JEFFERSON JOURNAL OF SCIENCE AND CULTURE

The scholarly publication from Jefferson Scholars Foundation

Issue 3, 2013

"To see differently in this way for once, to want to see differently, is no small discipline"

Jefferson Scholars Foundation

JEFFERSON JOURNAL OF SCIENCE AND CULTURE

Issue 2, 2013

Co-Editors-in-Chief

Sarah A. O'Halloran
Corlett W. Wood

Section Editors

Associate Editor Natural Sciences
William J. Dirienzo

Associate Editors Arts & Humanities
Harold Smith Reeves

Associate Editor Social Sciences
Roberto I. Armengol

The Jefferson Journal of Science and Culture was founded on the belief that the cross-pollination of various disciplines is a crucial factor in the advancement of scholarship. To facilitate and focus such exchange, this journal is dedicated to publishing articles, which address a specific topic of broader interest. Scholars from various fields are expected not to dispense with the robes of their specialty, but to allow their disciplinary expertise to make an impact beyond its customary bounds.

Acknowledgements: The Editorial Board would like to thank the staff of the Jefferson Scholars Foundation, as well as the Jefferson Fellows for their support in creating this publication. We would also like to thank our peer reviewers, and our proofreader Melissa Maki.

JEFFERSON JOURNAL OF SCIENCE & CULTURE

Jefferson Scholars Foundation
112 Clarke Court
P.O. Box 400891
Charlottesville
VA 22904-4891

jeffersonjournaluva@gmail.com
www.jeffersonjournal.org

Copyright © 2013 by the Jefferson Scholars Foundation at the University of Virginia

Jefferson Scholars Foundation

Jefferson Journal of Science and Culture

Issue 3, 2013

All papers are available to download from www.jeffersonjournal.org

Jefferson Scholars Foundation

When More Speech is Not Enough:
An Argument for the Regulation of Political Deception Through a Campaign Ethics Council

Robert N. Spicer
Department of Communication & Theatre
Millersville University

> "They are not seeking to assure … that 'advertising … flows both freely and cleanly.' Instead they are seeking to poison the stream, to deprive voters of a free choice by diverting the intended exercise of the franchise to an unintended result."
> *Tomei v. Finley*

Introduction

Two overlapping, dominant discourses about political campaigns repeatedly turn up in the legal discussions, court decisions, and academic research cited in this article. The first is summed up in the saying, "*politics ain't beanbag*,"[1] an oft-repeated phrase originating in a newspaper column in 1895.[2] As the old saying implies, politics can be a rough and tumble, ugly business. The second dominant discourse is the argument that a political culture is best left unfettered and that, even if there is some ugliness and deception, these unfortunate byproducts will be weeded out by debate. In other words, the marketplace is best left to work itself out and the best cure for bad speech, such as deception, is not regulation but rather more and better speech to counter the bad speech.

This is best exemplified by Hugo Black's argument in *New York Times v. Sullivan* that, "An unconditional right to say what one pleases about public affairs is … the minimum guarantee of the First Amendment."[3] Some courts have held that false speech on its own has no value and enjoys no First Amendment protection.[4] Justice Black takes the argument in the opposite direction, asserting that such speech is not only *protected,* but government

---

[1] I would like to note that "politics ain't beanbag" is also the title of the memoir of John "Pitt" Pittenger (1930-
[2] "politics ain't beanbag," Taegan Goddard's Political Dictionary, accessed September 27, 2012, http://politicaldictionary.com/words/politics-aint-beanbag/.
[3] New York Times v. Sullivan, 376 U.S. 254 (1964), at 297.
[4] Garrison v. Louisiana, 379 U.S. 64 (1964), at 75.

intervention to stop deception is a far greater danger than speech that deceives the public and/or does reputational harm to its target. In its simplest form this argument is manifested in Thomas Jefferson's statement, "I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it."[5]

As it is currently treated by the courts, free speech carries with it the inconveniences of politicians being able to lie freely, the damage caused by defamation, and the undermining of electoral integrity when votes are cast based upon false impressions. The question raised in this article is whether one should accept the premise of Jefferson's statement. Are there perhaps inconveniences of government intervention and regulation of speech that might be worth enduring for the sake of penalizing political deception? The free speech absolutist and marketplace of ideas perspective would say no. This article develops a competing ethos; another way of thinking about free speech that protects political participation but deters deception. This article will interrogate the notion that the best cure for bad speech (i.e. deception) is good speech (i.e. corrections). Most of all, this is an attempt to begin building a new political discourse that addresses the fact that "the proliferation of demonstrable factual falsity in public debate" is a problem that "the venerable and inspiring history of freedom of expression has virtually nothing to say."[6]

Part I of this article will discuss legal scholarship that specifically addresses the issue of regulating campaign deception. One of the central questions of such scholarship is the issue of defining the line between individual liberty and the role of government in political life. This question will be addressed in the context of that legal scholarship. Part II will follow with an analysis of the judicial discourse surrounding the regulation of factual falsity. This will involve looking at how the courts have ruled in key cases involving false speech especially *New York Times v. Sullivan* and the more recent decision in *U.S. v. Alvarez*.[7] Part III looks at how states attempt to restrict political falsehoods through various statutes. Finally,

[5] Thomas Jefferson. (1791). Strengthening the State Governments: To Archibald Stuart. Jefferson, Thomas, 1743-1826. Letters. Electronic Text Center, University of Virginia Library, accessed November 27, 2012, http://goo.gl/lNel3x.
[6] Frederick Schauer, "Facts and the First Amendment," *UCLA Law Review* 57, no. 4 (2010): 908.
[7] United States v. Alvarez, 132 U.S. 2537 (2012).

following the decisions made in *Pestrak v. Ohio,*[8] *Michigan v. Dewald,*[9] and *281 CARE Committee v. Arneson,*[10] Part IV offers a proposal for one way to create a campaign ethics council that could be used as a deterrent for factual falsehoods in political campaigns without offending the First Amendment. While this article does argue strongly in opposition to the Court's decision in *Alvarez,* it also recognizes that this decision has set a legal standard for how lying is handled vis-à-vis free speech concerns. With this in mind, the council proposal outlined here is designed to stay within the legal parameters set by the *Alvarez* Court.

I. Literature Review: On freedom, authority, and legal scholarship

Before embarking on this discussion, it is essential to define the terms as they will be used. The word "liberal" is especially problematic because of its common use and misuse. As it applies to this discussion, liberal is used to refer to the belief that freedom is best defined as the absence of constraint. It could also be described as libertarianism as Fred Siebert[11] called it in *Four Theories of the Press*. Some, Laura Stein[12] and David Harvey[13] for example, call it neoliberalism. Harvey's neoliberalism includes Reagan and Thatcher, who are more commonly referred to as conservatives. For some, liberal refers to Barack Obama, for others it is the "classic liberalism" that is exemplified by John Stuart Mill.

As simply put as possible, liberal is used here to refer to a belief in negative liberty, the absence of constraint. Liberalism is the tendency to "privilege *rights* over *obligations*."[14] Defined by Zizek through the lens of his three-part conceptualization of ideology, "liberalism is a doctrine (developed from Locke to Hayek) materialized in rituals and apparatuses (free press, elections, market, etc.) and active in the 'spontaneous' (self-) experience of subjects as 'free individuals.'"[15] This is the definition of liberalism at work in this article.

---

[8] Pestrak v. Ohio Elections Commission, 926 F. 2d 573 (1991).
[9] Michigan v. Dewald, 705 NW 2d 167 (2005).
[10] 281 CARE Committee v. Arneson, U.S. District Court, D. Minnesota, Civil No. 08-5215 ADM/FLN (2013).
[11] Fred Siebert, "The Libertarian Theory." In *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Communist Concepts of What the Press Should Be and Do* (Champaign, IL: University of Illinois Press, 1963).
[12] Laura Stein. *Speech Rights in America: The First Amendment, Democracy, and the Media* (Chicago: University of Illinois Press, 2006).
[13] David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).
[14] Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and Zizek* (Oxford: Blackwell Publishers, 1999), 263.
[15] Slavoj Zizek, "The Spectre of Ideology." In *Mapping Ideology*, ed. Slavoj Zizek (Brooklyn, NY: Verso, 1994), 9.

Once liberalism is defined, the next question of importance for this article is posed by Torfing who asks, "is it really possible to create a synthesis of *liberal individualism* and *republican communitarianism*?"[16] He concludes, "common, political obligation is perfectly compatible with individual liberty."[17] The conclusion of this article is not just that individualism and communitarianism are compatible, but that some variation of combining the two is essential to the survival of a political system. This echoes Torfing's argument that, "The absence of a common, political obligation fosters a gradual weakening and impoverishment of the political community, which in turn may result in a failure to secure the rights of the citizens and uphold the liberal democratic regime."[18] This position is applied to the problem of political deception to justify the idea that political lies must be punished and deterred and that this can be done without threatening individual liberty.

The liberal judicial discourse that resists any and all regulation of political lies is the product of a line of thought critiqued by Shadia Drury who draws a connective line between lies and ideals, ideals being false statements that over-idealize our political reality. When it becomes clear that a society is not living up to its ideals, "We begin to feel that we are living a lie."[19] The liberal judicial discourse does not disallow truth but rather proposes *there is no truth* per se, "there is no such thing as a false idea," as the Supreme Court said in *Gertz v. Welch;*[20] there are only our ideals that we may at times be unable to meet. The law is not allowed to distinguish between a lie and a statement of ideals just because that statement of ideals does not coincide with reality and, in so doing, deceives the public; the law is also constrained from punishing factually false statements for the sake of protecting statements of ideals.

More importantly, by protecting lying through the First Amendment in the name of individual liberty and by purportedly being a bulwark against government abuse of power, this legal regime also empowers government abuses by giving government the power to lie.

---

16 Torfing, *New Theories of Discourse*, 266.
17 Ibid.
18 Ibid., 265.
19 Shadia Drury, "Noble Lies and the First Amendment: A Symposium on the Death of Discourse: Act II: Lying and Politics," *University of Cincinnati Law Review* 64, no. 4 (1996): 1228.
20 Gertz v. Welch, 418 U.S. 323 (1974), at 339.

Philosophically speaking, it places freedom and truth (unnecessarily) at loggerheads with one another and in terms of practical political application, it strengthens the power of empire to "create its own reality."[21] In professing to protect liberty from the abuses of power, it only strengthens power by protecting power's most useful tool: deception.

Slavoj Zizek argues, "There is in liberalism, from its very inception, a tension between individual freedom and the objective mechanisms which regulate the behavior of a crowd."[22] This is the paradox of the classic liberal notion of freedom as the absence of constraint upon choice. Zizek's analysis places this problem in the context of contemporary politics with a political left looking to protect individuals from the excesses of unrestrained market capitalism and a political right that wants that market to go unrestrained while imposing "family values" through various legal and cultural mechanisms.[23] In the end, Zizek argues, the freedom of liberalism becomes the greatest tyranny of all, "its modest rejection of utopias ends with the imposition of its own market-liberal utopia."[24] In the case of political speech, it is the utopia of the so-called self-correcting marketplace of ideas.

This is part of the thinking behind the call for a campaign ethics council in Part IV of this article. Some of the legal scholars discussed here argue that, even if one wants to implement a "truth in campaign ads" law, a political equivalent to the false advertising laws that restrict product advertising, it would be difficult to get around the dominant First Amendment jurisprudence. The courts have knocked down such laws in multiple cases[25] and so punishment through fines or imprisonment are not workable, nor are they desirable, solutions to the problem. A campaign ethics council would recognize, punish, and hopefully deter lying in political campaigns in a way that provides a forum for what George Orwell called justice and common decency, a belief that the material existence of citizens, how they

[21] Ron Suskind, "Faith, Certainty and the Presidency of George W. Bush," *New York Times*, October 17, 2004, http://www.nytimes.com/2004/10/17/magazine/17BUSH.html.
[22] Slavoj Zizek, *Living in the End of Times* (Brooklyn, NY: Verso, 2011), 36.
[23] Ibid., 37.
[24] Ibid., 38.
[25] Minnesota v. Jude, 554 NW 2d 750 (1996); Washington v. 119 Vote No! Committee, 957 P. 2d 691 (1998); Rickert v. State of Washington Public Disclosure Committee, 168 P. 3d 826 (2007).

come into contact with one another in "family life, the pub, football, and local politics" should be the organizing principle of politics.[26]

That First Amendment jurisprudence that disallows any statutory solutions to political lying made its way to the U.S. Supreme Court most recently in *U.S. v. Alvarez*,[27] which will be discussed in the next section. That decision, and the others cited above, held that the law must remain value neutral, the public is subjected to the excesses of the unrestrained market for ideas, and market failure is expressed in the form of deception. This, as Stein argues, is the deceptive simplicity of First Amendment absolutism that does not "differentiate between laws that expand or support and those that curtail speech."[28] In other words, the presence of government is not always a force of restriction; it may also protect and enhance freedom. For example, acknowledging the protection of truth through the recognition and punishment of lying enhances freedom by protecting citizens from the deception of political leaders.

Robert Sokolowski addresses this issue as a conflict between truth and freedom. The argument goes, as he says, that truth "seems to exclude freedom. If something shows up as true, we seem to have no further choice about the matter."[29] In other words, if something is declared "truth" we lose the freedom to act against it. Instead of having two equally acceptable alternatives we have truth and non-truth and the latter has been deemed unacceptable; it ceases to even be a choice. Sokolowski argues that the way to bridge this gap between truth and freedom is through the idea of responsibility.

For Sokolowski the discovery of truth creates freedom. A lie is defined by Bok as "an intentionally deceptive message in the form of a statement."[30] Adler defines lying as "asserting what one believes false."[31] Martin Jay argues lying "requires the acquired skill to

---

[26] George Orwell, *The Road to Wigan Pier* (New York: Mariner Books, 1972), 176-177.
[27] Alvarez, 132 U.S.
[28] Stein, *Speech Rights in America*, 7.
[29] Robert Sokolowski, "Freedom, Responsibility, and Truth." In *Freedom and the Human Person*, ed. Richard Velkley (Washington, D.C.: The Catholic University of America Press, 2007), 39-53.
[30] Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Vintage, 1999), 15.
[31] Jonathan Adler, "Lying, Deceiving, or Falsely Implicating," *The Journal of Philosophy* 94, no. 9 (1997): 435.

speak improperly."[32] In all three instances, *intent* is a necessary ingredient. By definition, as Sokolowski argues, "we can choose to tell the truth or to tell a lie only after we have acquired the truth in some manner."[33] It is a sense of responsibility, whether it is to the community, one's honor, or the concept of truth itself, which compels one to tell the truth. Where a regulatory regime comes into the equation is in how much power it is given to define, and compel one to tell, the truth.

Sokolowski's use of responsibility is helpful in examining political lies because there are a variety of angles through which responsibility can be applied to the problem. There is the politician's responsibility to be truthful to constituents. There is the responsibility of the public to be truthful to one another when participating in political debate. There is the collective responsibility of the community, through the law, to protect the reputations of participants in the political process, both politicians and members of the public, from defamatory and/or false attacks. There is also the collective responsibility to protect the integrity of the electoral process.

Some legal scholars have proposed a number of solutions to these problems, arguing in favor of some form of regulation of political lying.[34] Others have argued against any such statutory solutions.[35] Within these discussions freedom, control, responsibility, and truth come into conflict with one another, but what these discussions make clear is that attempts to place them into conflict create a false choice. A political system need not choose between

---

[32] Martin Jay, *The Virtues of Mendacity: On Lying in Politics* (Charlottesville, VA: University of Virginia Press, 2010), 39.
[33] Ibid., 40.
[34] Harvard Law Review Association, "Avoidance of an Election or Referendum When the Electorate Has Been Misled," *Harvard Law Review* 70, no. 6 (1957): 1077-1094; Colin White, "The Straight Talk Express: Yes We Can Have a False Political Advertising Statute," *UCLA Journal of Law and Technology* 13, no. 1 (2009): 1-55; Jack Winsbro, "Misrepresentation in Political Advertising: The Role of Legal Sanctions," *Emory Law Journal* 36 (1987): 853-916; Janet Hall, "When Political Campaigns Turn to Slime: Establishing a Virginia Fair Campaign Practices Committee," *Journal of Law and Politics* 7 (1991): 353-377; Peter May, "State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks," *Boston University Law Review* 72 (1992): 179-216; Evan Richman, "Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law," *Cardozo Arts & Entertainment Law Journal* 16 (1998): 667-705.
[35] William Marshall, "False Campaign Speech and the First Amendment," *University of Pennsylvania Law Review* 153, no. 285 (2004): 285-323; Simon Rodell, "False Statements V. Free Debate: Is the First Amendment a License to Lie in Elections?" *Florida Law Review* 60, no. 4 (2008): 947-960; Jonathan Varat, "Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship. *UCLA Law Review* 53, no. 5 (2007): 1107-1141.

freedom and truth, between freedom and control, or between freedom and responsibility. These concepts can, and sometimes must, coexist peacefully.

In his examination of lying in political ads, Jack Winsbro says that freedom and restriction *must* coexist. Winsbro argues that democratic theory assumes voters will make choices based on available information and that if that information is false it will defeat the entire purpose of the process.[36] He cites the example of Senator Robert Taft's reelection bid in 1950, in which he was falsely accused of opposing raising the minimum wage. In this example, Taft could have easily corrected the record but instead chose to call his accusers "communists." This is because, as Winsbro argues, correcting the record usually doe not help win an election. In most cases, the most effective response is for the candidate to return fire. Political attacks beget political attacks. So, politicians having free reign to lie threatens the reputations of political participants, the integrity of the system, and conflicts with attempts "to keep the voter's mind free from the polluting effects of false information."[37]

While Winsbro acknowledges these needs, he is also pessimistic about the possibility of meeting them because of the First Amendment impeding restrictions on political lying. His best statement of his argument comes in his conclusion where he says that it would be a "cruel irony" if the First Amendment, which had been designed to protect and enhance political speech, ended up being "an absolute bar to the elevation of political discourse."[38] Gerald Ashdown comes to a similar conclusion, arguing that the Supreme Court applies "with a vengeance" to First Amendment jurisprudence the idea that false campaign speech statutes have a potential chilling effect on valid speech and that any "legal device that discourages [political] engagement threatens to undermine democracy."[39] Ashdown's argument is echoed by Cleveland Ferguson who argues that, "legislatures that truly desire to curb negative campaigning must operate within a narrow regulatory environment."[40]

---

[36] Winsbro, "Misrepresentation in Political Advertising," 863.
[37] Richman, "Deception in Political Advertising," 679.
[38] Winsbro, "Misrepresentation in Political Advertising," 916.
[39] Gerald Ashdown, "Distorting Democracy: Campaign Lies in the 21st Century," *William and Mary Bill of Rights Journal* 20, no. 4 (2012): 1095.
[40] Cleveland Ferguson, "The Politics of Ethics and Elections: Can Negative Campaign Advertising be Regulated in Florida?" *Florida State University Law Review* 24, no. 2 (1997): 500.

Despite the challenge posed by a high First Amendment hurdle, some legal scholars have proposed possible solutions to the problem of lying in politics. Janet Hall proposes "a private, non-partisan committee" made up of seven volunteer members who are not affiliated with any political party, which would "circulate a voluntary code to candidates" and "would issue findings of fact, but would have no power of law."[41] Some of Hall's ideas overlap with the press ethics council proposed by Painter and Hodges[42] and the Ohio campaign committee addressed in *Pestrak v. Ohio,* all of which will be addressed in section IV of this article. Some might question the value of such committees that have no power of law. While legal sanctions are important, there is also value in an official declaration, a statement from an independent committee that says to the public, "we have examined this claim and found it to be false" or to declare a politician is *knowingly* making false statements. A declaration from such an independent committee would carry greater weight than counter arguments by campaign opponents or even the press. This is the value of such a committee.

Peter May proposes "a combination of symbolic and instrumental measures to discourage deceptive negative political broadcast advertising" and, like Hall, calls for a Code of Fair Campaign Practices "to which candidates may subscribe voluntarily."[43] His proposal includes that voluntary code, the publicizing of a list of candidates who subscribe to it,[44] and fines for campaigns that employ anonymous attack ads.[45] May concludes that some action is necessary because "state and federal regulation has inadequately deterred political candidates from choosing to lie and misrepresent in their political advertisements."[46] This conclusion reinforces one of the points of the Sen. Taft incident described above. The politicians themselves force one another into scenarios where they have to return fire and the political and legal systems have done little to mitigate the ugliness.

This fact, taken with the current Supreme Court and its decision in *Alvarez*, present a political exigency, a moment to reconsider the meaning and value of freedom, to ask *what it*

---

41 Hall, "When Political Campaigns Turn to Slime," 373.
42 Chad Painter and Louis Hodges, "Mocking the News: How *The Daily Show with Jon Stewart* Holds Traditional Broadcast News Accountable," *Journal of Mass Media Ethics* 25, no. 4 (2010): 257-274.
43 May, "State Regulation of Political Broadcast Advertising," 206.
44 Ibid.
45 Ibid., 208.
46 Ibid., 212.

means to be free, if that particular meaning of freedom is useful or desirable, and, if so, how to best maintain that notion of freedom in our contemporary political system. A judicial system that is worth anything must ask not only the philosophical meaning of freedom, but also its implications in the actual application of the law. The next section examines that application in practice in two key cases. The first, *New York Times v. Sullivan,* represents the beginning of the current (de)regulatory regime, and the second, *U.S. v. Alvarez*[47] represents that regime as it currently exists.

II. Judicial Discourse and Lying

When looking at how the courts have handled false political speech, or even false speech in general, the starting point for contemporary legal thinking has to be *New York Times v. Sullivan*. In *Sullivan* the Supreme Court asked whether a form of speech "forfeits [First Amendment] protection by the falsity of some of its factual statements and by its alleged defamation" and concluded that, "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test for truth."[48] This absolutist position, refusing any test for truth, stands in contrast to the many times the Court has said false speech has no inherent value and enjoys no First Amendment protection. Even Justice Black said in a 1968 television interview the phrase "congress shall make no law" does not give a person the right to say whatever she wants whenever and wherever she wants.[49]

The *Sullivan* case involved civil rights activists taking out an ad in the *New York Times* in 1960 that accused police in Montgomery, Alabama of abusing activists, students, and Dr. Martin Luther King Jr. The problem was that the ad contained false information, describing events that never took place or describing them inaccurately.[50] L.B. Sullivan, who was a city commissioner in Montgomery, sued the *Times* for defamation, although his name did not appear in the ad, arguing that since he was the commissioner in charge of the Montgomery police force, false accusations against the police amounted to false accusations against him

---

47 Alvarez, 132 U.S.
48 Sullivan, 376 U.S. at 271.
49 Readers interested in hearing the interview with Black will find it on the oyez.org website at this URL: http://www.oyez.org/sites/default/files/justices/hugo_l_black/hugo_l_black-1968-interview.mp3.
50 Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Vintage, 1992), 10.

and were thus defamatory. The Alabama trial court awarded Sullivan damages of $500,000 enough to have potentially bankrupted the *Times*. The U.S. Supreme Court overturned that ruling, arguing, "debate on public issues should be uninhibited, robust, and wide-open" and that sometimes that would include "vehement, caustic, and sometimes unpleasantly sharp attacks" on public officials.[51] This landmark case is important because of the precedent it set for defamation jurisprudence and its recognition of "the role of the American press as an agent of democratic change."[52]

The *Sullivan* Court made a strong statement for protection of even false criticism of public officials. An even more strongly worded rebuke against defamation laws comes from Justice Black, joined by Justice Douglas in a partial concurrence, partial dissent in *Rosenblatt v. Baer*. They argue the "only sure way to protect speech and press … is to recognize that libel laws are abridgments" of the First Amendment and, citing *Sullivan*, Black quotes his own words stating, "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."[53] While this absolutist conception of the First Amendment is appealing, it is not so easy a thing to maintain.

A better stance on free speech is to recognize that it should not be free "from regulation, but from undue regulation."[54] This is best addressed through the overbreadth doctrine as discussed by Samuel Alito in his dissent in *United States v. Stevens* where he argues the doctrine is about finding a balance between the "social costs" of finding a law unconstitutional and the chilling effect of the enforcement of an overly broad law.[55] The social costs connected to false political speech include a misinformed electorate, election fraud, disenfranchisement, officials elected under false pretenses, and the approval of referendums the public may have voted down had they been properly informed. Why, as Schauer[56] asks, does free speech theory seem to have nothing to say about these social costs?

---

[51] Sullivan, 376 U.S. at 270.
[52] Lewis, *Make No Law*, 42.
[53] Rosenblatt v. Baer, 383 U.S. 75 (1966), at 95.
[54] Alexander Meiklejohn, *Freedom of Speech and its Relation to Self-Government* (New York: Harper & Brothers, 1948), 38.
[55] United States v. Stevens, 130 U.S. 1577 (2010), at 1594.
[56] Schauer, "Facts and the First Amendment."

The more recent case of *United States v. Alvarez* indicates that it may not be that the Court has *nothing* to say about these social costs but rather that its response is inadequate. The dominant judicial discourse says social costs are best mitigated by counter speech as opposed to government regulation. In *Alvarez,*[57] the plurality evokes "Oceania's Ministry of Truth," from Orwell's classic *1984*.[58] Here the Justices call on an emotional response to notions of authoritarianism, a potential outcome of restrictions on lying, so easily elicited by the mere mention of Orwell. The Court holds, "Permitting the government to declare [lying about military service] to be a criminal offense … would endorse government authority to compile a list of subjects about which false statements are punishable."[59]

In *U.S. v Alvarez,* Xavier Alvarez, shortly after winning a seat on the Three Valley Water District Board of Directors in Claremont, California, introduced himself at a board meeting as a 25-year veteran of the U.S. Marine Corps and a winner of the Medal of Honor. Yet he never served in the military. These were factually false statements and the courts in this case, the Ninth Circuit and the U.S. Supreme Court, recognized them as "fabrications"[60] and "an intended, undoubted lie."[61] Alvarez was indicted for violating the Stolen Valor Act, a law making it illegal for individuals to take credit for military awards they did not earn.[62] The Ninth Circuit overturned that decision and held that the Stolen Valor Act violated the First Amendment. The federal government appealed this decision to the U.S. Supreme Court.

The Supreme Court upheld the Ninth Circuit's decision finding the Stolen Valor Act unconstitutional. The plurality decision in *Alvarez* begins by establishing that the Court, with a few exceptions, has not allowed content-based restrictions on speech. The plurality held that while "false statements have no value and hence no First Amendment protection" there is no "general exception for [the restriction of] false statements" and that the cases where the Court has allowed such an exception have been defamation cases.[63] The point is that the Court has "not confronted a measure, like the Stolen Valor Act, that targets falsity and

---

[57] Alvarez, 132 U.S. at 2547.
[58] George Orwell, *1984* (New York: Penguin Books, 1949).
[59] Alvarez, 132 U.S. at 2547.
[60] United States v. Alvarez, 617 F. 3d 1198 (2010), at 1201.
[61] Alvarez, 132 U.S. at 2542.
[62] Alvarez, 617 F. 3d at 1201.
[63] Alvarez, 132 U.S. at 2544-2545.

nothing more."[64] In other words, in order for a statute to stand it must proscribe falsity accompanied by some other social ill. For example, perjury is not just a false statement, it is a false statement that impedes the functioning of the courts, undermining the ability to render a decision based on truth.

It could be argued that deception in campaigns does the same to the public's ability to *render a vote* based on truth, acknowledging that "Implicit in the right to vote is the right to cast that vote based on accurate information."[65] The electoral process is not only a competition between ideas, it is a decision about to whom the power to govern should be given. How can the claim to power be legitimate if that decision is not based on truth? When a grand jury, twelve citizens in a juror's box, or a judge or justice are given false information and the speaker of that false information gives it knowingly with the intent of hindering the justice system it is acknowledged by the court as a legitimately punishable crime. Why is the same not true of knowing falsity in the court of public opinion? These questions "are more than just platitudes. The essence of democracy itself presumes an electorate guided by accurate information and participating in rational, thoughtful decision making."[66]

What is most problematic about the plurality decision in *Alvarez* is the holding that the Stolen Valor Act was not narrowly tailored. Even advocates of truth in advertising laws must admit some concern about the idea of giving a government the power to judge what is true and what is false. However, this concern is taken too far when the U.S. Supreme Court and the Ninth Circuit give First Amendment protection to speech *they acknowledge* as demonstrably false. Protecting some false speech is essential, but to protect the knowingly false statement, made with malice of forethought, bestows First Amendment protection on speech that does not deserve it.

Judge Bybee make this important distinction, in his Ninth Circuit *Alvarez* dissent, between protected and unprotected false statements by noting the Supreme Court made an exception for some forms of protected false speech. Citing *New York Times v Sullivan,* Bybee

---

[64] Id., at 2545.
[65] William Williams, "Necessary Compromise: Protecting Electoral Integrity through the Regulation of False Campaign Speech," *South Dakota Law Review* 52, no. 2 (2007): 340.
[66] Ibid., 341.

argues that erroneous speech that is critical of a public official's public conduct is protected because of an interest in protecting political debate and preventing the self-censorship of public criticism of public officials that might be created by a fear of lawsuits or governmental punishment. The important distinction is that between protecting false speech criticizing government and false speech used by politicians to mislead citizens or to attack opponents. This distinction is lost in *Alvarez.* There are a number of statutes around the country that could now be challenged based upon the decision. The next section explores those statutes.

III. State Restrictions on Falsity

In order that a statute may withstand a constitutional challenge like that in *Alvarez,* it is essential that it preserve "the state's interest in maintaining an enlightened electorate while also protecting the free exchange of ideas and information which is vital to public debate."[67] There are three ways to categorize how some states have attempted to do just that vis-à-vis political deception. These are (a) election conduct statutes, (b) affiliation statutes, and (c) campaign message statutes. This section will define these three categories and present a brief discussion of examples of each. This is necessary for leading into the discussion of a campaign ethics council in section IV to show the statutory remedies such a council would either be replacing or supplementing.

Election Conduct Statutes

The first category is defined as those statutes that restrict citizens from engaging in some form of deception that would interfere with the state's ability to conduct elections. There is a clear and compelling government interest in fair and efficient elections. Speech that interferes with such conduct should be given no First Amendment protection. Examples of such illegal conduct would be speech that either (a) interferes with the governmental function of holding an election or (b) disenfranchises an individual or group of their right to vote. One example of how some of these statutes describe such deceptions is through the creation and dissemination of facsimiles of ballots that include false information intended to mislead voters. Another statutory violation occurs when political

[67] Lance Conn, "Mississippi Mudslinging: The Search for Truth in Political Advertising," *Mississippi Law Journal* 63 (1994): 517.

operatives impersonate an agent of the government through speech or misappropriation of, or creating facsimiles of, government documents.

For example, it is illegal in the state of Arizona to mail false information about an election on documents forged to appear as if an agent of the state government created them.[68] Louisiana has a similar but more specific statute that makes it illegal to mail a facsimile of a ballot in which the candidates are designated with incorrect ballot numbers.[69] So if a Democratic campaign wanted to deceive Republican voters into accidentally voting for the Democratic candidate, they might mail ballot facsimiles to registered Republicans in which the ballot number printed next to the Republican candidate is actually the ballot number for the Democratic candidate (thus inducing those voters to erroneously vote for the Democrat).

This first category of statutes is the most resistant to constitutional challenge for a few reasons. First, there is an undeniable governmental interest in the fair and efficient conduct of elections. Coinciding with this interest is the voters' ability to exercise their right to vote. Speech that disrupts this process has no value and should not be protected. Second, some of the forms of speech in question here should be considered fraud. There is a clear government interest in protecting the legitimacy of government communiqués to citizens. Allowing the fraudulent use of government insignia could cast a shadow of illegitimacy over all government communiqués. Third, the statutes do not restrict falsehood alone, but falsehood in combination with some other social ills: fraud and impersonation of a government official and disenfranchisement of voters. The Court's holding in *Alvarez* "rejects the notion that false speech should be in a general category that is presumptively unprotected."[70] Such false speech must be combined with some other social ill in order to be restricted. Each of the above statutes meets this standard.

False Affiliation Statutes

[68] Arizona Revised Statute § 16-925 (1998).
[69] Louisiana Revised Statute § 18:1463B(1) (2011).
[70] Alvarez, 132 U.S. at 2546-2547.

The second category of statutes addresses the problem of false affiliation with a campaign. This category breaks into two sub categories based upon how each law defines and thus regulates the problem of affiliation. Three of the statutes, in Alabama, Kansas, and Louisiana, regulate affiliation as an external problem. That is, it is illegal to misrepresent oneself as speaking on behalf of a campaign with which you have no affiliation. The other two statutes, both of which are from Ohio, regulate affiliation as an internal problem. These statutes make it illegal to gain employment or volunteer with a campaign with the intention of impeding its progress. These statutes, § 3517.21[71] and § 3517.22,[72] deal with infiltrating a campaign for a candidate running for office and an issue advocacy campaign respectively.

The external and internal affiliation statutes address two different kinds of deception but both are still about affiliation. With an external affiliation, deception one need not have any contact with the campaign in question. For example, someone could go door-to-door talking to voters while pretending to be affiliated with their opponent's campaign and spreading lies about that opponent. This does not require the person to have any contact with the other campaign; the deception is perpetrated against the public. An internal affiliation deception is one that is perpetrated against the public *and* the other campaign. Someone could volunteer for a campaign and then do things to sabotage it. It could just be internal subterfuge, harming the campaign without making contact with the public; or it could be using the campaign's resources to send false information to the public, thus deceiving both the campaign and the voters.

Campaign Message Statutes

The third category of statutes addresses the truth or falsity of messages disseminated from campaigns to the public. This category is broken into four sub-categories: (a) false information about a candidate, (b) false information about an issue, (c) false information about a candidate or an issue, combining the first two into a single statute and, (d) false statements of incumbency. The fourth type, like the election conduct statutes, is likely to be the most resistant to constitutional challenges. However, in light of *Alvarez*, it is possible to imagine scenarios in which they might be knocked down. The second and third categories

[71] Ohio Revised Code § 3517.21 (1995).
[72] Ohio Revised Code § 3517.22 (1995).

should be least resistant to constitutional challenges. Finally, the statutes in the first category are likely to face challenges if they do not strictly follow the actual malice standard set by *New York Times v. Sullivan*.

One statute that may be challenged constitutionally is Washington § 42.17A.335[73] which makes it illegal to make false and defamatory statements about a candidate for office. This statute was passed after the Washington Supreme Court, in *Washington v. 119! Vote No Committee*, knocked down a similar statute. Conversely, a false incumbency statute was allowed to stand in *Ohio Democratic Party v. Ohio Elections Commission* where the Tenth District Court of Appeals held that Ohio R.C. 3517.21(B)(1) was constitutional. The court rejected the argument that implying incumbency is subjective, holding "the standard for determining what a statement communicates is based on the reasonable reader standard, not what a particular person may subjectively perceive."[74]

That being said, the Stolen Valor Act seemed narrow and specific, yet The U.S. Supreme Court found it to be unconstitutional. It is difficult to imagine that a false claim of incumbency during a campaign could possibly be worse than falsely claiming to have won military awards, but somehow the former still stands while the latter was knocked down. So, despite being narrowly tailored, and having a court decision to support its maintenance, a false incumbency statute could face constitutional scrutiny. One can propose good arguments to support it, and all of the statutes discussed above. However, as was discussed in Section I, the courts can often find good arguments against them, making it difficult to protect such statutes. This more than anything demonstrates the need for, at the very least, some discussion of what an independent campaign ethics council might look like and might be able to do. Discussion about how to punish and deter campaign lies without running afoul of the First Amendment would be particularly useful. The next section will describe how such a council would do just that.

IV. Creating a Campaign Ethics Council

[73] Washington Revised Code § 42.17A.335 (2009).
[74] Ohio Democratic Party et al. v. Ohio Elections Commission, 4256 Court of Appeals of Ohio, Tenth District (2008), at 9-10.

The handling of political speech by the legal system is a double-edged sword. On one hand, allowing for the regulation of political falsehoods may give the state unnecessary and undesirable power to define truth and squash critics. For example, during the U.S. Supreme Court hearing in *Sullivan,* Herbert Weschler argued, through their handling of L.B. Sullivan's lawsuit, the Alabama Supreme Court had transformed "the action for defamation from a method of protecting private reputation to a device for insulating government against attack."[75] On the other hand eliminating all punishment for false advertising or defamation in politics, or at least making the punishment for such violations toothless, is to give the state and incumbent politicians the power to freely deceive the public and use reputational attacks as weapons against critics. In other words, protecting lies from government power also empowers government to lie. There is also a moral/philosophical question about the value of the liberal understanding of freedom discussed above. This problem is best critiqued by Frederick Schauer who argues free speech theory not only has a "complicity in exacerbating a culture of public falsity" but also has "essentially nothing to say" about the problem.[76] This article is an attempt to contribute to creating an answer to the problem.

A workable solution, a counter-legal discourse to First Amendment absolutism, and a discussion of falsity and free speech, could begin with a combination of aspects of *Michigan v. Dewald* and *Pestrak v. Ohio*. *Dewald* presents an argument that is useful for justifying the need for regulation. The contribution from *Pestrak* is a model for creating a committee that would implement the regulation. From *Dewald* one can model a test for defining what constitutes a "regulatable" lie. From *Pestrak* one can create a plan for how a council would employ that test. It is important to note that this committee would not involve the criminalization of lying but rather official declarations of falsity and deterrence. This point cannot be stressed enough. The incorporation of *Pestrak* will be discussed later in the article in the section addressing the power and responsibilities of the council. It is essential to first address the value of *Dewald*.

The Dewald Four-Part Test

---

[75] Thomas Kane, "Malice, Lies and Videotape: Revisiting *New York Times v. Sullivan* in the Modern Era of Political Campaigns," *Rutgers Law Journal* 30 (1999): 767-768.
[76] Schauer, "Fact and the First Amendment," 912.

In its decision, the *Dewald* court presents a four-part test for defining an act as violating Ohio's false pretenses statute.[77] The test asks if there was (1) a false representation of facts, (2) did the defendant have knowledge of the falsity, (3) did the defendant use that false representation to deceive someone, and (4) it asks if there was a "detrimental reliance by the victim" on that false information.[78] The fourth prong of that test is most useful. Did the victim of the fraud rely on the false information to guide her actions? Did that reliance on false information end up harming the victim in some way? In *Dewald* the "detrimental reliance", victimization came from the fact that individuals donated to Dewald's political action committee (PAC) under the false pretense.[79] Simply put, Dewald was asking both Bush and Gore supporters for money to support their respective choices in the campaign and giving those supporters the false impression he was affiliated with whichever campaign he was asking the potential donor to support.

Applying detrimental reliance to political communication acknowledges that the public relies on certain organizations for information about the candidates who are asking to be considered for office. The public relies on many sources of information but chief among them are the campaigns themselves. What does the candidate say about herself? How do her staff and surrogates present her? Sometimes just as important is what the candidate's opponent says about her. The reliability of the information disseminated by the campaigns is even more important when considering that 48 percent of what the public hears comes from the campaigns, not from reporters or other third party observers.[80] The campaigns and their public relations machines are becoming more powerful in managing how information flows to the public.

Thus it is ever more important that there be some counterbalance to that power, and in order to develop this counterbalance it is essential to re-imagine what it means to hold power, who holds power, and how power is exercised by one sector of society over another.

---

[77] The false pretenses statute in question here, MCL § 750.218, is a statute making it illegal to use false pretenses to defraud another person out of land or money.
[78] Dewald, 705 NW 2d 167 at 173.
[79] Id., at 174.
[80] "The Master Character Narratives in Campaign 2012," Journalism.org, accessed August 23, 2012, http://www.journalism.org/analysis_report/2012_campaign_character_narratives.

The judicial discourse surrounding free speech, especially the marketplace of ideas discourse, imposes upon this discussion a dichotomy. It is a discursive construction of public v. private or state v. individual, which by extension imposes upon the discussion the arguments like those made by Justice Kennedy in *Alvarez*, which call upon allusions to Orwell, and imagine a world made up of only two possibilities. There is either pure freedom, where the First Amendment protects deception but it is perfectly acceptable because living with the lies is preferable to living with a government that is too powerful (and even if we have to live with lies, the marketplace will work them out of the system). Or, there is authoritarianism, where the government is controlling minds, defining truth and eradicating individual liberty. It is a false dichotomy, between pure freedom and pure authoritarianism, which defines freedom as only the absence of government intervention.

A theory of free speech that has something to say about deception, that addresses Schauer's lament, is one that must re-imagine freedom beyond the simplistic "absence of government" construction. A central assumption here is to agree with Kennedy's argument in *Alvarez*, that authoritarianism is undesirable and add to that assumption the idea that authoritarianism thrives on deception. However, the absence of government is not inherently also the absence of authority abusing power, and the presence of government is not inherently authoritarian. The state, the corporation, organized political movements and organizations such as PACs and special interest groups can all act as sources of authority. The media are sources of authority, although it is important to not be lured into the trap of defining the media as one globular mass holding power, but rather to see media as many different potential sources of power. Along with opposition to abuses of authority, a theory of free speech that has something to say about deception should invoke "notions of community, civic virtue and active participation, which have been buried by the surge of moral individualism and the advent of the hyper-market society."[81]

It is not enough to simply see the government as a threat to individual liberty and the development of civic virtue. This perspective creates a judicial discourse that uses Orwell to protect free speech in a supposed struggle between the virtuous individual and the evil state. This is an inadequate imagining of the political structure as dichotomous where multipolar

[81] Torfing, *New Theories of Discourse*, 262.

structuring is necessary to how the political system should be described. In the context of managing the power of the press, Kenney and Ozkan[82] echo Lowenstein's[83] triangulation of power. Lowenstein argues, "We must picture in our mind's eye powerful national media on one side, powerful centralized government on the other side, and now a powerful national press council in the middle."[84] Even this tripolarity is not enough. In developing a theory of free speech that has something to say about deception we must imagine in our mind's eye government, international corporations, political campaigns and their candidates, political action committees, special interest organizations, all the various media institutions, all as sources of power and all vying for greater power, and a powerful campaign ethics council in the middle.

Painter and Hodges discuss the usefulness of press councils in other nations, such as India, and present a model that could be transformed into a campaign ethics council. They describe press councils as having four important characteristics.[85] First, they are "chaired by highly prestigious citizens." Second, "a system of funding has been worked out that assures solvency." Third, "the council is empowered by law to monitor both alleged misbehavior by news organizations and unjust conduct by the government itself." Finally, "complaints may come to the Council from a wide base" including citizens, politicians, government and media outlets. All of these characteristics could be applied to a campaign ethics council and are discussed in the next four subsections.

Membership on the Council

The members on the council should reflect a community-oriented ideal rather than top-down governance. The chair and general committee should include respected members of the community that come from a variety of backgrounds. This could include former elected officials, retired judges, campaign professionals, journalists, academics, and business owners, but of the utmost importance is the inclusion of members of the community who are not part of the political world, for example homemakers and middle-income workers.

---

[82] Rick Kenney and Kerem Ozkan, "The Ethics Examiner and Media Councils: Improving Ombudsmanship and News Councils for True Citizen Journalism," *Journalism and Mass Media Ethics* 26, no. 1 (2011): 38-55.
[83] Ralph Lowenstein, *Press Councils: Idea and Reality* (Columbia, MO: Freedom of Information Foundation, 1973).
[84] Ibid., 88.
[85] Painter and Hodges, "Mocking the News," 265-266.

The council should not be limited to members of the political class who would make it insular and react to campaign practices with an insider's mindset, which is going to be different from the mindset of the average campaign observer. No one who is serving in government or employed in any way as a campaign official, or an active member of a political party, may serve on the committee. All committee members who have a background in campaigns or government must be retired from those positions.

Choosing members to serve on the committee could be a tricky process. Having a council of members appointed by an elected official, like a governor, may be most efficient, but it would not give it the necessary independence from politicians. The best method for choosing members is through popular election. Elections would be held every two years and would be non-partisan; political parties would of course have the First Amendment right to endorse candidates, but candidates would not be allowed to seek endorsements or any other kind of support, financial or otherwise, from any political party. This means no donations from political parties or PACs, and no campaign apparatus through a party. It is essential that the council remain as independent from the partisan political culture as possible. To raise public awareness, the state would hold four public forums in different parts of the state and the secretary of state's website would contain a series of two minute videos, one for council candidates to make their case for why they would like to serve, and why their service would be of value.

Some critics may question the ability of such a council to apolitical. This is a weak argument. If such a council is inherently lacking in the ability to be fair in its judgments then why should Americans trust any level of the judicial system? If it is assumed, and faith in government is based at least in part upon the assumption, that a judge or justice can be fair minded in hearing a case, why could one not assume the same from a campaign ethics council? In *Tomei v. Finley* the court stated, "Every judge perforce comes to the bench armed (or burdened) with his or her background and perspective."[86] The court proceeds stating this is especially so when hearing First Amendment arguments, which the court says elicit a "Pavlovian response" from judges.[87] However, they follow this by saying even though First

[86] Tomei v. Finley, 512 F. Supp. 695 (1981), at 697.
[87] Id.

Amendment arguments can sometimes cloud a court's judgment, in the *Tomei* case Finley's attempt to protect his dishonest speech by doing just that failed; he was unable to cloud the court's judgment. A campaign ethics council, whoever sits on it, would have to make similar judgments about the social costs of speech. If a judge has the mental capacity to make such decisions fairly a council should be able to as well.

Funding the council

The ideal way to fund a campaign ethics council would be through tax dollars. However, this funding scheme would likely expose formation of the council to greater political opposition. So the best proposal for solvency for a campaign ethics council would be to treat it as a non-profit organization that is funded through philanthropy, much like the VFCPC model described by Hall.[88] As with Hall's model the cost of running this council would be minimal involving a small amount of funds to maintain a website. Communication with campaigns would be done via email, but there should be some money to pay for printing materials to communicate with candidates and voters who do not have Internet access, which should be rare. Since work on the council would be done on a volunteer basis, there would be no operating costs to pay for council member or staff salaries. There would be some cost to mail reports to voters stating which candidates signed a "clean campaign" pledge. Other than that, the majority of the council's communication would be done via the web and the cost for that would be minimal. It should be fairly easy to raise this small amount of money through donations.

The powers and responsibilities of the council

The empowerment of a campaign ethics council is a trickier issue. This is where the decision in *Pestrak v. Ohio* becomes useful. In 1984, Walter Pestrak was running for the Democratic Party's nomination for Trumbull County Commissioner in Trumbull, Ohio. He took out a campaign ad in a newspaper claiming his opponent, the Democratic incumbent, had committed "illegal acts."[89] His opponent claimed Pestrak's accusations were false and filed a complaint with the Ohio Elections Commission claiming Pestrak had violated Ohio

[88] Hall, "When Political Campaigns Turn to Slime."
[89] Pestrak, 926 F. 2d 573 at 575.

Rev. Code § 3599.091(B)(10)[90] which made it illegal to knowingly make false statements about a candidate. As Williams notes, "Ohio's statute provided for four enforcement options."[91] These functions included (1) a fine, (2) a cease and desist order, (3) referring the violation to a county attorney for criminal prosecution or (4) the court could "determine and then publicly declare the truth of challenged statements."[92] The Ohio Elections Commission exercised the third and fourth options in the *Pestrak* case.

The Commission found that Pestrak's statements were false, declared them so, as the fourth function allows, and "recommended criminal prosecution, although no prosecution was brought."[93] The Commission's decision was released one day before the election. Pestrak went on to lose. He then sued the commission for damaging his campaign, claiming that the Ohio statute was unconstitutional on its face because, he contended, "its basic purpose [was] to distinguish among types of political speech based on their content."[94] The Sixth Circuit Court of Appeals agreed in part, and disagreed in part, with Pestrak's argument.

The Sixth Circuit found the Ohio Elections Commission's first two enforcement options unconstitutional for two reasons. Both of the reasons for its decision, the court said, "flow from the fact that the law permits an administrative agency, rather than a court, to make binding determinations regarding the legality of certain forms of speech."[95] The court held that this commission was not subject to the same limits on power as a court. Specifically, punishment of public figures relating to the First Amendment requires "clear and convincing evidence" and this commission, while recognizing that rule, is not necessarily subject to it and could change their policy at any time.[96] There was also the fact that cease and desist orders have been recognized by the U.S. Supreme Court as an unconstitutional prior restraint violation of the First Amendment.[97]

---

[90] *Pestrak* was decided in 1991. Ohio Rev. Code § 3599.091 and § 3599.092 were amended and renumbered § 3517.21 and § 3517.22 in 1995.
[91] Williams, "Necessary Compromise," 343.
[92] Ibid.
[93] Pestrak, 926 F. 2d 573 at 575.
[94] Id.
[95] Id., at 578.
[96] Id.
[97] Id.

The Sixth Circuit, on the other hand, found the commission's third and fourth options to be constitutional. On the third option, the power to recommend prosecution for the commission of a crime, the court found no constitutional threat because it is no different than anyone claiming that a crime has been committed and urging a prosecutor to do something about it.[98] This point underlines how a campaign ethics council would work as a supplement to, not a substitute for, both government remedies and the social functions of organizations such as Fact Check.org. While fact checking organizations could perform a very similar function, gathering evidence about a claim and then declaring it either true of false (or partially one or the other as some of these groups do), there is something fundamentally different about a government agency or public committee declaring something false. For example, in *U.S. v. Alvarez* the U.S. Supreme Court and Ninth Circuit Court of Appeals both literally called Xavier Alvarez a liar. There is something far more impactful about being called a liar by two federal courts as opposed to being called a liar on a website's message board.

Because of this power the government, whatever branch, should be measured in its speech and aware of the consequences of that speech. As for the Constitutional concerns surrounding that speech, the Sixth Circuit in *Pestrak* found that the fourth function of the commission did not violate the U.S. Constitution, referring to it as a "truth declaring" function.[99] The court actually found this function of the commission was, first, just one more example of some branch of the government engaging in research and making a declaration as to the truth of a claim. Governmental agencies at every level—local, state, and federal—spend money to research issues, gather information, put that information into some form for public consumption, and disseminate that information. This speech act by the government does not have a chilling effect on the speech of others. Similarly, giving this power to a campaign ethics council would not have a chilling effect.

This last point brings up an interesting argument the *Pestrak* court makes about the commission's fourth function. This is that the government's speech in this case is just one more contribution to the marketplace of ideas. In essence, the Sixth Circuit argues, a

[98] Id.
[99] Id., at 579.

declaration from the commission falls under the argument that, "the usual cure for false speech is more speech."[100] In the end, the Sixth Circuit ultimately found that only the fine and the cease and desist order functions of the commission were unconstitutional. The Ohio statute was not unconstitutional on its face[101] and the commission did not violate Pestrak's constitutional rights.[102] So, in the *Pestrak* decision there is a good model for how to form a campaign ethics council and delineate the responsibilities of such a council. It should *not* have the power to hand out fines. It should *not* have the power to issue a cease and desist letter to prevent speech. It *should*, however, following *Pestrak*, have the power to research a statement and make a public declaration as to whether it is true or false, in the same way government agencies engage in fact finding, allowing it to serve the function of better informing the public. It *should* also have the power to refer any criminal activities to the proper authorities.

The committee could also serve the function of being an alternative to the judiciary, giving candidates a forum in which they can air their grievances without resorting to litigation. If a campaign ethics council could put out a press release declaring one candidate's statement about another to be false, this could be enough to avoid a full blown defamation lawsuit—as when former Rep. Steven Driehaus unsuccessfully sued a political advocacy group, alleging it made false statements about his voting record.[103] The public declaration could give the potential plaintiff a sense of satisfaction that her name has been cleared and keep the lawsuit out of the courts. Also, if the council declares a statement to not be defamatory, then proceeding with a lawsuit will prove difficult and will thus be discouraged.

A campaign ethics council should also have the power to create and circulate a clean campaign pledge. Hall makes this part of her proposal arguing that a public pledge signing would encourage a cleaner campaign.[104] It would also not violate the First Amendment because it would be an opt-in mechanism. Candidates certainly have the option to not sign the pledge, but they would likely be inclined to because it looks bad for a candidate to

---

100 Id.
101 Id., at 577.
102 Id., at 580.
103 Susan B. Anthony List v. Rep. Steven Driehaus, U.S. District Court, S.D. Ohio, Western Division, Case No. 1:10-cv-720 (2013).
104 Hall, "When Political Campaigns Turn to Slime," 355-356.

publicly refuse such a pledge, implying they at least want the *option* of an un-clean campaign. The pledge would not be coercive and it would discourage dishonest attacks between opponents.

Finally, if some crime has been committed in the course of a campaign the committee should have the power to refer those criminal allegations to the proper authorities. However, the prosecution of that crime should not offend the First Amendment right to free speech. It should also be reiterated here that this proposal would actually go so far as to argue that all campaign speech statutes should be decriminalized and should carry consequences other than fines or prison sentences. An official public declaration of the falsity of one's statement can be consequence enough.

Access to the council

Following the press council example proposed by Painter and Hodges a campaign council should allow for a broad base of access. There should be a formal and open process for bringing complaints to the council that encourages complaints from any voter. This is not to say that any and all complaints brought to a campaign ethics council should be fully pursued. Sometimes an investigation is enough to potentially harm an individual's reputation. This is demonstrated in *Brown v. Florida* in which Greg Brown, a public official, became the target of false ethics complaints filed by supporters of his political opponent. The Florida First District Court of Appeals held that the First Amendment did not protect a right to file such false ethics complaints because this form of speech forces its target to engage and respond to the speech within the confines of the court system whereas false accusations in the press can be responded to with counter claims or simply ignored.[105] The First Amendment does not give one the right to use the court system as a political weapon. Likewise, it would not give one the right to misuse a campaign ethics council.

When a complaint is filed, the council could meet to discuss the accusations without pursuing a full investigation should they find the accusations to be baseless. Again, the *Dewald* standard would be useful to follow for making such decisions: was it a false statement of fact, did the accused make the statement *knowing* it was false, did the accused use the false

[105] Brown v. Florida, 969 So.2d 553 (2007), at 560.

statement to purposefully deceive someone, and was there a detrimental reliance on the part of the receiver(s) of the message? A campaign ethics council would apply *Dewald's* four-prong test, along with the *New York Times* actual malice standard, in pursuing *Pestrak's* third and fourth functions, to act on the results of the test, and have a broad base of public access.

The *Pestrak* court voiced concern about a lack of restraint on the power of an elections commission. While the proposal in this article does not include the power to impose a fine or a cease-and-desist order, it is nevertheless useful to place some restraints on the campaign council's power in order to avoid overreach on the part of the council and/or use of the council as a political weapon, as illustrated in *Brown v. Florida*. Here the decision in *281 CARE Committee v. Arneson* is a useful model to follow. In that case, the 281 CARE Committee challenged the constitutionality of Minn. Stat. § 211B.06[106] a statute making it illegal to make false statements in political messages. The District Court of Minnesota held that the statute was constitutional and noted a few safeguards against the use of the statute as a political weapon.

First, complainants filing under § 211B.06 must file their complaint under oath; thus filing a false complaint and using the council as a weapon against political enemies would be an act of perjury.[107] The council reviews all complaints before holding a probable cause hearing. So the complainant has the burden of proof in all cases and must file the complaint, pass the review of the elections commission, and successfully defend the complaint in a probable cause hearing before the election's commission even begins to hold a full hearing about the veracity of the claim and whether to take action on it. Additionally, if the complainant is unsuccessful the defendant has the right to seek attorney's fees from the complainant.[108] So there are a number of safeguards to deter abuse of the system in Minnesota. All of those safeguards would be applied and used a model to place the same restraints on a campaign ethics council. The characteristics described in this section would make a campaign ethics council useful for fulfilling the community-oriented mindset that Torfing describes without creating a disturbing effect on First Amendment rights.

---

[106] Minnesota Revised Statute § 211B.06 (1998).
[107] 281 CARE, U.S. District Court, D. Minnesota at 24.
[108] Id., at 25.

Conclusion

The rationale for the creation of a campaign ethics council is not rooted in a belief that political deception is somehow more prevalent today than it has been in the past. The evolution of communication technology, as Perloff points out, certainly means that persuasion and deception happen at a faster pace[109] (5) and the speed of transmission, compounded by subtlety and complexity in messaging,[110] makes it difficult to critically analyze deception. However, technological changes are also not an important part of the impetus for this article.

What *is* the central concern for this argument is the need to foster a critical counter-discourse to the liberalism critiqued by Stein, Zizek, and Sokolowski. This version of liberalism advances a simplified understanding of freedom as the absence of government constraint. This is the liberalism that is dominant in much of our contemporary political debate that has produced the problematic decision in *Alvarez*. A political system is strengthened by the presence of "common decency" and decisions such as *Alvarez* undermine that. As a result, the political culture not only allows for, but also now officially protects, deception because it makes the (poor) assumption that deception can be countered by fact checking.

This concept of freedom as the absence of constraint, and in some cases specifically as the absence of government, is socially detrimental as it undermines any legal arguments, philosophical inquiry, social science, and policymaking interested in advancing a sense of social responsibility or public interest. For example, Phillip Napoli sees two paradoxes in media policymaking directed toward protecting the notion of a public interest. The first is that the courts and congress require evidence to justify media regulation while simultaneously placing constraints on an agency's ability to gather the data necessary to find and present such evidence.[111] Second, this "trend toward evidence-driven policymaking ...

---

[109] Richard Perloff, *The Dynamics of Persuasion: Communication and Attitudes in the 21st Century* (New York: Routledge, 2010), 5.
[110] Ibid., 9-10.
[111] Phillip Napoli, "Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation," *Administrative Law Review* 60, no. 4 (2008): 805.

conflicts with an increasingly politicized policy environment."[112] These two paradoxes are combined with a "strong deregulatory bent"[113] that is part of the political culture, making it difficult to advance any kind of public interest, media regulatory policies because such policies are instantly dismissed as government intrusion.

For Laura Stein this is a problem of neoliberalism. Stein argues that media policy has been, since the 1970s, "shifting steadily toward neoliberal understandings of speech rights."[114] This means it becomes increasingly difficult to have any regulation of speech because the courts have come to see a self-correcting marketplace of ideas as the best model for explaining how political speech works. In other words, regulation is unnecessary and burdensome because the market will work itself out, bad speech (i.e. deception) will be corrected by good speech (i.e. fact checking). Stein argues because of "the importance of media to democratic societies, this assumption must not go unquestioned" (ibid.). Her argument about regulating the media industry should be extended to the problem of political deception because the marketplace assumption has been extended to this problem, as evidenced by *U.S. v. Alvarez*.

A campaign ethics council is a practical and valuable solution for two reasons. First, as it is envisioned in this article, there is minimal danger in it overstepping legal boundaries and infringing on individual rights, as defined by the current legal regime of neoliberalism. As noted in the introduction, this article has argued strongly against the *Alvarez* decision. However, that decision is a precedent that will impact any court challenges to a campaign ethics council, and it is important to operate within political reality. Second, it creates a *public* space in which corrections can be made and there is an official recognition that a political statement is false, a recognition that carries more weight than an opposing candidate or member of the press pointing out the falsity of a statement. Most of all, this acts as a kind of pushback against the pervasive First Amendment absolutism and marketplace of ideas construction that falsely claims that the cure for all bad speech is always only good speech.

---

[112] Ibid., 808.
[113] Ibid., 811.
[114] Stein, *Speech Rights in America*, 13.

Finally, there is the need to assure electoral integrity. Free speech is not always best served by the absence of government. Free speech also cannot serve the public interest when misinformation goes unchecked because that misinformation "plays a deleterious role. If the voters are being deceived into voting for someone who fraudulently induced them to elect him, the purpose behind the First Amendment is undermined."[115] This should be the greatest concern. A free speech tradition that has nothing to say about misinformation, lies, deceit, half-truths, propaganda, prevarication, obfuscation, and credibility gaps, by extension, has nothing to say about the integrity of American politics and governance. By sheltering deception behind free speech in the name of free speech, the judicial discourse of *Alvarez* only undermines that which it claims to protect.

[115] Richman, "Deception in Political Advertising," 705.