditure context, it is with the skewing effects of wealth.

The state interests accepted by the Court as supporting limits on corporate expenditures also include what can only be described as antialienation concerns. According to the Court, restrictions on corporate expenditures are supported by the need to preserve "the individual citizen's confidence in government"[88] and to sustain "the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government."[89] Seen as such, the anticorruption rationale reflects virtually the exact same antialienation concern that supports regulating campaign speech.[90]

The recognition that the state interests in corporate expenditure regulation are the same as its interests in campaign speech regulation is obviously significant for the assessment of the latter's constitutional-

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[86] *Id.* As some have noted, this interest might be more accurately characterized as one designed to promote political equality rather than one aimed at than fighting corruption. *See* Julian N. Eule, *Promoting Speaker Diversity:* Austin *and* Metro Broadcasting, 1990 SUP. CT. REV. 105, 109-10 (arguing that the state interest in preventing the campaign distortion caused by massive infusions of wealth into the political system is actually an equality interest).

[87] *McConnell*, 124 S. Ct. at 695-96 (quoting *Austin*, 494 U.S. at 660). Although *Austin* addressed only the "corrosive and distorting" effects on elections caused by corporate wealth, *McConnell*, without discussion, extended this rationale to support restrictions on labor unions' campaign expenditures as well. *Id.* at 690-700. The Court did so, moreover, even though, unlike corporations, the wealth of labor unions may have some relation to its political ideals. *See infra* note 121 (discussing the *McConnell* Court's treatment of the constitutionality of campaign expenditure limits on labor unions).

[88] *McConnell*, 540 S. Ct. at 696 n.88 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978)). The Court's solicitude for the state's interest in not allowing confidence in government to be eroded dates back to *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), although in that case the Court framed the issue as not allowing confidence in government "to be eroded to a *disastrous extent*." *Id.* at 27 (quoting United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)) (emphasis added).

[89] *McConnell*, 124 S. Ct. at 696 n.88 (quoting *Bellotti*, 435 U.S at 788-89).

[90] Indeed, this rationale encompasses not only false campaign speech but negative campaign speech, whether false or not. Calvert, *supra* note 44, at 1540.

ity. If the factors on both sides of the constitutional equation are the same, reviewing how those competing interests are weighed in one context should offer significant insight into how they might be weighed in the other. At this point, then, the Court's decision, holding that the interests of antidistortion and antialienation are sufficiently weighty to sustain corporate expenditure limits against constitutional challenge,[91] offers us an early return in our assessment of the constitutionality of deceptive speech regulation, suggesting that such restrictions should also be upheld.[92] The question remains, however, whether the state's interests and their countervailing First Amendment concerns play out differently in the context of corporate expenditure than in the deceptive campaign speech context in a manner that might lead to a different result.[93]

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[91] *McConnell*, 124 S. Ct. at 695-96; *see also supra* text accompanying note 87.

[92] The decision upholding limits on corporate expenditures may also offer insight into the constitutionality of noncorporate campaign expenditures. Although thus far, the Court has held that the anticorruption interest does not justify restrictions on political campaign expenditures generally, see *Buckley*, 424 U.S. at 45, 53, 56 (finding a lack of compelling state interest in restricting what candidates can spend of their own wealth), the antidistortion and antialienation interests may arguably support restrictions on those expenditures as well on grounds that the infusion of large aggregations of wealth from any source may have "distorting and corrosive" effects. Whether the Court is likely to restrict such expenditures after *McConnell* is anyone's guess. Even if it holds that the state interests supporting limiting noncorporate and corporate expenditures are similar, that alone would not resolve the constitutional issue. The Court could still distinguish corporate expenditures on grounds that they are of lesser First Amendment value. *See infra* notes 118-27 and accompanying text (discussing the argument that corporate and labor expenditures are lesser-value First Amendment speech).

[93] To be sure, one might be tempted to distinguish the restriction on corporate expenditures from the restriction on false campaign speech on the grounds that the restriction on corporate expenditures, at least according to the Court, is merely a regulation while the restriction on false campaign speech is a complete ban. After all, the *McConnell* Court argued that because corporations and labor unions were not prohibited from organizing and administering political action committees (PACs) to fund campaign speech, "it is simply wrong to view the provision [prohibiting corporate campaign expenditures] as a complete ban on expression rather than a regulation." 124 S. Ct. at 695 (internal quotation marks omitted). It is unclear, however, why the distinction drawn by the Court should have significance. True, the corporation may be able to get its message out through another entity, but it remains prohibited from speaking. The fact that *Y* can ask, or even direct, *X* to carry its message should not justify a direct prohibition on *Y*'s own right to speak. *See id.* at 768 (Kennedy, J., concurring in part and dissenting in part) (contending that "[t]he majority can articulate no compelling justification for imposing a scheme of compulsory ventriloquism" which forces an organization to communicate through an artificial, secondhand structure, which in turn distorts that organization's message). Indeed, under the Court's logic, one might equally respond that a ban on false campaign speech is not a complete ban either. The campaign speaker remains free to speak truthfully.

A. *Campaign Deception or Campaign Money: Which Holds Greater First Amendment Value?*

The first argument that campaign finance analysis should yield a different constitutional result than campaign speech regulation is that the free speech interests opposing regulation are more powerful in one area than another. The issue can be stated more succinctly: is there a greater First Amendment right to lie or to spend money?

1. Are Calculated Falsehoods Protected Speech?

Despite Charles Fried's assertion that "[i]n political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights,"[94] the claim that deceptive campaign speech implicates free speech concerns is not immediately obvious. Falsity, after all, has no apparent First Amendment status. As long ago as *Chaplinsky v. New Hampshire*,[95] for example, the Court observed that libel was among the classes of speech that are not of sufficient value to justify constitutional protection.[96] To be sure, *New York Times Co. v. Sullivan*[97] undercut the *Chaplinsky* dictum and held that some falsity, specifically defamatory statements about public officials, would be constitutionally protected as long as the statements were not uttered with "actual malice" meaning knowledge of falsity or with reckless disregard for the truth.[98] *Sullivan*'s reasoning, however, was less about the First Amendment value of falsity, although the Court gave a nod in that direction,[99] than it was about providing breathing space for protected expression on grounds that too quickly sanctioning falsity would chill public debate. As the Court stated, "erroneous statement is inevitable in free debate, and . . . it must be pro-

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[94] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992), *cited in* State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 697 (Wash. 1998).

[95] 315 U.S. 568 (1942).

[96] *Id.* at 572.

[97] 376 U.S. 254 (1964).

[98] *Id.* at 279-80. Later cases have since made clear that the actual malice standard also applies to political candidates. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) ("[I]t is abundantly clear that . . . publications concerning candidates must be accorded at least as much protection . . . as those concerning occupants of public office.").

[99] *Sullivan*, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error." (internal quotation marks omitted)).

tected if the freedoms of expression are to have the breathing space that they need . . . to survive . . . ."[100]

In *Gertz v. Robert Welch, Inc.*,[101] the Court again made clear that falsity alone was not entitled to First Amendment protection. As *Gertz* stated:

> [T]here is no constitutional value in false statements of fact. . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[102]

If *Gertz* is correct, the First Amendment claim for protection of false campaign speech must then rest on a rationale similar to *Sullivan*, i.e., that the reasons to protect the speech rest more with problems of government intervention than with a finding that the statements themselves have inherent value.[103] Indeed, this claim must go beyond *Sullivan* if it is to be argued that the protection of false campaign speech should apply to statements uttered with actual malice as required in defamation actions or in most state campaign practices acts.[104]

As we have seen, the arguments in support of such an extension are considerable. First, greater latitude for campaign speech may be appropriate because of the heated nature of political campaigns.[105] Second, in election contests specifically, the First Amendment principle that the final arbiter of political truth should be the people and not the government has particular resonance.[106] After all, not only are the people charged with determining political truth but the ballot box gives them the opportunity to do so. Third, there is a particular dan-

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[100] *Id.* at 271-72 (internal quotation marks omitted).

[101] 418 U.S. 323 (1974).

[102] *Id.* at 340 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[103] *But see supra* notes 61-63 and accompanying text (discussing the value of falsity in political campaigns); *supra* note 99 (noting that falsity has inherent value in public debate).

[104] The requirement that actual malice is required for all campaign speech, however, would at least protect defendants, like Cooper in *Boyce v. Isley*, who are sued by private figures claiming defamation. Under existing law, such plaintiffs do not have to show actual malice but can predicate liability on negligence. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-48 (1974).

[105] *See supra* notes 53-69 and accompanying text (discussing the need for uninhibited speech in the campaign environment).

[106] *See supra* notes 45-48 and accompanying text (discussing how fundamental it is to a democracy that the people remain the decision makers).

ger in this area for partisan abuse.[107] As Geoffrey Stone explains in addressing the constitutionality of campaign statutes that prohibit the dissemination of false political statements:

> The point is not that government does not have a legitimate interest in protecting the quality of public debate. Surely it does. It is, rather, that there is great danger in authorizing government to involve itself in the process in this manner. This danger stems from the possible effect of partisanship affecting the process at every level. The very power to make such determinations invites abuse that could be profoundly destructive to public debate.[108]

The arguments supporting protection of deceptive campaign speech, in fact, recently carried the day before the Washington State Supreme Court in *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*.[109] In that case, the court held that a state statute prohibiting false political advertising sponsored in connection with a state initiative campaign was unconstitutional under the First Amendment, even though the state statute predicated liability upon the advertisement being published with actual malice.[110] Whether that case reflects the law of the land, however, is unclear.[111] As a concurrence in the case maintained, "[t]oday the Washington State Supreme Court becomes the first court in the history of the Republic to declare First Amendment protection for calculated lies."[112] Accordingly, the First Amendment status of intentionally deceptive campaign speech remains ambiguous.

2. Are Corporate Campaign Expenditures Protected Speech?

The Court in *Buckley* concluded that political campaign expenditures generally are entitled to full First Amendment protection[113] and

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[107] *See supra* notes 64-66 and accompanying text (arguing that this regulation can be turned into a weapon for partisanship).

[108] Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 140 (1993).

[109] 957 P.2d 691 (Wash. 1998).

[110] *Id.* at 697.

[111] For example, an Ohio law that similarly sanctioned knowing false statements of fact was upheld in *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991) and *McKimm v. Ohio Elections Commission*, 729 N.E.2d 364, 375 (Ohio 2000).

[112] *119 Vote No! Comm.*, 957 P.2d at 701 (Talmadge, J., concurring).

[113] Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam). As the Court stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their

the arguments supporting this conclusion need not be repeated here.[114] Whether corporate expenditures, however, are entitled to similar protection is an open question.[115] This is so because the Court

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> exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. (footnote omitted).

[114] For what it's worth, I agree with *Buckley*'s conclusion on this point. *See* Marshall, *supra* note 25, at 352-54 (agreeing with *Buckley* that "the expenditure of money for political speech and the political speech itself are inextricably bound"). For excellent commentary on the opposite side, see Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235, 1236-37 (2000) (arguing that political money should be treated as both property and speech); *see also* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) (concluding that "nothing in the First Amendment" prohibits legislative restrictions on the use of money in political campaigns when such restrictions would move the process "closer to the kind of community process which lies at the heart of the First Amendment—a process wherein ideas and candidates prevail because of their inherent worth" and not their fundraising abilities); William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 510-12 (1996) (discussing the criticisms levied against the money-as-speech proposition).

[115] The Court has held that not all campaign money is entitled to the same First Amendment status. Campaign contribution restrictions, for example, have been held not to trigger the most exacting constitutional scrutiny because such regulations "entail only marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21; *see also* McConnell v. FEC, 124 S. Ct. 619, 628 (2003) (citing *Buckley*); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 (2000) (describing contribution limits as more akin to an abridgement of the right of association rather than the right of free speech). The Court also distinguished between campaign expenditures and campaign contributions on grounds that the state interest in regulating contributions is greater than its interest in regulating expenditures because donations created a greater risk of actual, or the appearance of, quid pro quo corruption. *Buckley*, 424 U.S. at 45-47.

Buckley's expenditure/contribution distinction has been among the most criticized aspects of the opinion. The Court's conclusion that contributions raise only marginal restrictions on the donor's speech have been criticized on several grounds, including (1) that contributions, like expenditures, express political messages, see Kathleen M. Sullivan, *supra* note 78, at 666 ("[B]oth contributions and expenditures may equally express political opinions."), (2) that contributions are essentially a form of indirect expenditures, *id.*, and (3) that "[a] contribution is a quintessential act of political association, just as an expenditure is an act of expression," Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 796 (1998). The Court's attempt to distinguish between the strength of the state interest in limiting contributions vis-a-vis limiting expenditures has also been criticized on grounds that it is the demand for campaign expenditures that drives the need for campaign contribu-

has been less than specific in explaining its decisions holding that, although campaign expenditures in general cannot be constitutionally limited, corporate expenditures can.[116] One answer might be that corporate expenditures may be especially limited because they implicate a more compelling state interest than exists with respect to other political expenditures. If so, the comparison between corporate expenditures and deceptive campaign speech rests with the analysis of the relative strength of the state's interests discussed below.[117] Alternatively, however, the Court might be suggesting that corporate speech is not entitled to full protection because it is of inherently lesser value. Support for this interpretation comes from the Court's account of corporate speech as being distortionary because the "'immense aggregations of wealth that are accumulated with the help of the corporate form . . . have *little or no correlation to the public's support for the corporation's political ideas.*'"[118] While this passage may not be a model of clarity, it can be read to mean that, in the Court's view, corporate expenditures raise less First Amendment concern because their power to persuade in the political marketplace is unrelated to their intellectual content and serves only to skew public debate away from a fair and informed assessment among competing ideals.[119] Accordingly, the expenditures, to use a familiar phrase, have only "slight social value as a step to truth"[120] and, as such, are only low-value speech and not entitled to full First Amendment protection.[121]

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tions. *See* Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1055-56 (1999) (criticizing the outcome of *Buckley* that has left the demand side of campaign finance unregulated even in the face of "the hydraulic pressures to raise and spend money on contested political campaigns").

[116] *McConnell*, 124 S. Ct. at 644-48. Noncorporate campaign expenditures, however, can be subject to disclosure laws. Coordinated campaign expenditures may also be regulated as campaign contributions. *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 464-65 (2001) (upholding the constitutionality of expenditures by a political party that are independent from the party's efforts on behalf of a particular candidate, but still allowing restrictions of coordinated expenditures).

[117] *See* discussion *infra* Part III.B (comparing the state's interest in regulating corporate expenditures with its interest in regulating deceptive campaign speech).

[118] *McConnell*, 124 S. Ct. at 695-96 (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990)) (emphasis added).

[119] Richard Hasen terms this the "barometer equality" argument. Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 41-42 (2004).

[120] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* discussion *supra* Part III.A.1 (describing how, why, and in what context false speech is not protected by the First Amendment).

[121] In fact, concluding that corporate expenditures, like false statements of fact, should be deemed to have "no constitutional value" is problematic. To begin with,

speech doctrine normally does not turn on whether there is a correlation between the speaker's message and the speaker itself. The Court did not inquire in *Cohen v. California*, for example, whether Paul Cohen believed in the statement on the back of his jacket, or even whether it was his jacket. 403 U.S. 15 (1971). Rather, the focus in evaluating First Amendment worth is generally upon the value of the speech itself, regardless of the identity of the speaker. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.").

The Court has offered two arguments related to corporate structure that purportedly support treating corporate expenditures as having low First Amendment value. First, the Court has treated corporate expenditures as, in effect, akin to state-subsidized speech on grounds that corporate wealth is only accumulated through the special legal benefits accorded corporations by state law. *See* FEC v. Beaumont, 539 U.S. 146, 123 S. Ct. 2200, 2206 (2003) (describing how "[s]tate law grants corporations special advantages" including "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" (internal quotation marks omitted)). Because of this special treatment, the Court concluded, allowing corporations to use their wealth to influence political decision making would provide them with "an unfair advantage in the political marketplace." *Id.* (internal quotation marks omitted). Second, the Court maintained that corporate expenditure limitations could be justified on grounds that they protect shareholders from having their "money used to support political candidates to whom they might be opposed." *Id.*(internal quotation marks omitted). Banning expenditures from corporate treasuries thus prevents corporations from engaging in speech not reflective of the positions of its shareholders.

Whether such considerations should lead to the conclusion that corporate expenditures should be viewed as having low-level value under the First Amendment is debatable. It is notable that the Court has rejected, for example, the general contention that entities receiving government subsidies may be precluded from engaging in First Amendment activity. *See* FEC v. League of Women Voters, 468 U.S. 364 (1984) (holding unconstitutional the requirement that public broadcasting stations that receive grants from the Corporation for Public Broadcasting are prohibited from editorializing). However, even accepting the legitimacy of the subsidized speech and shareholder protection rationales, these arguments do not support *McConnell*'s upholding of labor expenditures limitations. The state subsidy argument does not apply to unions because, as the Court itself recognized in *Austin*, unions raise money "without the significant state-conferred advantages of the corporate structure." *Austin*, 494 U.S. at 665. Similarly, the argument that expenditure bans protect dissenting organization members also does not apply to unions because, as *Austin* again recognized, union members, unlike shareholders, can decline to contribute to support the political activities of their organization. *Id.* at 665-66; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (holding that union employees have a First Amendment right to, but cannot be compelled to, contribute to the political activities of other union members with whom they disagree). Accordingly, "the funds available for a union's political activities more accurately reflect[] members' support for the organization's political views than does a corporation's general treasury." *Austin*, 494 U.S. at 666.

The argument that the combined category of corporate and labor expenditures is of greater First Amendment value than false campaign speech is therefore relatively straightforward. *McConnell*, in sustaining such regulations, thus opens the door to other types of campaign regulations that restrict non-low-level speech, including presumably other types of campaign expenditures. *Cf.* Hasen, *supra* note 119, at 71 (arguing that *McConnell* could affect expenditures by "a wide group of nongovernmental ac-

But even if both corporate expenditures and false campaign speech are construed to have only low value in the search for truth, they could nonetheless be distinguished from each other. False campaign speech may need more expansive protection than corporate expenditures for reasons unrelated to the inherent value of falsity. These are the reasons already mentioned, such as the need for breathing space for election speech, the First Amendment principle that in matters of politics, the people and not the government should be the arbiters of truth, and the risk that enforcement of campaign speech regulations would be vulnerable to partisan misuse.[122]

Similar arguments, however, could be advanced with respect to the regulation of corporate expenditures. To the extent campaign finance limits have provisions that may be subject to differing interpretations, partisan abuse is again possible.[123] Moreover, campaign finance restrictions raise a problem with political self-dealing that campaign speech restrictions do not. While deceptive campaign speech regulations are neutral between incumbent and challenger, campaign finance regulations generally are not.[124] As Ronald Cass argues, campaign finance issues are matters of "immediate personal concern" to legislators, and it would be unexpected if their regulation

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tors"). The problem in drawing this conclusion from *McConnell*, however, is that the Court did not grapple with the potential significance of its labor expenditure holding and instead treated labor and corporate expenditures as constitutionally equivalent without discussion. The Court's decision may thus have been as much about not disrupting the delicate political balance achieved by Congress in enacting BCRA as it was an effort to wholly reformulate the First Amendment law regarding campaign expenditure limitations.

[122] *See supra* notes 66, 107-08 and accompanying text (discussing the argument that false campaign speech sanctions are vulnerable to partisan abuse).

[123] Certainly the attempt in BCRA to impose bright-line limits on the situations in which corporate speech can be proscribed is helpful step in avoiding this problem. At the same time, however, even BCRA has some provisions, such as the limit on coordinated expenditures, that are sufficiently unclear as to raise the potential for partisan abuse. For example, Republicans have already asked the FEC to investigate whether the expenditures of some organizations have been improperly coordinated with the Kerry campaign. *See, e.g.*, Lisa Getter, *Kerry Aided by "Illegal" Soft Money, GOP Claims*, L.A. TIMES, Apr. 1, 2004, at A22 (detailing Republican claims of the Kerry campaign's alleged coordination with 527 groups); Andrea Stone & Jim Drinkard, *F.E.C. Filing Targets Liberal Groups*, USA TODAY, Apr. 1, 2004, at 4A (reporting on the Republican National Committee's attempts to block fundraising for MoveOn.org and other groups by claiming illegal coordination with the Kerry campaign).

[124] As Michael Klarman notes, "[t]he one thing that virtually all commentators agree upon . . . is that legislators drafting campaign finance legislation will seek to enhance the advantages of incumbency." Klarman, *supra* note 75, at 537.

were enacted without advantaging incumbency.[125] Again, as with campaign speech regulation, the possibility of political abuse merits close First Amendment scrutiny.[126]

3. Summary

At first glance, corporate campaign expenditures would seem to present greater First Amendment issues than deceptive campaign speech. After all, while the Court has held that there is no First Amendment value in false statements of fact, it has stated that campaign money implicates substantial First Amendment concern. Upon closer review, however, the question is more complex. First, corporate expenditures can also be seen as having little First Amendment value if they are, as the Court suggests, distortive and thus of little worth in the search for truth. Second, the First Amendment claim for false campaign speech can be based on concerns unrelated to the value of falsity, namely that regulating such speech would chill the give-and-take inherent in election battles and open the door to partisan abuse. Seen in this light, the claim for First Amendment protection for false campaign speech may be stronger than for corporate campaign expenditures. But the comparison is still not complete because the regulation of corporate campaign expenditures also raises concerns of political misdealing, as campaign finance regulation is inherently susceptible to the problems of legislative entrenchment. As such, its regulation also calls for careful scrutiny. In the end, then, the First Amendment case for protecting deceptive speech and the one for protecting corporate expenditures are not easily distinguished.[127] The claim that there is a clear difference in the constitutional equation

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[125] Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 56-58 (1998).

[126] *McConnell* has been thoroughly criticized for overly deferring to legislative judgment despite the likelihood that campaign finance regulation will generally serve incumbency advantage. *See* McConnell v. FEC, 124 S. Ct. 619, 720 (Scalia, J., dissenting) (highlighting the regulations' unfair effects on challengers versus incumbents); *id.* at 742 (Kennedy, J., dissenting) (criticizing the *McConnell* majority's deference to Congress despite the incumbency protection problem); *see also* Bauer, *supra* note 75, at 19 n.84 (arguing the incumbency protection issue was not properly addressed by the majority in *McConnell*); Hasen, *supra* note 119, at 60-62 (discussing the incumbency protection issue).

[127] As noted above, the wildcard in this is the Court's suggestion that labor expenditures are of the same First Amendment value as corporate expenditures. If this is indeed the Court's position, then expenditures clearly hold more First Amendment value than false campaign speech. *See supra* note 121 (assessing the case for treating labor expenditures like corporate expenditures).

governing the two issues must come from the other side of the constitutional inquiry, i.e., that there is a difference in the relative strengths of the state's interests supporting regulation. We now turn to this issue.

B. *Lies or Money: Which Raises the Greater Concern?*

The issue of whether the state's interests in regulating campaign finance are greater than its interests in regulating campaign speech poses the considerable question of what causes greater harm to the electoral process, lies or money? *McConnell* is helpful in setting the framework for answering this question because it has identified the relevant state interests to be compared—the interests in preventing distortion and in limiting voter alienation.[128] We address each interest in turn.

1. Campaign Distortion

As we have seen, the state interest in preventing campaign distortion is common to both campaign speech and campaign finance regulation. The antidistortion interest, however, applies differently in the two areas. With respect to proscribing deceptive speech, the state's interest is the relatively straightforward purpose of preserving informed and accurate electoral choices, because allowing misleading information to enter the political marketplace can lead the electorate to make uninformed or misinformed choices.[129]

The state interest in curbing the distorting effects of money on the electoral process, on the other hand, is less direct. While money can have a direct effect on voter choice if only one side has the resources to disseminate its message, the distortion recognized in the corporate expenditure cases is not based on the concern with the inability of some to communicate. The concern, rather, is that "immense aggregations of wealth" will allow some entities to overcommunicate. But assuming that the disseminated messages are not misleading, why is over-communication a problem? As Justice Thomas writes in his *McConnell* dissent:

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[128] *McConnell*, 124 S. Ct. at 696-97.

[129] *Cf.* Carlton F.W. Larson, Case Note, *Bearing False Witness*, 108 YALE L.J. 1155, 1157 (1999) (noting that proper legislative action is premised on accurate information).

> The only effect, however, that the "immense aggregations" of wealth will have . . . on an election is that they might be used to fund communications to convince voters to select certain candidates over others. In other words, the "corrosive and distorting effects" . . . are that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas.[130]

Of course, the actual reason underlying the fear that wealth will distort campaign results is that political ads do not "convince" the electorate of the "correctness" of their positions as those terms are used by Justice Thomas. If they did, the quantity of political ads would not make a difference—so long as the candidates had resources to provide a sufficient threshold of information to the voters. Rather, the answer to Justice Thomas is that rational, fact-based decision making does not explain voter decision making. As Daniel Ortiz explains in his important work, *The Democratic Paradox of Campaign Finance Reform*,[131] the premise of campaign finance regulation is that, although there may be a class of politically aware or well informed voters who are moved by rational persuasion, there remains a more fluid group of uninformed and relatively disinterested voters who respond better to emotional stimuli than to reasoned appeals.[132] Accordingly, wealth matters, because it has the ability to affect voter choice through its advertisement purchasing power unrelated to its ability to intellectually convince voters of the correctness of particular positions.[133]

Note, at this point, the differing assumptions between the antidistortion rationale in the campaign finance setting and in the campaign speech context. For campaign speech, the assumption underlying the regulatory interest is that voters are politically informed individuals who are persuaded by reasoned arguments based on fair assessments of the facts.[134] For this reason, campaign speech that distorts the facts is problematic. The assumption in campaign finance regulation, on the other hand, is that voters are relatively uninformed and are per-

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[130] *McConnell*, 124 S. Ct. at 735 (Thomas, J., dissenting) (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990)).

[131] Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998). Ortiz terms this premise undemocratic because the notion that voters will be moved by emotion rather than by reasoning through political arguments is inconsistent with "one of democracy's central normative assumptions: the idea that voters are civically competent." *Id.* at 895.

[132] *Id.*

[133] *Id.*

[134] *See* discussion *supra* Part II.A (discussing the reasons for regulating deceptive campaign speech).

suaded more by emotion than by reason. Thus, the financial power that enables one side to dominate the avenues of mass communication is the regulatory target. Asking which regulatory interest is stronger thus becomes, in effect, the question of which group, informed or uninformed voters, is more needful of government intervention on its behalf. Is there a greater interest in protecting the ability of the informed voter to make reasoned decisions or is it more important to protect the less informed from the manipulative force of extensive advertising campaigns?

Actually, the dichotomy is probably less stark. The voting decisions of most of the electorate are probably best described as "low-level reasoning"—a process that involves both rational and nonrational, informed and uninformed behavior.[135] Thus, even if it is accurate to distinguish between relatively informed and relatively uniformed voters, the state interests in preventing both wealth and message campaign distortions cut across the entire electorate.

It may be argued, nevertheless, that there is a greater interest in limiting the power of wealth to distort campaigns on grounds that it may be easier to protect oneself from misleading information than from emotional manipulation, because the former engages the rational processes while the latter works more subconsciously.[136] The answer to this point, however, is that there is also emotional power in deception. In fact, the power of deception to affect voting choices may be greatest with respect to those who are least informed. Consider, once again, the ad in *Boyce & Isley*.[137] Although Cooper's ad may have been sufficiently dramatic to sustain the attention of relatively disinterested voters, it is far less likely that a response by Boyce would be equally attention-grabbing. His claim that he had not charged the state $28,000 per hour, but had only sought that amount in fees, may be too subtle to attract the disinterested voters' attentions. If the

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[135] *See generally* SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 7, 16 (2d ed. 1994) (arguing that voters act more on "cues" from the political culture than on a detailed understanding of political issues).

[136] Any argument that there is a greater interest in protecting voters from factual distortion than from emotional manipulation, on the other hand, would have to be based on the grounds that it is more consistent with the democratic premise that voting behavior is fact based and rational. As Ortiz points out, however, such an argument misunderstands why campaign regulation is needed in the first place. Ortiz, *supra* note 131, at 895.

[137] Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893 (N.C. Ct. App. 2002); *see also supra* text accompanying note 10 (quoting the ad).

truth, as they say, has difficulty catching up with a lie,[138] its ability to do well will be enormously more difficult when the lie is dramatic and the truth only nuanced.

2. Voter Alienation

The question of whether false statements contribute to voter alienation as much as or more than the insertion of large sums of money into campaigns is also difficult. Those arguing that money inflicts the greater injury might rely on the point presented above, that concerns with truth are overstated because American voters have traditionally accepted deceptive campaign statements as an ingrained part of the nation's political life.[139] Indeed, rather than operating as a source of voter turnoff, the voters' awareness of deceptive campaigning serves as a source of entertainment and provides voters with a healthy skepticism of politicians that serves, rather than undercuts, democracy. The same, however, can be said about public awareness of the influence of money in the political process. That money has always had enormous political power is no secret. After all, as early as 1895, the industrialist and political powerbroker Marcus Hanna famously stated: "There are two things that are important in politics. The first is money and I can't remember what the second one is."[140]

More importantly, the everyone-knows-politicians-lie argument does not fully address the voter alienation question. Although voters at one level accept the reality of deceptive campaign messages, this does not mean that they are not turned off by that realization. The belief that all politicians lie hardly invites political participation any more (or less) than the belief that money controls politics.

It might also be contended that the infusion of wealth fosters greater voter alienation than deceptive campaign speech because the latter works directly on the voter while the former operates behind the voters' backs. In the case of a deceptive campaign ad, the voter has the power to either believe or disbelieve the ad—the power of the candidate's deception, in short, is a function of the voter herself. In the case of campaign finance, on the other hand, the voter is power-

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[138] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974), *quoted in* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 593 (1980) (Rehnquist, J., dissenting).

[139] *See supra* notes 53-54 and accompanying text (noting that American voters are traditionally skeptical toward the statements of political candidates).

[140] *See* Cynthia Crosson, *The Man Who Made Political Campaigns All About Money*, WALL ST. J., Mar. 24, 2004, at B1 (quoting Hanna).

less. She has no role in limiting the influence that the large campaign donation has on the candidate, and she may then arguably become more alienated from a system over which she has no control.

There are two weaknesses to this position. One is descriptive: is it truly less of a turnoff to the process to be deliberately lied to than it is to have decisions made behind one's back? Secondly, and more importantly, while there may be merit in the contention that believing political events are outside of one's control is more alienating, this rationale applies more to the regulation of campaign contributions than to corporate expenditures. The troublesome aspect of corporate expenditures, according to the Court, lies less in their ability to curry favor[141] than in their ability to sway voters through expensive media campaigns. The voter thus has the same option when faced with an ad paid for by corporate wealth that she has when faced with a deceptive campaign ad. She can either accept or reject the message.[142]

Perhaps the best argument that campaign finance raises greater regulatory concern with respect to voter alienation is that the harms caused by the infusion of wealth into the system may be broader than those caused by campaign deception. False campaign speech affects, and is designed to affect, the results of elections. The citizen who believes that all candidates lie might on that basis be deterred from participating in a political election. The infusion of money into a political campaign, on the other hand, is designed to affect the results of elections *and* the subsequent actions of elected officials. Money thus taints the entire political process and not just political campaigns. The citizen who believes that the political process belongs primarily to the highest bidders might be disaffected from the political process altogether—including believing that without money, political change is not possible.

Deceptive speech, however, may also cause estrangement from the entire political process. After all, believing that all candidates lie to get elected is hardly a recipe for believing in candidates once they

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[141] To be sure, in *McConnell v. FEC*, the United States offered this reason in its defense of corporate expenditure limitations. 124 S. Ct. 619, 748 (2003) (Kennedy, J., concurring in part and dissenting in part) (citing the government's brief for the proposition that "[f]avoritism and influence are not, as the Government's theory suggests, avoidable in representative politics"). The Court majority, however, did not rely on this rationale in upholding the corporate speech expenditure limitation.

[142] In fact, she may be better equipped to resist the ad paid for by corporations or unions because, while disclosure laws will empower her to ascertain where the money is coming from, she will not have similar means to uncover an ad based on deception.

have been elected.[143] Moreover, as Robert Bellah notes, disparaging attacks on political leaders undercut a society's respect for its political institutions and its own sense of communal identity.[144] It is not clear, in short, that money is any greater source of voter alienation than is the barrage of negative, deceptive candidate attack ads that dominate contemporary political campaigns.

3. Summary

As with the previous discussion of the relative strength of the competing First Amendment interests, analysis of the state interests in combating voter alienation and campaign distortion does not clearly establish a significant difference in the constitutional equation respecting deceptive campaign speech regulation and corporate expenditure regulation. Although the campaign distortion addressed by each type of regulation is different, there is no clear argument that eliminating the distortion resulting from campaign lies is any more, or less, compelling than eliminating the distortion caused by the infusion of immense aggregations of wealth into political campaigns. Similarly, the state's interests in combating voter alienation seem largely equivalent. Neither the belief that wealth controls politics nor the belief that politicians lie to get elected instills much faith in the political system. If there is to be a distinction drawn between the state's interests in limiting corporate expenditures and its interests in proscribing deceptive campaign speech, it may have to be articulated on grounds other than preventing campaign distortion and combating voter alienation.[145]

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[143] On the other hand, it is not clear that the voter disillusionment derived from believing one has been misled in the course of a political campaign has much staying power after the election. Whether this is because voters assume that once elected, politicians will be bettered by respect for the institution they represent, or whether voters are simply vested in affirming their own political choices, the fact is that politicians' approval ratings generally go up after being elected, no matter how unseemly the political campaign. *Cf.* Richard Benedetto, *Clinton's Job Rating Hits All-Time High*, USA TODAY, Jan. 17, 1997, at 10A (noting that President Clinton began his second term in office with a 62% approval rating).

[144] *See* Bellah, *supra* note 51, at 745 (noting that the reputations of community leaders shape the identity of the community).

[145] One such argument is readily available. The contention could be made that there is a greater regulatory interest in regulating campaign finance because of the strength of a government's interest in promoting political equality. After all, lying has no financial threshold and the ability to lie does not categorically exclude persons a priori from competing in the political process. A system in which wealth has excessive influence, on the other hand, penalizes those without substantial resources ab initio.

C. *Implications*

If the preceding analysis is accurate, there is little basis to distinguish the constitutional equation governing the regulation of false campaign speech from the equation governing the regulation of corporate expenditures. Because *McConnell* upheld the regulation of corporate expenditures, it would follow directly that the regulation of deceptive campaign speech should be upheld as well. As applied to *Boyce & Isley*, then, this would suggest that there is no reason to disturb the appellate court's decision on constitutional grounds.[146] If Cooper's statement satisfied requirements for liability generally, it should not matter that the false statement was disseminated in the course of a political campaign—a conclusion that should send chills through the hearts of political candidates and consultants everywhere.

But the implication of *McConnell* for campaign speech issues may be even more significant. If corporate expenditures are deemed not to be low-level speech,[147] then the conclusion that the state's antidistortion and antialienation interests are sufficiently compelling to justify corporate expenditure prohibitions is even more far-reaching.[148] For example, to use examples from the case law, to the extent that the state's interest in prohibiting election-day endorsements for candidates is premised on eliminating campaign distortion,[149] or to the ex-

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This rationale, however, does not explain *McConnell* because the case did not overturn precedent suggesting that political equality was unavailable as a justification for campaign finance restrictions. In *Buckley*, for example, the Court rejected, in no uncertain terms, the political equality rationale as providing the basis for campaign finance regulation. To the *Buckley* Court, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. 1, 48-49 (1976) (per curiam).

[146] Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893 (N.C. Ct. App. 2002). However, there are other potential grounds for reversal. The case could be overturned if a higher court were to disagree with the appellate court's assessment that Cooper's statement was false. The defamation claim might also be reversed on common law defamation grounds, such as finding that Cooper's statement that Boyce "charged" instead of "sought" legal fees, *id.* at 899, was not defamatory.

[147] As noted earlier, the *McConnell* Court's treatment of labor and corporate expenditures as constitutional equivalents clearly suggests this result. *See supra* note 121 (observing that *McConnell* treated labor and corporate expenditures in the same manner without discussion).

[148] It might also be suggested that the state interest in combating deceptive campaign speech could be construed under campaign finance precedent to be more expansive in other ways. After all, if the state interest in anticorruption includes the prevention of corruption and the appearance of corruption, why can't the state interest in antideception include the prevention of deception and the appearance of deception?

[149] *See* Mills v. Alabama, 384 U.S. 214 (1966) (holding unconstitutional an Alabama law prohibiting the publication of editorials on election day that urged citizens

tent that the state's interest in regulating the content of candidate speech in judicial elections is based upon the antialienation concern of promoting citizen confidence in judicial institutions,[150] such measures might also be upheld under a post-*McConnell* jurisprudence. The latent tension between *McConnell* and cases such as *Mills v. Alabama*[151] or *Republican Party of Minnesota v. White*,[152] in short, should be obvious.

It may be the case that *McConnell* did not intend to go this far and was intended to apply only to the campaign finance area. But the opinion itself suggests otherwise. Although the Court was careful in *McConnell* to assure that its analysis would not apply to noncampaign expression, it did not distinguish among different types of campaign expression (speech and finance) and instead grouped them together. Thus, referring to a campaign finance restriction, the Court stated, "[w]e assume that the interests that justify the regulation of *campaign speech* might not apply to the regulation of genuine issue ads."[153] Moreover, it is not clear how the Court could categorically distinguish between campaign speech and campaign finance even if it wanted to do so, since it has found that the appropriate factors to be weighed for each issue are exactly the same. One might be able to distinguish between noncampaign political speech and campaign political speech, as the Court does, on grounds that different state interests are at play in each context. But a similar distinction cannot be made when working from the premise that the same interests are at stake. The only point of distinction is whether the interests work out differently from the corporate expenditure to the deceptive speech context—the issue we have already visited.

There are, of course, escape options. The Court could abandon its expansive notions of antidistortion and anticorruption and decide to uphold corporate expenditure limitations on political equality grounds. Such a move, in one sense, would be groundbreaking in setting the stage for further campaign finance reform.[154] In another

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to vote in a certain way, despite the Alabama Supreme Court's claim that the law protected against voter confusion).

[150] *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (holding unconstitutional a canon of judicial conduct prohibiting judicial candidates from announcing their views on legal or political issues, despite the claim that the canon preserved the appearance of impartiality).

[151] 384 U.S. 214 (1966).

[152] 536 U.S. 765 (2002).

[153] *McConnell*, 124 S. Ct. at 696 n.88 (emphasis added).

[154] *See* Spencer Overton, *The Donor Class: Campaign Finance, Participation, and Democracy*, 153 U. PA. L. REV. 73, 81-85 (2004) (arguing that *McConnell* provides a founda-

sense, however, it would be fairly modest. Commentators since *Austin v. Michigan State Chamber of Commerce*, for example, have already effectively argued that the state's interest in combating the "corrosive and distorting effects of immense aggregations of wealth" recognized in that case is actually an equality interest.[155]

Alternatively, the Court could retreat from its *Buckley* holding that campaign money is exactly the same as core political speech. This also might be considered revolutionary given that so much jurisprudence and legislation has proceeded from the "money equals speech" assumption. On the other hand, this step also might be considered relatively modest, given that the Court's campaign contribution decisions already suggest that, in application, the Court has not found dollars and words to be completely fungible.[156] For now, however, the opinion has as much to say about campaign speech as about campaign finance.

CONCLUSION

Money alone does not win elections. Although it may be true, as the Court stated in *Buckley*, that the power of political messages to persuade voters is dependent upon the funds through which that message is disseminated, it is also true that the persuasive power of money is dependent upon the message it carries. Money is also not alone in its ability to inflict injury upon the political process. Unregulated campaign speech can generate more than its share of harm. Like political money, deceptive campaign speech can distort debate in the political marketplace. Like political money, deceptive campaign speech can alienate the electorate and discourage political participation.

In *McConnell v. FEC*, the Court made clear that the state's interests in preventing campaign distortion and voter alienation were sufficiently weighty to justify limiting campaign expenditures by corporations and labor unions. As a matter of campaign finance law, the merits of this decision can be debated, but it is clear that *McConnell* will also have significant ramifications for election issues other than campaign finance because of the way it was decided. By tying its holding

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tion for upholding campaign finance regulation on political equality grounds).

[155] *See, e.g.*, Eule, *supra* note 86, at 109-10 (arguing that the antidistortion interest is actually an equality concern).

[156] *See* Sullivan, *supra* note 78, at 666 (criticizing the Court for treating campaign expenditures as core speech interests, while arguing that campaign contributions do not implicate expressive interests).

to the antidistortion and antialienation interests, the Court has also set the stage for upholding significant restrictions on campaign speech. In particular, the logic of *McConnell* would suggest, at the least, that the First Amendment does not require special solicitude for false campaign speech despite the argument that speech in this area should be most protected. This would mean that deceptive campaign speech could be prohibited, but only when the statements are uttered with actual malice—a qualification that, although highly protective in most areas, may arguably be insufficiently protective when applied to campaign speech.[157] Even more problematic for free speech purposes, *McConnell* may go even further to suggest that campaign speech may be subject to even greater restrictions than that applied in other areas because, according to the Court, the antidistortion and antialienation interests are so powerful in the political campaign setting.

Certainly, sanctioning deceptive campaign messages is supported by sound policy considerations. But the First Amendment concerns triggered by such regulation are also compelling. After all, campaign speech by its very nature is tumultuous, provocative, and prone to overstatement; and investing the government with the power to proscribe campaign speech, in any form, raises the most serious First Amendment concerns. Thus, while it may be true that *McConnell* sheds significant light on the validity of deceptive campaign speech restrictions, it is also true that weighing the competing interests underlying campaign speech restrictions sheds significant light on the validity of *McConnell*.

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[157] Indeed, if the subject of the false statement is a private person and the statement is defamatory, it can be sanctioned upon a finding of only negligence. *See* Gertz v. Robert Welch, Inc. 418 U.S. 323, 347 (1974) (holding that states may define for themselves the appropriate standard of liability in defamation suits brought by private individuals against the media, "so long as they do not impose liability without fault"). This may be significant even in campaigns because, even though a candidate's political opponent will be construed to be a public figure necessitating application of the actual malice standard, it is possible that a candidate's statements could be construed to be defamatory towards third parties. In fact, some of the plaintiffs in *Boyce & Isley* were merely members of candidate Boyce's firm and, as such, contended that they were private figures who did not have to show actual malice. 568 S.E.2d 893, 900-01 (N.C. Ct. App. 2002).