

CANDIDATE FALSE STATEMENT LAWS AND THE FIRST AMENDMENT:
AN ANALYSIS OF CONSTITUTIONAL PRINCIPLES

by

AMY MARIE FEINBERG

(Under the Direction of William E. Lee)

ABSTRACT

Since the early 1900s, states have enacted laws to prohibit false statements about candidates in elections. These laws have in some states been overturned more than once, as state assemblies often choose to pass slightly modified versions of these laws after unfavorable judicial outcomes. In the wake of the 2014 Supreme Court decision in *Susan B. Anthony List v. Driehaus*, this thesis examines why states continue to seek to adopt statutes to criminalize false statements about political candidates. This work identifies three reasons prompting the actions of most states: a desire to protect candidates, to protect voters, and to protect the elections process itself, but ultimately concludes that these statutes, while perhaps well-intentioned, are ultimately unlikely to be constitutional.

INDEX WORDS: Thesis; Candidate False Statement Laws, First Amendment, Political Campaigns, Chilling Effect

CANDIDATE FALSE STATEMENT LAWS AND THE FIRST AMENDMENT:
AN ANALYSIS OF CONSTITUTIONAL PRINCIPLES

by

AMY MARIE FEINBERG

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment
of the Requirements for the Degree

MASTER OF ARTS

ATHENS, GEORGIA

2015

© 2015

Amy Marie Feinberg

All Rights Reserved

CANDIDATE FALSE STATEMENT LAWS AND THE FIRST AMENDMENT:
AN ANALYSIS OF CONSTITUTIONAL PRINCIPLES

by

AMY MARIE FEINBERG

Major Professor: William E. Lee
Committee: Michael Cacciatore
John Soloski

Electronic Version Approved:

Julie Coffield
Interim Dean of the Graduate School
The University of Georgia
May 2015

ACKNOWLEDGEMENTS

Many people have helped me in the completion of my thesis work and more generally, this Master's program, and I'd like to offer my sincerest thanks to them and give them some of the credit they deserve here.

First and foremost, I'd like to express my thanks to Dr. William Lee, my advisor and committee chair, who was always ready with suggestions, improvements, and encouragement, both when the project was moving quickly and when it was in a lull. I have also benefited from the time and effort of Dr. Michael Cacciatore and Dr. John Soloski, my committee members who provided thought-provoking questions, editing suggestions, and the occasional reminder to maintain my focus. In addition, this project would not have been possible without Debbie Sickles and Victoria Cooper, who helped me navigate the many bureaucratic twists and complications of completing a dual degree program.

Thank you to my friends, who tolerated many thesis-driven disappearances, and in particular to Hays Watson, who not only read my first draft and sent me his thoughts within in an hour of its completion, but frequently reminded me to get things done. Another thank you goes to my mom, who tolerated my destruction of her home office space with hundreds of pages of research over winter break. One more thank you belongs to my dad and step-mom, who have supported me in my many college decisions. Finally, I'd like to thank my older sister Jayne, on whose unwavering support I have always relied.

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	iv
LIST OF TABLES	vi
CHAPTER	
1 INTRODUCTION AND PURPOSE	1
2 THE SUPREME COURT AND FALSE STATEMENTS	9
3 STATE-BY-STATE FALSE STATEMENT LAWS	22
4 TREND ANALYSIS IN CANDIDATE FALSE STATEMENT PROHIBITIONS ...	43
5 A RIGHT TO LIE IN POLITICAL CAMPAIGNS	71
REFERENCES	81

LIST OF TABLES

	Page
Table 1: “Why have states developed laws prohibiting false statements about candidates?”	41
Table 2: “What are the Penalties for Violating State Laws Prohibiting False Statements about Candidates?”	42

CHAPTER 1

INTRODUCTION AND PURPOSE

Who gets to determine truth and lies? The core of the American condition is a heartfelt belief that every person has the right to speak, but when the implicit assumption that such speech will be true is violated, we are left unclear on what the appropriate response should be. Is it the role of the public to act as citizen detectives and unearth misleading discourse in the public sphere, burning falsehoods on a pyre? Is it instead the job of a governmental body to discover truth and punish lies?

These questions lie at the heart of a conundrum in American life, that of the proper balance between freedom and regulation. Pundits and politicians alike shriek about smaller government, but a persistent pressure seeps in to the debate whenever the specter of a terrible possibility occurs. Will someone not step in?

False statements about political candidates are an instance where, again and again, someone has tried. Twenty-one states have at some point enacted laws which regulate false statements of fact about political candidates. This thesis will examine whether the government, be it federal or state, has the authority to prohibit such statements. Its intent is not to determine whether the government should be acting to determine whether speech is true or false, but only whether or not that authority exists in the context of statements about political candidates. Although several states have laws about false statements with regard to referenda as well as false statements about candidates, this thesis will focus only on the candidate laws.

In a protracted battle between state legislatures and their courts, laws prohibiting false or misleading statements about political candidates have been put on the books, only to be overturned by courts and then reinstated with cosmetic changes. Every elementary student has probably been taught that the judicial branch has the final say on whether a law is itself legal, and yet in practice the picture is one of determined legislatures which on certain issues pass similar laws with minor modifications and wait to be told once again that the law is illegal.

Whether the government can prohibit false political speech, and what its role is in the punishment of lies, remains a contested issue despite landmark cases which may create the general feeling that the breadth of the right to free speech is a settled issue. In the spring of 2014, when *Susan B. Anthony List v. Driehaus* was decided by the Supreme Court, this discussion had a brief moment in the sun. The debate continues, but quietly, quietly, surfacing in niche blogs and academic discussions and awaiting the next moment when some small portion of it is resolved.

In *Driehaus*, the United States Supreme Court considered whether the Ohio law prohibiting false statements about candidates in political elections had the potential to chill protected speech so as to prevent the citizenry from full participation in political debate. During the 2010 general election, Susan B. Anthony List, a non-profit, anti-abortion group, attempted to put up a billboard which read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion" (*Susan B. Anthony List v Driehaus*, 2013). The organization is opposed to the Affordable Care Act and interprets its provisions to include taxpayer-funded abortion. The billboard company refused to put the ad up after counsel for Driehaus threatened legal action. Driehaus then filed a complaint with the Ohio Elections Commission, claiming that the advertisement violated the false statement law. The Ohio Elections Commission found probable

cause for Driehaus in an expedited hearing, and both parties agreed to wait until the congressional election to hold the full hearing. After losing the election, Driehaus withdrew the complaint.

Susan B. Anthony List, however, continued its search for a federal response to its hardships. It amended its complaint to argue that what had happened during the Driehaus campaign could easily happen again. The Coalition Opposed to Additional Spending and Taxes (COAST) made a second complaint, saying it had intended to engage in similar speech about Driehaus's vote in favor of the Affordable Care Act but the proceedings against Susan B. Anthony List chilled its speech. These two cases were combined by the district court and it is this new case which made its way to the Supreme Court. While the Supreme Court only evaluated whether the petitioners had standing for a pre-enforcement challenge to the law, its consideration of First Amendment issues, such as whether the ability to argue that one's speech is true is sufficient to prevent the risk of future enforcement, spoke to the logic used by other courts in deciding the constitutionality of these laws (*Susan B. Anthony List v Driehaus*, 2013).

The Court's decision in *Driehaus* perhaps resolved little, but generated the sort of media coverage that only a Supreme Court decision can. While other cases on the docket caught the bulk of the public imagination, *Driehaus* offered a subtle buzz, bringing to national attention a scenario that had played out in many states. A previously unconstitutional political false statement law had been amended and was back on the chopping block, only this time the Supreme Court became involved. The ruling that petitioners Susan B. Anthony List and COAST had grounds to challenge to Ohio's false statement law seemed to signal that the unanimous Court was highly skeptical of the legality of the law itself.

As communication improves and the world finds itself metaphorically shrinking, the regulation of free speech will continue to be an important discussion. The application of falsity statutes to the political realm over the past century has added a unique twist to this. It forces a consideration of whether it is more important that all speech be heard or that the integrity of elections be protected. With *Driehaus* shining a light on the conversation, the corners of legal and political debate are announcing that its time everyone knew how far the government ought to go in acting as the arbiter of political truth.

Literature Review

The Ohio statute prohibiting specific false statements during the course of a political campaign very clearly states that it is designed to avoid attempts to tinker with the results of an election by stepping outside the bounds of truth. The fear is that false political statements could trick voters into making a decision different from the one they would make if they had access to all of the facts. Unfortunately, it is difficult to determine what exactly makes a statement “false.” A sliding scale exists between misleading statements and blatant lies, so it becomes hard to identify the bright-line for how far a statement must deviate from plain truth to become false.

The recent Sixth Circuit decision sums up both sides of the falsity debate: “Lies have no place in the political arena and serve no purpose other than to undermine the integrity of the democratic process... What is certain, however, is that we do not want the Government (i.e., the Ohio Elections Commission) deciding what is political truth -- for fear that the Government might persecute those who criticize it” (*Susan B. Anthony List v. Ohio Elections Commission*, 2014).

While the law in question in *Susan B. Anthony List v. Driehaus* is from Ohio, 20 states have at some point had a law prohibiting false political speech regarding candidates (Kruse, 2001). This emphasizes the decades-long nature of the question of the role of falsity in political discourse. Arguments for and against allowing political falsehoods range from protecting voters against a distorted political process on the one hand and protecting them against governmental, likely partisan, ministries of truth on the other. The obvious question becomes what counts as false and who gets to make the final decision. District Judge Timothy Black's comment in the Sixth Circuit decision essentially says that in order to protect the public from the excess of a potentially tyrannical government, we may need to accept some level of falsity.

At the heart of this debate is the idea that falsity is outside of the protection of the constitution. To gain further insight into where political falsity falls given the scope of protected speech, this thesis will seek to explain the responses of the United States Supreme Court to false statements within political discourse, to examine the Ohio law and other state statutes to see why they developed, and to assess the likelihood that these statutes comply with the First Amendment.

This first requires an overview at where the debate exists today. Much of this controversy actually exists in the world of the law itself, debate among justices each time one of these false statement prohibitions appears before a court. For example, the Supreme Court of Washington in *Ricker v. Public Disclosure Commission* in the majority opinion wrote, "there simply cannot be any legitimate, let alone compelling, interest in permitting government censors to vet and penalize political speech about issues or individual candidates" (2007). However, the four justices in the dissenting opinion "asserted that the majority had invited politicians "to lie with impunity"" (Rodell, 2007). Washington has historically been a place for groundbreaking

decisions on this issue. In 1998, Justice Talmadge declared in his dissent to *State Public Disclosure Commission v. 119 Vote No! Committee*, that the majority opinion was the first “in the history of the Republic to declare First Amendment protection for calculated lies” (1998).

These opinions succinctly capture large parts of both sides of this debate: there is a constant struggle to balance the right of the public to free speech and the desire of the state to prevent a mockery being made of the elections process. Much as there is wide debate among the country’s many judges, a parallel debate is occurring among scholars. Kruse (2001) is frequently referenced in these debates for her contention that such statutes should be constitutional in the context of ballot initiatives. Narrowly drawn, she says, “the statutes would prohibit only false speech unprotected by the First Amendment. Moreover, states have an interest in limiting false speech to protect both the integrity of their electoral processes and the general public debate.”

She goes on to say, however, that even if these laws were constitutional, they would have only limited effect:

These statutes would effectively prohibit few ads. Political ads tend to be misleading, confusing, evasive, but rarely outright false. Ads also tend to offer opinions, which are constitutionally protected and beyond the reach of an anti-false speech statute, regardless of how "false" an opinion may seem. In a political context, almost any statement could qualify as an opinion (2001).

The histories of enforcement of many of the prohibitions could support this claim, as these statutes have frequently been found not violated by courts in their respective locations. Although Kruse (2001) argues that these statutes could have a deterrent effect on false political speech by “establish[ing] the outward boundary of permissible speech and serv[ing] as a possible deterrent to misleading ads,” many others suggest that this is precisely the problem with such statutes.

These laws “unwisely put government in the business of acting as the ‘truth police’” write Nese and Mancil (2014). Their deterrent effect is problematic because it would exist on not only false or misleading speech, but also true speech. The very fact that so much of political discourse is murky could exacerbate the deterrence Kruse speaks of to the extent it becomes a constitutionally invalid chilling effect.

It is the objective of this thesis to examine in detail the laws in question themselves and to determine not whether the government should prohibit false campaign speech, but rather whether it could do so at all. This generates the methodology and research questions which follow.

Methodology and Research Questions

This research aims to analyze broadly the current status of prohibitions on false statements about political candidates within the United States. It will be divided into a series of questions which will first address informational goals about the Supreme Court (RQ1 and RQ2) and the laws of individual states (RQ3 and RQ4) and then seek to analyze trends in the justifications for the development of these laws and in the environment surrounding them (RQ5 and RQ6). Finally, it will evaluate whether or not these statutes are constitutional (RQ7). These research questions exist as follows:

RQ1: How has the Supreme Court of the United States assessed falsity in political speech?

RQ2: Why has the Supreme Court of the United States chosen to protect some false statements?

RQ3: Why have states developed false statement laws for political campaigns?

RQ4: Why have some of these laws been overturned?

RQ5: Do states with false campaign statement laws share reasons for developing them?

RQ6: Are there other similarities among these states, such as geography or political party, which demonstrate trends in the adoption of these laws?

RQ7: Are current state false statement laws constitutional?

To answer these questions, this thesis will include four additional chapters. Chapter 2 will address falsity in the political speech arena. Specifically, this chapter will address the research questions relating to the position of the Supreme Court with regard to false campaign speech. This section will make reference to *United States v. Alvarez*, in which the Court rejected an attempt to make falsity unprotected speech. The scope of this will be limited to falsity in political speech, as the Supreme Court has sought to differentiate this from commercial speech.

The following chapter will be dedicated to an examination of the states that have developed false statement laws and their reasons for doing so, thus answering RQ3. Chapter 4 will address the similarities and differences among states with campaign false statement laws and the laws themselves. It will outline the objectives of these states in designing false statement laws and analyze similarities among states which develop these statutes, as per RQ5 and RQ6. This chapter will develop answers to the questions about state law development, RQ4, RQ5, and RQ6. To answer these questions, comparative analysis will be done on the states with campaign false statement laws compared to each other and taken as a group and compared to states without such laws. The history of each state law and the surrounding campaigns will be considered in depth. Given the decisions in *Susan B. Anthony List v. Driehaus*, and recognizing that there is still room for development in this case on appeal, a final chapter will apply the principles from Chapter 2 to these laws and assess whether these laws are constitutional.

CHAPTER 2

THE SUPREME COURT AND FALSE STATEMENTS

Laws and regulations on lies span decades in United States legislative history. Whether there exists a compelling state interest to regulate certain kinds of speech has perpetually sparked questions about the breadth and meaning of the constitution's First Amendment. While many commonplace discussions of the First Amendment focus directly on press and the media, the amendment has significant meaning for other speech, both public and private.

In in the interest of free and open debate in a democratic society, political campaigns and elections become hot topics, often with vehement and even caustic allegations thrown around. In the United States, most non-commercial speech is protected as a result of a latent desire for a robust marketplace of ideas, in which important topics are able to be discussed without government regulation. For some time, however, there has been a fear within the United States that false statements during campaigns could trick voters into making poor decisions; that is, those which are contrary to what they had intended to vote for or which are based on false impressions of fact.

Historically, there are some limitations on lying. The best known instances of these are perhaps laws about libel and slander. But political lying does not fit neatly under these titles, both because it may involve public figures and because these statements are often not character indictments but are rather about the content of legislation or otherwise are not clearly libelous. Indeed, in some instances, such as the case of *United States v. Alvarez*, the lie being told was by a person about him or herself.

How does the United States Supreme Court view political lies, and what has it done either to halt them or protect them? March 9, 1964 marked the date of the decision in the historic Supreme Court case of *New York Times Co. v. Sullivan*. This was the first notable move to protect political falsity by the Supreme Court, and continues to be referenced in cases today. To determine the status of false statements within United States political campaigns and elections today, this chapter will examine the development of the Supreme Court's position on political falsity.

How the Supreme Court Assesses Falsity

In the plurality decision in *United States v. Alvarez*, Justice Kennedy wrote "Truth needs neither handcuffs nor a badge for its vindication" (*United States v. Alvarez*, 2012). This frequently repeated line succinctly captures the direction the Supreme Court has moved in its assessment of falsity.

RQ1 asks how the United States Supreme Court views false statements in the political arena. The slew of recent decisions on this topic shows a remarkable consistency across the past century with regard to the Supreme Court's view of political false statements.

In 2012, *Alvarez* served to somewhat resolve lower court squabbles over what Hasen (2012a) calls "a constitutional right to lie in campaigns and elections." It seems, however, that what the Court is really saying is that it is the role of neither the government nor any "truth commission" to weed out the lies, for attempts to do so inevitably come at the cost of chilling other truthful speech. This section will suggest that the goal of the Court is not to protect false statements, but rather to prevent attempts to regulate false statements from crowding out those which are true.

In doing so, it will reference *New York Times Co. v. Sullivan*, *Gertz v. Robert Welch, Inc.*, *United States v. Alvarez*, and *Susan B. Anthony List v. Driehaus*, among others, as major cases in the development of the Court's position on ministries of truth and the regulation of political speech.

New York Times Co. v. Sullivan (1964)

No First Amendment analysis would be complete without reference to *Times v. Sullivan*, and it is of particular importance here as it grounds the Supreme Court's future political false statement analyses.

Times v. Sullivan referenced an Alabama libel law which allowed truth as a defense but did not require the plaintiff to prove he or she had been harmed. It is an interesting analysis of libel laws largely because of the spillover effect the decision had to future First Amendment jurisprudence, but also because it was an instance in which the defense of truth was unavailable to the defendants, because there were factual errors within the advertisement with which Sullivan had taken issue.

In attempting to determine whether lying is protected by the First Amendment, the Supreme Court turned to the Sedition Act of 1798. The majority decision in *Times v. Sullivan* quotes the vehement words of the Virginia General Assembly in 1798, which said that the Sedition Act represented the exercise of power explicitly prohibited by the First Amendment, "A power which, more than any other, ought to produce universal alarm because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right" (*New York Times v. Sullivan, 1964*).

While the Supreme Court never ruled on the constitutionality of the Sedition Act, *Times v. Sullivan* seems to suggest broadly that it would have been unconstitutional. The Act made it unconstitutional to “publically criticize the U.S. government, president or federal officials” (Harris, 2011). Specifically, it made ““false, scandalous and malicious writing’ against Congress or the president punishable by fine or imprisonment” (Harris, 2011). The laws were implemented as a political tool to garner support for President Adams’s efforts to avoid joining the French Revolution. They were used exclusively to jail members of the rival political party, which allowed the measure to expire once it regained congressional control in 1801 (Bill of Rights Institute, 2010).

The historians of the Independence Hall Association argue that the Sedition Act blatantly violated First Amendment principles, but the practice of judicial review was not yet well established enough for the Act to be overturned. Further, they say, every justice on the court was a Federalist for whom the Sedition Act was politically convenient. Virginia and Kentucky declared the laws unconstitutional within their own legislatures (2008).

It is worth mentioning that a similar Sedition Act passed in 1918, again prohibiting false statements against the government, this time under the guise that they might “impede military success.” Harris suggests that the reason neither act was ever challenged in the judicial system is because each was only on the books for three years. However, the Supreme Court took the opportunity in *Times v. Sullivan* “to officially declare the Sedition Act of 1798, which had expired over 150 years earlier, unconstitutional” (2011).

The Virginia and Kentucky resolutions on the Sedition Act show that in the Constitution and in political discourse as early as 1798, the idea that free speech is the only effective buffer against lies, abuses, tyranny, and other injustices already had a foothold. *Times v. Sullivan* both

rearticulates and crystalizes this viewpoint. “Debate on public issues should be uninhibited, robust, and wide-open,” wrote Justice Brennan for the Court (*New York Times v. Sullivan*, 1964). This emphasis on free, open debate is the precursor to the protection of potential lies that is happening in the status quo. The desire to ensure that public debate be uninhibited requires that this be considered a prior issue to other concerns. Such ranking of concerns is also apparent in *Alvarez*.

In determining in *Times v. Sullivan* that free speech was a prerequisite to other rights and that it was the first line of defense against infringement of those rights, the Supreme Court created its own burden. That is to say, the prioritization of free speech with regard to all other rights requires in some sense that we be willing to sacrifice lesser concerns for the good of the aforementioned speech.

This is made abundantly clear in *Times v. Sullivan*. For example, the decision says that “discussion cannot be denied” and that the “duty” of criticism “must not be stifled” (1964). The power of the word “must” shows this prioritization scheme, indicating that there exists an obligation to prevent any such stifling. This idea that free speech is the panacea for all ills is further elaborated just a few paragraphs later:

that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones (1964).

Justice Brennan’s opinion literally ties the existence of full and flourishing freedom of speech to the stability of the federal government. As such, it begins to create the framework for a ranking

of sorts with regard to the obligation of the government and of the courts, which is to say that it makes apparent an obligatory dedication of said actors to the protection of free speech, at almost any cost, for that free speech is seen as the cornerstone of nothing less than national security.

Moreover, in stating that “the fitting remedy for evil counsels is good ones,” the Brennan opinion continues ideas first found in Justice Brandeis’s concurrence in *Whitney v. California*, that free speech is a critical element to the democratic process and the best remedy for falsehoods is the truth (1927).

Gertz v. Robert Welch, Inc. (1974)

In *Gertz v. Robert Welch, Inc.*, the Supreme Court once again says that speech itself is the cure for misuse of free speech: “however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas” (1974). In this, the “competition of other ideas” plays the same role as speech acts of truth are said to in other jurisprudence: they are the first and foremost remedy to political falsity, and, indeed, falsity in general.

To that end, free speech is both problem and solution, with the ultimate determination being that the benefits of its existence far outweigh the potential problems. Although false speech acts are seen as a burden to society and a social ill which undermines the democratic process, the flourishing of nearly all ideas and speech is seen as so integral to a successful and legitimate government that competitive ideas and true speech is the necessary response to false speech, not government regulation.

The *Gertz* decision asserts “Under the First Amendment, there is no such thing as a false idea” (1974). This, however, is in the context of opinion statements: ideas cannot be false, but

this says nothing about whether statements of fact can be false. This is particularly relevant in the context of state prohibitions on false statements about candidates, since the discussion on these laws will show that in many instances the enforcement records reflect difficulty distinguishing between statements of fact and opinion.

Adding to the concept that ideas cannot be false, *Alvarez* establishes in its discussion of content-based restrictions that false statements are not in and of themselves threatening (2012). In doing so, the Supreme Court begins to create the image which enables us to see why it is the role of other speakers and not of the government to regulate falsity. Since no idea is false, it is impossible to regulate the free exchange of ideas by virtue of subjecting them to tests of truth. Rather, it falls to the people of the United States to remain informed and outspoken so as to test the value and validity of any idea.

Of course, the question becomes what the responsibility is of the government to regulate false statements of fact, which are categorically different from opinions which could arguably be false. In fact, *Gertz* establishes a caveat to the argument that there is no such thing as a false idea, which is that there is “no constitutional value in false statements of fact” (1974). This immediate differentiation in *Gertz* seems to reserve the right to have some sort of control over such fact-statements.

The ensuing comparison in the decision of false statements of fact to the uselessness of fighting words as described in *Chaplinsky v. New Hampshire* (1942) would seem to suggest that the Supreme Court is looking not to protect false statements, but rather to ensure that true ones continue to be voiced, avoiding the presence of “intolerable self-censorship.” This seems to move away from the idea that the value of false statements of fact is at question; rather, it suggests that it is important to test the value and validity of statements, but that it is not the role

of the government to do so. In fact, the reference to “intolerable self-censorship” as the result of too much regulation suggests that not only is regulating falsity not the role of the government, but that in attempting to do so it may actually do more harm than good by thinning out not only the number of false statements made, but also the number of true ones.

The Court concludes that erroneous statements are inevitable in a world of free speech and debate, and goes on to seek methods by which to limit the harm such statements can do, largely through its emphasis on the power of counter-speech. Not only does the Supreme Court wish to avoid the chilling of potentially unpopular truths, but it also deems truth as a defense inadequate in ensuring that self-censorship is prevented. Although it ultimately concludes that the public figure rules established by *New York Times Co. v. Sullivan* do not apply to plaintiff in *Gertz v. Robert Welch, Inc.*, the Supreme Court makes reference to *Times v. Sullivan* in explaining why truth as defense is insufficient.

The suggestion that making it the burden of the defendant to prove that a statement is true is not sufficiently narrow so as to only deter false speech is particularly relevant to the campaign speech and ballot laws at issue today, as laws such as the Ohio statute challenged in *Susan B. Anthony List v. Driehaus* explicitly create so-called “truth commissions” which make it the burden of the defendant to prove to the commission that the statements in question were true.

United States v. Alvarez (2012)

While it is always possible to regulate libel, obscenity, or fighting words, which are all categories of speech that are not protected by the First Amendment, it can be very difficult to regulate other speech acts which are fully protected. In *Alvarez*, the Supreme Court looked for, but did not find, a compelling interest on the part of Congress for the regulations in the Stolen

Valor Act. Since the test for content-based restrictions on speech requires a compelling government interest (such as safety or national security) to be protected in a narrowly tailored fashion, it is difficult for content-based restrictions to be constitutional.

United States v. Alvarez was explicitly about a law which was a content-based restriction: under the Stolen Valor Act, it was a federal misdemeanor to lie about having received any United States military medal or decoration. In 2007, Alvarez was charged in California with two counts of falsely claiming to have received military medals, as these lies fell under the purview of the Stolen Valor Act.

The state laws at issue are often not explicit content restrictions: they restrict not what you can say politically, but rather create truth commissions which regulate lies in the political arena if a complaint is filed. However, it would appear likely that the concepts which applied to the content-based regulation of the 2005 Stolen Valor Act are also applicable to these state-level political falsity laws. In fact, the fate of the Stolen Valor Act would seem to mirror that of many of these state-level political falsity laws: Congress passed an updated Stolen Valor Act after the initial was overturned, just as many state governments updated their political falsity statutes after they were overturned.

As mentioned previously, *Alvarez* establishes that false statements are not in and of themselves threatening. The Supreme Court in *Alvarez* makes the argument that it is much worse for free speech to be chilled because of attempts to regulate lying than for some false statements of fact to slip through the cracks. Even if these statements are not valuable themselves, the ones that would be chilled by attempts to regulated the zero-value statements do have value, and thus the attempts at regulation would seem to do harm (2012).

The Supreme Court actually seems to go a step further in *Alvarez* and suggests simply because speech is knowingly false does not mean it is devoid of Constitutional value. This is simultaneously both the same as the crowd-out argument and distinct: in addition to the effect of “crowding-out,” or replacing somewhat false speech with no speech, the *Alvarez* Court suggests that the value in speech itself might be intrinsic so as to protect even false statements of fact (2012).

While *Alvarez* forms the basis for later decisions, specifically *Susan B. Anthony List v. Driehaus*, it is important to remember that the law in question in *Alvarez* was a content-based restriction, which are almost always unconstitutional. This is why the Supreme Court had to look for a compelling reason for the existence of the Stolen Valor Act of 2005. The state-level laws that regulate false statements about candidates in 20 states may or may not qualify as content restrictions: restricting lies could be considered a content restriction, but it could also be argued that there is no restriction on the content of a speech act, presuming the speech is true.

***Susan B. Anthony List v. Driehaus* (2014)**

The most recent political falsity cases make the Supreme Court’s views on such falsity rather apparent. In 2012 and 2014, the Supreme Court sent very clear signals that the government had no compelling interest in being the arbiter of truth and that lies were not inherently threatening.

The crux of political falsity decisions today is the Ohio statute prohibiting false statements during the course of a political campaign. Under this statute, a claim by Susan B. Anthony List that then-Representative Steven Driehaus had voted to spend taxpayer dollars on abortions (by voting in favor of the Affordable Care Act) was challenged. It is notable that under

the Ohio law anyone, not just the affected party, could lodge a complaint, and that the Ohio Elections Commission voted in favor of Driehaus (The Oyez Project, 2014). Even though Driehaus withdrew the complaint after losing the election and traveled elsewhere, Susan B. Anthony List and a second organization, COAST, continued to challenge the law under the argument that it could be used to prosecute or chill similar speech that they would take part of in the future.

Although the Supreme Court did not directly rule on the constitutionality of the complaint mechanism for falsity within the Ohio Elections Commission, in deciding the standing question in favor of Susan B. Anthony List and COAST, it certainly seemed to be suggesting that there was a problem with the law. After all, if the law were narrowly tailored to avoid chilling potentially true speech, it is likely the Supreme Court would not have found that both organizations suffered from a credible threat of enforcement against future actions.

This is very clearly laid out when the Supreme Court opinion says that to refuse review would be to directly create a forced choice for these groups between halting their speech and further proceedings by the Ohio Elections Commission. In keeping with this logic, the district court granted a preliminary injunction of the law shortly after the Supreme Court ruling on standing (*Susan B. Anthony List v. Ohio Elections Commission*, 2014).

This decision relied heavily on both *281 Care Committee v. Arneson* (2014) and *United States v. Alvarez* (2012). Although the *Care Committee* case has thus far escaped mention here since it was denied certiorari by the Supreme Court, it plays an important role in the jurisprudence on lying in campaigns and elections. *Care Committee* is about Minnesota's ballot measure falsity law, although the state is one of several which actually has laws for both traditional campaigns and ballot initiatives. Since the decision in *Care Committee* has so far been

appealed twice since 2010, most recently resulting in an 8th Circuit decision in early September, 2014, the *SBA List v. Driehaus* and *Care Commitee* decisions mutually cite each other.

They also both rely significantly on the 2012 *Alvarez* decision. In fact, Minnesota asked the Supreme Court to hold its petition until after it had decided *Alvarez*. *United States v. Alvarez* is perhaps the clearest statement of the Supreme Court's position on falsity. The Kennedy plurality took issue with the content-based restriction about medals of valor and noted that such restrictions only apply in cases of a "grave and imminent threat." While there are First Amendment exceptions for certain categories of speech, the Supreme Court did not find that false statements are inherently a grave and imminent threat.

The Supreme Court has effectively signaled that you can lie about your medals, about the content of political votes, and at times about other people. Given this, it seems reasonable that anyone who falls victim to an election-lies law would challenge it on First Amendment grounds (Hasen, 2012b). If this is true, and yet states continue to pass laws which punish falsity, why do they feel the need to do so, and why does the Supreme Court choose to protect such falsity?

Why Protect Falsity on a National Level?

This latter question, which has been referenced earlier as RQ2, is perhaps easier to answer, since this section has already established most of the answer. Protecting falsehoods is not about protecting them for their own value, which the Supreme Court has said is nonexistent, but rather about ensuring that laws which regulate speech are as directly and narrowly tailored as possible. Moreover, while the Supreme Court finds no value in false statements of fact, it finds immense value both in the practice of free speech and in the content of the resulting speech acts.

To ensure these practices continue, with all of their benefits for the stability of civil society, the Supreme Court is willing to protect political speech as a general category, whether true or false.

The stance of the Supreme Court on this is particularly interesting given that states and the United States Congress continue to pass laws which regulate political falsity. For example, although the 2012 *United States v. Alvarez* decision overturned the 2005 Stolen Valor Act, the 113th Congress passed another version of the Stolen Valor Act in 2013 which all of the same regulations but a slightly different explanation of what lies would be a federal misdemeanor, making it a crime only to lie about the receipt of military medals to obtain a tangible benefit.

That Congress so quickly passed a modified Stolen Valor Act could suggest that the deliberations of the Supreme Court on the constitutionality of regulations on political falsity will continue to be an issue for some time to come, as legislative bodies at both the federal and state level continue to make legislative regulations on political falsity.

CHAPTER 3

STATE-BY-STATE FALSE STATEMENT LAWS

In order to analyze why statutes regulating false political statements came to be (RQ3), it is first necessary to determine which states have or had such statutes. As mentioned previously, Kruse (2001) identifies 17 states as having statutes prohibiting false political speech about candidates, these being Alaska, Colorado, Florida, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, West Virginia, and Wisconsin. Also mentioned are Washington and Indiana, whose statutes regarding false political speech about candidates have been overturned or repealed prior to Kruse's writing. To some extent, her list has been affected by the intervening decade.

In a more recent work, Center for Competitive Politics researchers Matt Nese and Brennan Mancil (2014) also identify 17 states as actively having such false statement laws, although several of these states differ. Notably, Nese and Mancil exclude Nevada (since the statute had been overturned prior to their writing) and include Michigan. Although this chapter will address Michigan's false statement law in the interest of garnering a complete picture, Michigan will be excluded in the final list of states that have or had such laws since its law regulates anonymous statements rather than false ones.

As a third point of comparison in garnering a list of states comes from an October 2014 National Conference of State Legislatures (NCSL) report on states that have laws governing making false statements while campaigning. This report analyzed six kinds of statements, including such items as incumbency, endorsements, and identity that will not be considered in

this chapter. For the purpose of identify which states have laws regarding false statements about political candidates and why they developed them, the NCSL list of 27 states was narrowed down to just those in the category of “false statements” or “statements about other candidates” (Listes and Underhill, 2014).

This brought the NCSL list down to just 16 states. Although most of these overlap with one or both of the aforementioned pair of lists, it also added California and Kentucky. However, both of these states were ultimately excluded from the analysis; California because the relevant regulation is an optional fair practice pledge and Kentucky because the statute did not actually regulate false political statements with regard to candidates.

Thus, a final list of states that had at some point had political false statement laws by 2014 was compiled, including 20 total states. These are, alphabetically, Alaska, Colorado, Florida, Indiana, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, Washington, West Virginia, and Wisconsin.

Below is an overview of each of these states, including the year it first passed the relevant statute, why it passed that statute, and if that statute was later overturned or repealed. In some instances, notable amendments or cases where the statute was repealed and reenacted have been noted. For each state, the question “why has this state developed a campaign false statement law” (RQ3) has been answered. This information is compiled in Table 1 at the end of this chapter. The penalties of these laws will also be discussed for individual states, and Table 2 provides a reference point. RQ4, why some of these laws have been overturned or replaced, is also addressed. From an aggregation of the reasons for the passage and repeal of the relevant laws, Chapter 4 will identify shared justifications for the repeal or existence of these laws.

Alaska

In 1971, Alaska amended a statute for campaign misconduct in the first degree to include new language adopted by the state Constitution in 1970 and incorporated its law against political lying. Although the law has been amended numerous times, including being repealed in 1996 and immediately reenacted as campaign misconduct in the second degree (incorporating a lesser penalty for violations of the statute), the language of the subsection about false statements has remained consistent (Alaska Stat. § 15.56.014 and Alaska Stat. § 15.56.010).

Alaska criminalizes statements by any person, during the course of a campaign, which the speaker knows contain false factual information which could damage the reputation of a candidate for office. This statute is designed in its entirety to protect candidates for office against the corrupt practice of reputation-shattering lies told by competitors and their supporters (Alaska Stat. § 15.56.014).

Violations of this statute are a criminal offense which may be penalized with up to 90 days in prison and a fine of up to \$2,000 (Nese and Mancil, 2014).

Colorado

Colorado repealed and enacted its false political speech statute in 1981, when it did the same for its entire article of election offenses. This was done to eliminate duplications in the Colorado statutes which had resulted in varying criminal penalties for identical crimes. The statute explicitly grants authority to the Colorado attorney general to prosecute election offenses. Such offenses are punishable by up to 18 months in prison and a fine of up to \$5,000 (Nese and Mancil, 2014).

The Colorado statute is designed to prevent infringements on the will of the electorate, and it includes lies told not only about candidates but also about ballot initiatives. It was passed with the intent to prevent any person from knowingly or recklessly making communications that were designed to trick voters into voting against their own interests or desires.

Although Colorado does not have a long history of judicial interpretation of this statute, it has nevertheless been utilized in the Colorado elections process. For example, during the 2014 election cycle, the statute was used in cease and desist requests about a particular advertisement, by the legal counsel of Coffman for Congress in response to “patently false” advertisements by CounterPAC (Anderson, 2014).

Florida

Similar to Ohio language which gave the Supreme Court pause, the Florida false political speech statute allows for anyone with non-hearsay information to file a complaint with the Florida Elections Commission (Florida Elections Commission, n.d.). However, the statute is on the whole much narrower than in some other states: it applies only to candidates acting with actual malice. While most of the statutes discussed here prohibit false statements *about* candidates by anyone, the Florida statute only applies to speech by the candidates themselves. False statements of military service are also penalized.

The Florida Election Commission is tasked with the enforcement of chapter 104, Election Code Violations and Penalties, and 106, nonpartisan elections, of the Florida code. The Florida Elections Commission was created in 1973 to enforce campaign finance laws and given jurisdiction over chapter 104, including the falsity statute, in 1998 (Florida Elections Commission, n.d.).

The falsity regulation in Florida is somewhat different from most other states in that it carries only civil penalties for violations. These include fines of up to \$5,000 (Nese and Mancil, 2014). The regulation was adopted in 1953 to encourage transparency in elections (Fla. Stat. § 104.271).

Indiana

In 1986, Indiana enacted a false political speech statute, among a variety of election reforms, in an effort to promote fair and equal elections and specifically to avoid voter intimidation (Indiana §§ 3-14-3-1-14-3-24). Although much of what was simultaneously enacted remains on the books, Indiana repealed its false political statement regulation in 1992 (Burns Ind. Code Ann. § 3-14-3-22).

While this law is no longer on the books, similar elections code violations come with criminal penalties including up to one year in prison and fines up to \$5,000 (Moore, 2012)

Louisiana

Louisiana adopted in 1976 a statute aimed at prohibiting false political speech. Although large sections of the law remain today, a portion of the law prohibiting anonymous campaign materials was overturned both in 1989 and 1995, because the “right to distribute anonymous campaign literature is clearly protected” by the U.S. Constitution, and the false statement portion of the law was overturned in 1989 because it was not sufficiently narrow to address the state’s interest. Both sections appear in the law today in a modified format (La. R.S. § 18:1463).

The Louisiana legislature highlighted three broad reasons for its adoption of a statute against political lying. First, it found it had a compelling interest in “taking every step necessary”

to ensure elections are fair and ethical. Louisiana has written its reasoning for this into the text of the statute itself, arguing that an election is by design not fair and ethical if any person, candidate or otherwise, is permitted to “publish statements that make scurrilous, false, or irresponsible adverse comments about a candidate or proposition” (La. R.S. § 18:1463).

Further, Louisiana saw itself as having a responsibility to protect the electoral process broadly, through such items as ensuring truths be told and names be attached to such utterances, to ensure the public has access to information necessary for its decisions. This is closely related to Louisiana’s third and final justification for this law, an argument that the state of Louisiana seeks to protect the right of the public to “informatively exercise their right to vote” (La. R.S. § 18:1463).

Louisiana punishes violators of this law with up to two years imprisonment and a fine of up to \$2,000 (Nese and Mancil, 2014)

Massachusetts

Massachusetts is a known as a state that has historically had pressure for fair elections (“Brief History of Fair Elections Victories,” 2008). In a brief victory for fair elections movements within the state, a Clean Elections Law passed in 1998 by ballot initiative. However, this law was later repealed in 2003 by the legislature.

Although the Clean Elections Law made reference to similar practices as campaign lies, the current version of Massachusetts law prohibiting falsity in political campaigns was actually enacted in 1964. Further, the earliest version of a false political statement law about candidate-based lies in the state passed in 1922. The 1964 version extended the criminalization of political lying to ballot initiatives and referendum. The Massachusetts law is the only one with no

requirement of knowledge or intent with regard to falsity. Simply communicating a falsehood which “tends to injure or defeat” a candidate is punishable by a \$1000 fine or up to six months in prison (ALM ch. 56 § 42).

In keeping with its fair elections reputation, Massachusetts is also one of only 14 states to consistently distribute voter’s pamphlets on referenda, although Kruse notes that these pamphlets are no more accessible to voters than the proposals themselves (2001).

It is interesting to note that the language of the Massachusetts law with regard to fictions about questions posed to voters very closely mirrors that found in other states where the intent of the law is to protect voters against false or deliberately misleading advertising. The test for whether a falsehood violates the Massachusetts law is if the statement was “designed to affect the vote” on that initiative, which echoes language from other states, such as Colorado.

However, the candidate portion of the law is written in the context of protecting the candidate, rather than the voters. While the referenda portion of the law specifically mentions efforts to affect the vote, the ban on lying about candidates falls more in line with defamation standards by prohibiting falsehoods meant to “injure” or “defeat” the candidate (ALM ch. 56 § 42).

Michigan

Since 1954, Michigan has prohibited false statements about a candidate without the name of the author being attached to the statement. An earlier version of a similar law was passed in 1925. This is perhaps in a similar category to laws barring falsity, but different enough to warrant mention. The Michigan law does not criminalize lying in political campaigns, but rather criminalizes anonymity under such circumstances (MCLS § 168.931).

In adopting this regulation, Michigan sought to encourage “responsible political debate” by holding all parties accountable for their speech. This is worth noting for its similarities, in that it is some form of criminalized lying, however, this is not at all the same as a simple ban on lying. But, it would appear on the surface to at once be both harder to enforce (if one lies anonymously, how are they tracked down for the misdemeanor charge?) and unlikely to be different from a constitutional sense, since similar statutes were the earliest version of laws in other states that were ultimately overturned given a right to participate in the political process anonymously (MCLS § 168.931).

Minnesota

The criminalization of false political speech in Minnesota began in 1893, with a law designed to regulate and limit smear campaigns in elections. In 1913, the smear campaign law was split into multiple statutes, one of which would become the earliest version of Minnesota’s false political speech regulation. Specifically, Minnesota has banned “knowingly false statements of fact aimed at misleading voters about candidates and ballot propositions or ballot questions” (Petition for Writ of Certiorari *281 Care Committee v. Arneson*, 2011).

Minnesota considers itself to have a compelling interest in ensuring the presence of fair campaigns, and this constitutes the bulk of its logic for, and defense of, its regulation on false political speech (Petition for Writ of Certiorari *281 Care Committee v. Arneson*, 2011).

The language of the contested section and one other are together part of the “Minnesota Fair Campaign Practices Act” and the argument for their existence is twofold: first, the state seeks to promote fair and honest elections, and second, it seeks to prevent fraud against its citizens. The statute makes political lying via paid advertisement a gross misdemeanor, and

political lying via other venues, specifically letters to the editor, a misdemeanor. This language first appeared in the Minnesota statutes in 1988, and was modified in 1998 to revise the unconstitutional portions after the statute was overturned by the state court of appeals (Minn. Stat. § 211B.06).

The Minnesota campaign manual references 20 instances in which prosecution under either the Minnesota Fair Campaign Practices Act or its partner, the Corrupt Practices Act, was challenged, beginning in 1971. In 15 of these cases, the statute was found not to be violated. In only three cases was a penalty levied and later upheld. These include: a 2009 fine for a letter to city residents criticizing City Council via allegations known by the author to be false, an \$800 fine in 2008 for campaign flyer statements made by a candidate held to be false contentions of fact, and a 2006 decision which held that the hearing process was legitimate, allowing a fine to be levied (Simon, 2014). The law allowed for fines of up to \$3,000 or prison time of up to 90 days (Nese and Mancil, 2014).

Of the 20 instances in which the law was challenged, in the remaining two challenges to be discussed, the law overturned the statute for reasons of constitutionality. First, in 1996, the court in *State v. Jude* declared the statute unconstitutionally overbroad because it “extends to statements not made with “actual malice” (Simon, 2014). The 1998 revision of the law was meant to bring the law in line with the constitutional by amending it to include the actual malice standard. This new version was overturned in *281 Care Committee v. Arneson* in a 2011 decision that was recently upheld by the Eight Circuit Court of Appeals, in September 2014. The appellate court determined that the statute created a chilling effect on non-defamatory speech, a violation of the First Amendment (Furst, 2014).

At the moment, the Minnesota campaign manual still includes this statute, and simply notes that it has been found unconstitutional. It remains to be seen whether Minnesota will attempt again to revise this statute.

Mississippi

Mississippi first adopted a false statement statute as part of its 1935 Corrupt Practices Act. Mississippi's false statement statute is designed to invoke protections of candidate rights and to prevent misleading, late-breaking, and unfair elections by preventing accusations of improper conduct from being uttered within five days of an election, even if true. The false statement portion of the law is written to protect the integrity of candidates, with the aforementioned skew towards the overall fairness of the campaign process rather than of individuals within the campaign (Miss. Code Ann. § 23-15-875). Violations of this statute are a criminal offense, punishable by arrest with a \$500 bond and up to one year in prison (Nese and Mancil, 2014).

Montana

In 2012, Montana's "political-civil-libel" statute was overturned by the United States District Court for the District of Montana, Helena in *Lair v. Murray* (2012). To rectify the constitutional discrepancies, Montana in 2013 removed the unconstitutionally vague phrase "or any other matter that is relevant to the issues of the campaign," so that the statute now only regulates misrepresentations of candidate voting record (MCA § 13-37-131). The penalty for violating the statute is a fine of up to \$1,000 (Nese and Mancil, 2014).

Similarly, Montana amended the language of the law in 1999 after it was declared unconstitutional in 1998, but the intent of the law remained the same until the broader amendment in 2013.

In its effort to maintain the constitutionality of the political lying statute and other similar regulations within this section, Montana has argued that these laws as a whole are necessary to preserve the fairness and integrity of elections. Montana's focus is much more on the potential infringement of the rights of the candidates than of the voters (*Lair v. Murray*, 2012).

Nevada

Nevada's false political speech statute was ruled unconstitutional in 2005 for violating due process in *Nevada Press Association v. Nevada Commission of Ethics*. Violations of the statute could be penalized by fines of up to \$5,000. During the proceedings, the state and the Nevada Commission of Ethics maintained that the law had been passed to preserve the integrity of the elections process and was necessary to do so.

Given the state of flux in which these laws seem to exist and the debate about whether or not states are allowed these laws that continues to quietly happen, it is interesting to note that the court in this instance found that preserving the integrity of the election process was a compelling and legitimate instances (although not one which justified the abbreviated trial procedure the court would conclude violated due process rights). As has occurred with other political falsity regulations, this one was deemed to have a chilling effect on protected political speech (*Nev. Press Ass'n v. Nev. Comm'n on Ethics*, 2005).

The aforementioned chapter was adopted in 1997.

New York

New York adopted a restriction on false statements about candidates in 1974, but this was later overturned in *Vanasco v. Schwartz* (9 NYCRR § 6201.1). The court in *Vanasco* declared large portions of the Fair Campaign Code unconstitutional, and today what was once a restriction on almost any misrepresentation in the course of a political campaign is limited to a ban on the deliberate misrepresentation of the contents of a political poll (*Vanasco v. Schwartz*, 1975). Where many states have continuously struggled to align their false statement laws with the Constitution after numerous unfavorable judicial decisions, New York simply struck the offending sections from the law entirely (9 NYCRR § 6201.1). When it was in force, violations of the law came with fines up to \$1,000 (*Vanasco v. Schwartz*, 1975).

New York had two goals in passing this law, which it continues to attempt to achieve with the watered down version of the regulations. First, New York sought to “stimulat[e] just debate” about the views and qualifications of any candidate and to protect the right of “every qualified person or political party to full and equal participation in the electoral process.” Both halves of this reasoning appear to be directed at the candidates for political office (9 NYCRR § 6201.1).

North Carolina

In a long list of election-related misdemeanors, North Carolina makes it unlawful for any individual, whether or not they are a candidate, “to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity” (N.C. Gen. Stat. § 163-274). This law was

first passed in 1931 and includes criminal penalties of up to one year in prison and a fine of up to \$3,000.

North Carolina's law is noteworthy because its anti-anonymity language within the statute was found not to violate the right to free speech. North Carolina considers its election misdemeanors statute part of a larger effort to restore confidence in the government (N.C. Gen. Stat. § 163-274).

North Dakota

North Dakota passed its first limitation on false political statements in 1981. Like Tennessee, the North Dakota law is purely based on publication of falsity. The candidate falsity statute is part of a laundry list of deceptive behaviors that North Dakota seeks to prohibit in the interest of ensuring broad notions of fairness in its elections process. In that interest, the law applies as well to a number of categories of ballot measures. North Dakota separates these out, whereas other states put them all under the category of "questions posed to voters" (N.D. Cent. Code § 16.1-10-04). Since North Dakota is known as a state with heavy initiative activity, it follows logically that the statute also includes limitations on lying in those campaigns (Kruse, 2001). Violating any one of the various sections of this law comes with criminal penalties of up to one year in prison and a fine of up to \$3,000 (Nese and Mancil, 2014).

Ohio

The regulation of false political speech in Ohio, and in fact the entire Ohio Elections Commission, developed in 1974 as a direct response to the Watergate scandal (Ohio Elections Commission, 2013). The Ohio Elections Commission was created to enforce campaign finance

and fair campaign practices laws. It enforced a political disclaimer law later overturned by the Supreme Court (*McIntyre v. Ohio Elections Commission*, 1995), and was then reconfigured and reestablished as an independent government agency in 1996, following a 1995 push in the state for campaign finance reform. The first version of Ohio's political false statement law was established under the Ohio Elections Commission and went into effect in 1976 (Ohio Elections Commission, 2013).

The state of Ohio argues that its expedited ruling process solves potential abuses on the complaint system for allegations of falsity during campaigns. However, petitioners Susan B. Anthony list and the Coalition Opposed to Additional Spending and Taxes (COAST) were deemed by the Supreme Court to have standing to challenge the law in June 2014, and the district court got the message and overturned the law in early September. The statute was amended and renumbered during the 1995 campaign finance reform efforts, and from there was kept largely the same until it was overturned in 2014.

Prior to its spin at the Supreme Court, the Ohio law faced five constitutional challenges. Three served to specify the intent of the law or declare it constitutional (1978, 2002, and 2008). Sections of the law were deemed unconstitutional in 1987 and 1988; these were amended by 1995 when the statute was renumbered (ORC Ann. § 3517.21). Violations of the Ohio law are punishable by up to six months imprisonment or a fine of up to \$5,000 (Nese and Mancil, 2014).

Oregon

Oregon passed its earliest Corrupt Practices Act by ballot initiative in 1908 (Tomeo, 2005). This law was focused on disclosure of campaign expenditures ("Oregon law on elections facing test," 1938). In 1967, Oregon added a campaign false statement regulation, among others,

to the statute (ORS § 260.532). Violations of this regulation result in the payment of noneconomic damages or a fine of up to \$2,500, whichever is greater (Nese and Mancil, 2014).

The history of enforcement for the statute seems to indicate that it is most often interpreted very narrowly and found not to be violated. For example, a false statement that could create a true inference is not considered to be a lie regulated by the statute. Other Oregon court cases involving the interpretation or enforcement of the statute often seem to go to great lengths to find a mechanism by which the statement in question could have been true (ORS § 260.532). However, Oregon's Corrupt Practices Act has been held to be of utmost importance in preventing the disenfranchisement of voters by the Oregon Supreme Court and this is the primary reason for its existence (*Thornton v. Johnson*, 1969).

Tennessee

Tennessee has one of the shortest false political speech regulations, a one sentence statute prohibiting knowingly false publications opposing any candidate or election and making the offense a Class C misdemeanor. This comes with penalties of up to 30 days in jail and a fine of up to \$50 (Nese and Mancil, 2014).

The earliest form of this statute appeared in Tennessee Codes Annotated in 1950.

The Tennessee statute is significantly different from the speech statutes discussed elsewhere in that it prohibits only publication of falsehoods, but is worth mentioning in the interest of obtaining a complete picture of the regulations on campaign lies (Tenn. Code Ann. §2-19-142). Tennessee has had two recent court cases involving enforcement of the statute, and in both it was treated as an issue of libel (*Murray v. Hollin*, 2012) Tennessee is better known

for its protections against online deceptive practices, such as the creation of false websites to trick voters (Common Cause, 2008).

Utah

Utah's election law regarding political falsity was enacted in 1995 under Utah's "Election Recodification – Phase III" bill, although a version of the law appeared in Utah Code Annotated 1953.

The legislature in Utah adopted perhaps the simplest language of any of the state political false statement statutes. Rather than enumerating lengthy reasoning or even a punishment for the violation of the statute, the Utah statute is merely a single sentence prohibiting false statements with relation to candidates:

A person may not knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting at any primary, convention, or election (Utah Code Ann. § 20A-11-1103).

It is, however, written with the intent to avoid false statements which affect voting. The statute does not itemize ways in which these statements could affect voting, but exists as a broad ban on any statement which could be interpreted as such (Utah Code Ann. § 20A-11-1103). Violating this statute may result in as much as six months in prison and a fine of up to \$1,000 (Nese and Mancil, 2014).

Washington

Washington enacted its false political speech regulations with three specific goals: to protect candidates for office, to protect the democratic process, and to encourage people to run for office (RCW 42.17A.335). Violations can cost as much as \$10,000 (*State v. 119 Vote No! Committee*, 1998). The value that the state places on these goals is fairly apparent from its insistence on the presence of the law.

Washington is one of several states where the law regulating false political speech has been overturned via a court process multiple times. In spite of this, Washington has continued to tweak and pass anew legislation for the purpose of regulating false campaign speech each time the law is overturned.

The earliest version of the current text appeared in 1984, although the statute was renumbered and recodified in 2012, after a number of other small adjustments through the years.

The Supreme Court of Washington ruled the ballot law unconstitutional in *State v. 119 Vote No! Committee* (1998), and the candidate law was included in the repeal. However, it was less than a year before “Political advertising or electioneering communication — Libel or defamation per se” was back, returning to the books in 1999.

The law was again overturned in 2007, when the Supreme Court of Washington in *Rickert v. State, Public Disclosure Commission* found it unconstitutional for having “no requirement that the prohibited statements be defamatory” (2007). In once more passing the law (in 2009), the legislature clearly laid out its reasoning. First, that defamation damages “the integrity of elections by distorting the electoral process” because it warps the presence of an informed electorate in a democracy and lowers “the quality of campaign discourse and debate.”

Second, that defamation “may deter individuals from seeking public office,” and finally that may expose an innocent or truthful candidate to ridicule and backlash, both within the context of the campaign and in his or her regular life (RCW 42.17A.335).

West Virginia

The text of the West Virginia statute encompassing false statements makes it readily apparent that this statute had been designed to prevent voter intimidation and fraud against the electorate. A version of the law regarding false statements about candidates first passed in 1905, but the vast majority of this law is about practices such as paying for editorial support and threatening a voter, either to get them to vote a certain way or to refrain from voting (W. Va. Code §3-8-11)

The law has been amended many times, but is distinct among such laws in that it lacks the long history of judicial decisions attached to similar statutes in other states and thus such amendments seem to have been born of a desire for material change or clarification within the statute rather than to skirt issues of constitutionality (W. Va. Code §3-8-11). Violations of the law may be met with imprisonment of up to one year and a fine as large \$10,000 (Nese and Mancil, 2014).

Wisconsin

Wisconsin first passed its statute to prohibit false statements of fact in political campaigns in 1913 as part of its Corrupt Practices Act. It was repealed and recreated in 1973 to fall under Wisconsin’s campaign finance law, and broadened in 1993 to include false statements about referenda, in addition to false statements about candidates (Wis. Stat. § 12.05) The

language of the current law was first created in 1967, although even the Wisconsin Legislative Council Staff was unable to identify the intent behind this wording change (Haas and Smith, 1981). Wisconsin's law carries the steepest penalties of such laws in any state: up to three years in prison and a fine of up to \$10,000 (Nese and Mancil, 2014).

The Supreme Court of Wisconsin in 1938 interpreted the intent of the legislature in passing the 1913 regulation and determined the scope of its applicability in *State ex rel. Hampel v. Mitten*. It ultimately concluded that in passing the initial law, the 1913 legislature sought to regulate statements which infringed with the will of the electors; which is to say that the measure of any violation is whether or not it made it impossible to determine who electors did want or would have wanted in office absent the lie, and that the goal of the legislation therefore is to prevent interference with the desires of voters (*State ex rel. Hampel v. Mitten*, 1938).

Table 1: Why Have States Developed Laws Prohibiting False Statements about Candidates?

State	Reason for Enactment	Year Enacted	Repealed?	Year repealed, if repealed
Alaska	<ul style="list-style-type: none"> • Candidate protection 	1970		
Colorado	<ul style="list-style-type: none"> • Prevent infringement upon the will of voters 	1980		
Florida	<ul style="list-style-type: none"> • Transparency in elections 	1953		
Indiana	<ul style="list-style-type: none"> • Fair elections • Prevent voter disenfranchisement 	1986	Repealed by legislature	1992
Louisiana	<ul style="list-style-type: none"> • Fair and Ethical Elections • Protect the Electoral Process • Allow public to informatively exercise their right to vote 	1976		
Massachusetts	<ul style="list-style-type: none"> • Candidate Protection 	1922		
Minnesota	<ul style="list-style-type: none"> • Fair elections • Prevent fraud against citizens 	1913	Void by Court (1996), re-enacted (1998), Void by Court	2014
Mississippi	<ul style="list-style-type: none"> • Fair Elections • Candidate protection 	1935		
Montana	<ul style="list-style-type: none"> • Fair elections 	1995	Void by Court	2012
Nevada	<ul style="list-style-type: none"> • Integrity of Elections 	1997	Void by Court	2005
New York	<ul style="list-style-type: none"> • Stimulate debate • Candidate protection 	1974	Void by Court	1975
North Carolina	<ul style="list-style-type: none"> • Restore confidence in the government 	1931		
North Dakota	<ul style="list-style-type: none"> • Fair elections 	1981		
Ohio	<ul style="list-style-type: none"> • Watergate 	1976	Void by court	2014
Oregon	<ul style="list-style-type: none"> • Prevent voter disenfranchisement 	1967		
Tennessee		1950		
Utah	<ul style="list-style-type: none"> • Prevent infringement upon the will of voters 	1953/1995		
Washington	<ul style="list-style-type: none"> • Candidate protection • Integrity of Elections • Encourage running for office 	1984		
West Virginia	<ul style="list-style-type: none"> • Prevent voter disenfranchisement 	1905		
Wisconsin	<ul style="list-style-type: none"> • Prevent infringement upon the will of voters 	1913		

Table 2: What are the Penalties for Violating State Laws Prohibiting False Statements about Candidates?

State	Legal Citation	Penalty	Maximum Imprisonment	Fine
Alaska	Alaska Stat. § 15.56.014	Criminal	90 days	up to \$2,000
Colorado	Colo. Rev. Stat. § 1-13-109	Criminal	18 months	up to \$5,000
Florida	Fla. Stat. § 104.271	Civil		up to \$5,000
Indiana	Burns Ind. Code Ann. § 3-14-3-22	Criminal	one year	up to \$5,000
Louisiana	La. Rev. Stat. § 18:1465	Criminal	two years	up to \$2,000
Massachusetts	Mass. Gen. Laws Ch. 56, § 42	Criminal	six months	up to \$1,000
Minnesota	Minn. Stat. § 211B.06	Criminal	90 days	up to \$3,000
Mississippi	Miss. Code Ann. § 23-15-875	Criminal	one year	
Montana	Mont. Code. Ann. § 13-37-131	Civil		up to \$1,000
Nevada	Nev. Rev. Stat. Ann. § 294A.345	Civil		up to \$5,000
New York	9 NYCRR § 6201.1	Civil		up to \$1,000
North Carolina	N.C. Gen. Stat. § 163-274	Criminal	One to Sixty days, depending on prior convictions	
North Dakota	N.D. Cent. Code § 16.1-10-04	Criminal	one year	up to \$3,000
Ohio	Ohio Rev. Code Ann. § 3517.21	Criminal	six months	up to \$5,000
Oregon	Or. Rev. Stat. § 260. 532	Civil		for damages or up to \$2,500, whichever is greater
Tennessee	Tenn. Code § 2-19-142	Criminal	30 days	up to \$50
Utah	Utah Code Ann. § 20A-11-1103	Criminal	six months	up to \$1,000
Washington	Rev. Code Wash. § 42.17A.335	Civil		up to \$10,000
West Virginia	W. Va. Code § 3-8-11	Criminal	one year	up to \$10,000
Wisconsin	Wis. Stat. § 12.05	Criminal	three years	up to \$10,000

CHAPTER 4

TREND ANALYSIS IN CANDIDATE FALSE STATEMENT PROHIBITIONS

The 20 states discussed come from a wide range of political cultures. They are different with regard to their level of importance to national elections. They have different demographics, different political leanings, and vastly different geographies. Roughly half of them lie on either side of the Mississippi river, a division which has in initiative studies been telling: Kruse (2001) identifies the movement westward beyond the Mississippi as the time when ideas of direct democracy became popular. She argues that since Western states were in their “formative years” in 1898, when South Dakota became the first state to adopt the initiative and referendum as practices of direct democracy, they were more likely to adopt such values.

Given these seemingly random dispersions, the question becomes: why did each of these states adopt a ban on the practice of lying about candidates in an election process? Moreover, do the relevant states share reasons for doing so (RQ5)?

The identification of the reasons behind each state’s adoption of a prohibition against candidate-based lies revealed a strong pattern in the reasoning that state legislatures as a whole have in adopting these statutes.

Categorization of State Reasoning for Adoption of False Statement Laws

To identify the above-mentioned pattern among state justifications for the adoption of state laws which prohibit lying about candidates for political office, the reasons for enactment in

Table 1 were reviewed. Certain phrases appear repeatedly in these reasons, such as “fair elections.”

Ultimately, three broad categories encompassed much of the reasoning for each state to have adopted the relevant statutes. These are: candidate protection, voter protection, and process protection. They will each be discussed in detail, with states using the reasoning of each category enumerated. It will be demonstrated that every state, save two, fits neatly within these categories.

Candidate protection. This category encompasses any statute enacted for the purpose of incubating candidates against defamation or other lies intended to hurt the candidate either personally or in the election.

Five states use some version of this reasoning, either alone or in conjunction with another category. Alaska, Massachusetts, Mississippi, and New York all simply have or had statutes with the intent to prevent some sort of harm from befalling the candidate for office. Washington had this reasoning as well, but had an additional subsection within this category that deserves mention, which is that the state sought to encourage citizens to run for office. This makes logical sense only if the assumption is made that citizens are afraid to run for office because of the risk of disparaging lies being told about their characters, and will therefore decide to run if such lies are prohibited. As such, this is considered a candidate protection reason, because the protected party is a candidate or potential future candidate, even though it is written with the general citizenry in mind.

Only Alaska and Massachusetts developed these laws purely for the purpose of candidate protection. Mississippi, Washington, and New York each also included reasoning involving the third category, protection of the electoral process.

Voter protection. This category encompasses any political falsity statute passed for the purpose of protecting voters. Such reasoning generally took two forms: states either sought to prevent fraud against voters or other forms of disenfranchisement which would lock voters out of the elections process, or they sought to ensure that the election accurately reflected the will of the voters.

Colorado, Indiana, Louisiana, Minnesota, Oregon, Utah, West Virginia, and Wisconsin all incorporate some version of the logic that voters needed to be protected into their reasoning for the enactment of the statute.

Three states, Colorado, Utah, and Wisconsin, were especially concerned with the idea that if lies were allowed the votes that were cast would not accurately reflect the will of the voters, either because they would depress turnout, cause vote-switching against a voter's best interests, or otherwise impact the result of the election.

Every other state in this category passed the law as a portion of process-based voter protection rather than results-based voter protection. These states were less concerned that the outcome of the election would be adversely impacted or that the will of the voters would fail to be expressed, but worried instead that the voters would be unable to express their informed opinions (Louisiana) or would otherwise be swindled out of the process of the election.

As with the candidate protection category, this category of reasoning was frequently paired with the third category of state reasons for adopting statutes which regulate the use of falsity in political campaigns, that being protection of the election process itself. Three states, Minnesota, Indiana, and Louisiana, incorporated both of these reasons into their justification for the passage of their specific laws.

Process protection. The final discrete category of justification for these laws is process protection, which here means any law designed to protect the fairness or integrity of the election itself. Eight states specifically sought to promote fair elections, these being Indiana, Louisiana, Minnesota, Mississippi, Nevada, North Dakota, and Washington. Several of these states referred to the “integrity” of the election process as worthy of protection and important to the overall health of a democracy.

In a similar move, Florida actively protected transparency in elections, seeking to ensure openness and honesty among candidates on the campaign trail. The move to protect transparency is noteworthy given that the Florida statute applies only to lies told about candidates by other candidates, therefore making transparency a much more viable issue to target.

Louisiana essentially made two arguments for its protection of the election process, first that the process needed to be protected because it was quite literally the cornerstone of democracy and infringement on the election process would undermine the structure as a whole, and second that elections ought to be not only fair but also ethical.

New York is the state in this category which does not fit quite as well as the others. New York’s process-based justification for the law is the stimulation of debate. While the underlying reason to stimulate debate is of course the belief that vigorous debate is key to the democratic process and thus to the cornerstone argument that the Louisiana legislature has forwarded, this reasoning is merely implicit in the statute and much less overt than in the case of Louisiana. Further, the state that New York’s justification is most similar to is actually Michigan, who adopted its statute to encourage “responsible political debate,” but the Michigan state only prohibited anonymous statements, not false ones. It’s interesting that the reasoning for the two statutes is so similar, given that the legislation was so different: the overturned New York statute

very specifically prohibited certain kinds of lies told about candidates, while Michigan just requires everything be linked to a candidate. In spite of the difference in the laws themselves, the goal was the same: to protect the legislative process by making it safer for candidates to engage in vigorous debate.

Exceptions. Two states do not fit in well with this categorization. The first is North Carolina, which was the only state to say anything remotely resembling the idea that it should prevent falsity in political campaigns to restore faith in government. It is possible that certain other state reasoning could be interpreted to fall within this, particularly those states that talk about the necessity of the integrity of the democratic process, but certainly none come close to the argument that faith in government could be restored by a cleaner elections process.

The second exception is Ohio, which in an odd way was also trying to restore faith in government. Ohio's statute, and the existence of its entire elections commission, was a direct response to the Watergate scandal. After seeing a massive case of political lying divide the nation, Ohio decided to rein in its own elections process. This could vaguely be considered a process-based or even voter-based protection, but the reasoning from the state of Ohio is so specific that it really does not fit in with the broad, more generic reasons offered by other states.

States Share Reasons for Development

The detailed overview of each state that has or had a false statement law has revealed that on the whole, states do have overlapping reasons for adopting these false speech states, even if not every state overlaps with every other. With the exception of North Carolina, for its "faith in government" justification, and possibly Ohio, for the aforementioned room for an ambiguous interpretation of its justification, every state that has or had a law prohibiting false statements

about political candidates used at least one of the three categories of protections outlined above in its justification, those being candidate-based, process-based, and voter-based, although the last could perhaps be construed as “citizen-based” and remain accurate.

Process-based justifications were by far the most common, accounting for ten of the 20 states in whole or part. It was also the most frequent mate for a justification in any other category: of states using two categories of rationale (and no state used more than two), process-based justifications were always the pair, which is to say that no state paired a candidate-based justification with a voter-based justification.

The possible exception to this is New York, which is categorized for the purposes of this research as a candidate-based and process-based state, based on the proscription of legislative intent in the notes of the statute itself, but the court opinion in *Vanasco* has a vague suggestion that there exists an interpretation of New York’s intent which may have been voter-based (*Vanasco v. Schwartz*, 1975). This is deliberately overlooked for the purpose of this analysis in favor of the legislatures own articulation of its intent, but this does not preclude the previously mentioned possibility.

In consideration of the pairs of justifications used, it is also noticeable of states which used candidate-based reasoning, 40 percent (2 of 5) used *only* such reasoning, of state which used voter-based reasoning, 63 percent (5 of 8) used *only* such reasoning, and of states which used process-based reasoning, 40 percent (4 of 10) used *only* such reasoning, making voter-based justifications the most popular single-category reasoning, both by the percentage of states within the category to use only that reasoning and by the total number of states which used only that reasoning.

Additionally, of the states whose justifications fell within the categories enumerated, one-third used multiple categories of justifications. Of course, many states had more than one independent reason for enactment, but only six had reasons which spanned multiple categories (for example, “candidate protection” and “encourage running for office” are both candidate-based protections).

This categorization allows the question “Do states with campaign false statement laws share reasons for developing them?” (RQ5) to be answered affirmatively: in nearly all cases (with the two above-referenced exceptions), states do have similar reasons for adopting campaign false statement laws.

The obvious next step becomes a determination of whether there are other trends in the development of such laws broadly, or in which states developed laws within a specific category of justification.

Trends in False Statement Laws

In searching for trends in the development of false statement laws (RQ6), the initial instinct is of course to look for a correlation between geography and the states which have adopted false statement laws. However, it quickly becomes apparent that these states could not be much more geographically diverse if they tried: they span from coast to coast across the map in every direction, with a perhaps visible but not theoretically significant gap in the heart of the country, where the Midwestern plains states seem less apt to adopt such laws.

Even controlling for states which no longer have false statement laws and removing them from the map fails to reveal some area of the country more likely to adopt false statement laws.

In fact, a state in every federal appellate district has or had a false statement law at some point in time.

Next, one considers the possibility that there may not be regional differences in the adoption of these laws generally, but that such differences may appear in the justifications for the laws. Using the three categories outlined above, this again reveals limited information. It is noteworthy that there does appear to be a stronger proclivity in the eastern United States for candidate-based justifications and in the western United States for voter-based justifications. The latter has much more support: while it is true that few states in the western United States used a candidate-protection justification, the relative scarcity of this reasoning at all means that this is still a nearly-even divide. In contrast, states west of the Mississippi River seem more likely to adopt voter-protection statutes, but a somewhat more telling margin of five to three.

There is also a theoretical justification for the consideration that states west of the Mississippi River may adopt more voter-focused protections. Kruse argues that these western states are both more likely to have forms of direct democracy and to use them, which could suggest that they would also feel more pressure to protect the voters to ensure that direct democratic processes accurately reflect voter desires (2001). It is in large part these western states which make reference to “the will of the voters” in their justifications.

Kruse suggests that since the western states were in their formative years when the first state adopted the initiative and the referendum (South Dakota, in 1898), “not surprisingly, the initiative, referendum, and recall are largely a western phenomenon.” Given this argument, the states with false statement laws were compared to states which allow recall, constitutional initiatives, statute initiatives, or popular referendums.

This has several interesting results. First, only three states have a current false political speech statute and none of the four instruments of direct democracy mentioned above. All three of these are eastern states (Tennessee, North Carolina, West Virginia), but it seems just as likely that the presence of all three in the east is a coincidence born of the relative unpopularity of direct democracy tools in the eastern states, than that it has to do with the correlation with prohibitions on false speech about candidates. It would be far more logical to presume that this is likely commentary on the emphasis on tools of direct democracy in the east than to presume that it is about the false statement laws. This is particularly true given that half of the eastern states with a current campaign false statement law do have at least one tool of direct democracy and half do not.

A look at the western states may be more revealing. Of states west of the Mississippi River, half of those with current campaign false statement laws also have all four of the tools of direct democracy considered in this analysis. There is a logical argument to be made that states which adopt all the tools of direct democracy would also seek to protect the populace, and this is supported in part by the fact that the states in question use a variety of reasons for the implementation of these laws but none discussion candidate-protection; they are all designed to protect either the voter or the election process.

States which have or had a false statement law but do not have all four mentioned tools noticeably all lack the possibility for a constitutional initiative. Although 18 states allow this process, every state in the West with a false statement law which does not have all four direct democracy tools under consideration (Minnesota, Louisiana, Washington, Utah, and Alaska) is at least missing constitutional initiative capacity.

Further, of states which do have all four direct democracy tools (California, Nevada, Arizona, Oregon, Montana, and Colorado in the West) only California and Arizona do not have a campaign false statement law. California does, however, have a voluntary pledge not to make false statements that candidates are asked to sign.

Another noticeable feature of many of these statutes is that they include within their text both the candidate falsity law and a falsity law about ballot propositions. Although many states have or had a prohibition on making false statements with regard to candidates that do not have a prohibition on false statements with respect to questions posed to voters, of 13 states with such ballot question falsity laws, only one (South Dakota) does not also have a candidate law.

In their analysis of whether a right to lie in campaigns and elections exists, Nese and Mancil (2014) differentiate between states which make false statements about a candidate a criminal act and those who have civil penalties for it. By and large, these statutes are almost entirely criminal. In fact, of the five states which had civil penalties for violations of the prohibition (Florida, Indiana, Montana, New York, and Oregon), only two still have the prohibition at all (Florida and Oregon).

One obvious trend to look for is whether there is a political party similarity among states which adopt these statutes. In considering this issue, this work looks at the political control of state legislatures at the time the laws were enacted in each state. Thus, it makes a comparison between such items as the party in control in Nevada in 1997 with the one in control in Minnesota in 1913. Beginning in the 1970s, much of this information is collected from a National Conference of State Legislatures (NCSL) report by policy analyst Kae Warnock. For early adopters of these laws, party control was either identified in state records of such control or by identifying majority leaders in each house (2015).

This makes immediately apparent that half of the states which have at some point enacted such a law were controlled by the Republican Party in both houses at the time of enactment (Colorado, Indiana, Massachusetts, Minnesota, Montana, North Dakota, Oregon, Utah, West Virginia and Wisconsin). Michigan was also Republican at the time its law was adopted (1954), but is, as before, excluded from this analysis. Three states were split at the time of adoption (Alaska, Nevada and New York). Each of these had a Republican Senate and a Democratic House when it enacted these laws. The remaining third of relevant states were controlled by Democrats in both houses at the time of enactment.

There is, however, a noticeable difference in the trends of these states. Louisiana (1976), Ohio (1976), and Washington (1984) adopted their statutes much later than the other Democratic states, which all adopted their laws between 1931 and 1953. Thus, while Louisiana and Ohio represent Democratic states to adopt these laws as the “Solid South” was breaking up, every state controlled exclusively by Democrats prior to 1968 which adopted one of these campaign false statement laws is a former member of the Confederacy. This speaks not to the likelihood of former Confederate states to adopt these laws, since many former Confederate states never adopted such laws, but rather to the likelihood that a state which adopted such a law before 1968 would only do so if it was controlled by the Republican Party. 1968 is used here as the cut-off year since it marks the election of President Nixon, generally considered to be the end of the blue “Solid South” (Moser, 2013). During the 1970s, only states controlled in at least one house by Democrats (Alaska, Louisiana, New York and Ohio) adopted these laws. In 1980, these laws returned exclusively to the purview of Republican legislatures, with the exception of Democratic Washington in 1984 and divided Nevada, the last state to adopt its first campaign false statement law, in 1997.

As such, in seeking trends among the states which have developed these statutes, the most telling comparisons are those to other protections offered by the state to its citizens, such as acts of direct democracy and the attempt to regulate false statements about ballot initiatives, and those about political party at time of enactment. States which extend some of the aforementioned protections to their citizens are more likely to also include others. This is particularly true with regard to the likelihood that a state with a prohibition on false statements about ballot initiatives also has a prohibition on false statements with regard to political candidates. The issue of regulating false political speech appears to somewhat bipartisan, with a slant towards being a Republican issue, and most states consider this worthy of criminal penalties, most often resulting in a misdemeanor charge. These statutes were all adopted in roughly the last century, appearing sporadically throughout the country in their earliest forms.

Previously Overturned Political False Statement Statutes

In Chapter 3, several states which had lengthy court proceedings or numerous trials on the constitutionality of their false statement laws were mentioned in passing. Today, there are six states which once had a law prohibiting false statements about political candidates where the law no longer exists at all. Of these, Indiana is the only state where the law was repealed by the will of the legislature. The five other states which once had such statutes and no longer do are all instances in which the law was overturned by a court.

In addition to Minnesota, Montana, Nevada, New York, and Ohio, the five states who no longer have laws, Washington and Louisiana both have false statement statutes which were at one point overturned either in part or in their entirety but have since been reenacted in a modified format by the state legislature.

In the cases of Minnesota and Ohio, the relevant statutes were overturned near the end of the most recent legislative session, which leaves open the possibility that some modified form of the law may be enacted in the future. This may be particularly likely in a state such as Minnesota, which has repeatedly enacted a modified statute prohibiting false statements about political candidates after receiving unfavorable judicial decisions.

The following section will examine in detail the justification for declaring all or part of these laws unconstitutional. Although the enactment session included a brief discussion of the history of judicial decisions with regard to these laws, this will add the benefit of an examination of the specific judicial reasoning which occurred in each instance, in an effort to determine the existence, or lack thereof, of common threads by which these laws broadly may be deemed unconstitutional.

This section will not address the willful repeal of the statute by the Indiana state legislature, since this is outside the scope of a discussion on whether or not states have a right to criminalize lying in elections.

Louisiana

Louisiana's prohibition on false statements about political candidates is part of a lengthy statute in which a number of other election acts either are currently or were once prohibited. This included a subsection on anonymous statements, similar to the one which exists today in Michigan, which was overturned by court. However, only the court's reasoning with regard to its overturn of the false statement portion of the law is conceptually relevant.

In 1988, Louisiana amended the language of the false statement portion of the statute to read:

No person shall cause to be distributed, or transmitted, any oral, visual, or written material containing any statement which he knows or should reasonably be expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters (*State v. Burgess*, 1989).

However, since the amendment was not retroactively effective and the state had charged defendants Paul Burgess and James L. Fitzgerald with violations of the statute prior to 1988, the court evaluated only the statute before the amendment, which read:

No person shall publish, distribute or transmit, or cause to be published, distributed, or transmitted, any oral, visual, or written material containing any statement which makes scurrilous, false, or irresponsible adverse comment about a candidate for election in a primary or general election or about a proposition to be submitted to the voters, unless the publication contains the name(s) of the person(s) responsible for its publication (*State v. Burgess*, 1989)

This older statute appears on face more complicated and includes specifics that the legislature did away with on its own accord in 1988. One such detail is the limitation to only anonymous false statements.

In its decision, the court in *Burgess* applied the standard developed in *New York Times v. Sullivan* (1964) for constitutionally protected false speech with regard to public figures. It held that “lies and false statements” receive constitutional protection under the first amendment unless such statements are proven to have been made with ‘actual malice.’ In doing so, the court reasoned, “Although this standard was applied in the context of civil defamation suits, it is clear the standard defines the parameters of protected speech involving figures” and that the nature of the statute meant that anyone it applied to would inevitably be a public figure (*State v.*

Burgess, 1989). The court further took issue with the portion of the statute which reference ballot initiatives, going so far as to use the phrase “particularly disturbing” in expressing its feeling that the statute regulated speech which was absolutely entitled to First Amendment protection. In going on to conclude that the statute neither advanced a compelling interest nor was sufficiently tailored to do so, the court determined the statute unconstitutional.

However, since the court was only evaluating the pre-1988 version of the law, the newer version remained on the books. This raises the question of whether such interpretations might also have applied to the newer statute.

Although the use of actual malice and the lack of a narrowly tailored statute will be used as comparison points to the decisions of other courts, the fact that the court in *Burgess* addresses the anonymous statement version of the statute could differentiate this decision from the pure false statement statutes that this work seeks to analyze.

Minnesota

The earlier discussion on the Minnesota statute makes note of the fact that the Minnesota prohibition on false statements about political candidates has in fact been overturned twice, first in 1996 and then in 2014.

In *Minnesota v. Jude*, the court decided that language making political false statements a crime if person “knows or has reason to believe” they are false made the statute unconstitutionally overbroad (1996). Much like Louisiana, the court in *Minnesota v. Jude* then applied the *Times v. Sullivan* actual malice standard, latching onto an argument made by the state that the language in the statute in question should be “narrowly construed, to avoid a finding on unconstitutionality, as covering only statements made with “reckless disregard” of their truth or

falsity,” as is applied by *Times v. Sullivan* (*Minnesota v. Jude*, 1996). The court concludes that it is the presentation of the language of the statute before the grand jury in this instance, rather than the language of the statute itself, which makes it unconstitutional, and says that it cannot narrowly construe the statute in this particular instance, but that such narrow construction would change its decision with regard to the constitutionality of the statute. The court concluded the statute was unconstitutionally overbroad because it “extends to statements not made with ‘actual malice’” (*Minnesota v. Jude*, 1996). Although the statute was challenged several times, it was not again declared unconstitutional until *Care Committee v. Arneson*, which received its most recent adjudication in 2014. The Eighth Circuit Court of Appeals upheld a trial court decision from 2011 declaring the statute unconstitutional in September, and refused to rehear the case in October.

In its current campaign manual, Minnesota summarizes the results of these court endeavors by saying that the statute “presents a credible threat of prosecution for non-defamatory speech about ballot initiatives and plaintiffs presented sufficient allegations that their non-defamatory speech about ballot initiatives had been chilled” (2014, p. 30). Since Minnesota is one of several states which ties its prohibition on lies about ballot initiatives into the same sentence as the prohibition as lies about candidates, any decision about one part of the law by its nature would affect and even overturn the other. Thus, while *Care Committee v. Arneson* was a case about the ballot initiative law, its result affects the candidate portion of the law as well.

The court in *Care Committee v. Arneson* found its decision to be effected on the margins and in the details by the intervening years between the trial court and the end of the appeals process, specifically the *Alvarez* decision in 2012. Specifically, the court found itself varying analysis between strict scrutiny and intermediate scrutiny, although it ultimately concluded that

political speech was distinct enough from the question in *Alvarez* so as to make it appropriate to apply strict scrutiny (*281 Care Committee v. Arneson*, 2014).

Ultimately, the appellate court concluded that, in part based on the decision in *Susan B. Anthony List v. Driehaus*, a credible threat of enforcement did exist so as to potentially chill future speech about ballot initiatives. The court cites the decision in *McCutcheon*, stating, “Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people” (*281 Care Committee v. Arneson*, 2014)

The court actually concluded that political speech, even false political speech, deserves the most protection to “assure the unfettered interchange of ideas for the bring about of political and social changes desired by the people” because “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs” (*281 Care Committee v. Arneson*, 2014). Given this, the court then looked at whether the state had a compelling interest in protecting the integrity of its elections process. Although it concluded that such a reason did exist, it also found that this was still problematic when it came at the expense of potential public discourse. Thus, the crux of the decision was that the statute was not sufficiently narrowly tailored so as to avoid having a chilling effect on potential political speech.

Montana

Montana’s prohibition on false statements about political candidates has been overturned twice, first in 1998 and then again in 2012. As mentioned previously, Montana amended the statute in 2013 to exclude the language which had prohibited false statements generally and left

only the regulation prohibiting false statements about a candidate's voting record ("Misrepresentation of voting record," 2014).

Curiously, such regulation may still be subject to a similar judicial process, since arguably false statements about a candidate's voting record were essentially the central question in *SBA List v. Driehaus*, depending on whether the statute is interpreted to exclude only such statements as say a candidate voted for a certain bill which he or she voted against or whether it includes potential misrepresentations of what was included in a bill that a candidate did vote for (such as Susan B. Anthony List's interpretation that the Affordable Care Act was a vote for taxpayer funded abortion).

Regardless, the 1998 decision found that "Core political speech, that which Mont. Code Ann. § 13-37-131 attempts to regulate, occupies the highest, most protected position in the rough hierarchy in the constitutional protection of speech" and thus the statute was impermissible because it would inevitably lead to "self-censorship," the equivalent of the now-familiar chilling effect argument (*Montana Right to Life Assoc v. Eddleman*, 1998).

In an attempt to rectify this flaw, Montana modified certain aspects of the language of the statute, including specifically including a "reckless disregard" standard within the text of the statute. In addition, the 1999 amendment included replacing the phrase "or to make or publish a false statement that reflects unfavorably upon a candidate's character or morality" with "or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false" ("Misrepresentation of voting record," 2014).

The phrase "or any other matter that is relevant to the issues of the campaign" became problematic in *Lair v. Murray*. The statute was deemed unconstitutionally vague and overturned,

because there was “no way to know what constitutes a matter "relevant to the issues of the campaign,” and thus, the statute fails to clearly mark the boundary between permissible and impermissible speech” (2012). The court was vehemently opposed to this language, positing, “There is simply no way for a person or an organization to know with certainty whether an issue is "relevant" to a candidate's campaign” (*Lair v. Murray*, 2012).

The defendants in this instance argued that if a statement is made about a candidate, this would make the speech “relevant” to the issues of the campaign. The court had two responses: that “relevancy is in the eye of the beholder” and is thus a subjective metric of determination and that if the defendants were determined to be correct in their interpretation of the meaning of the statute, it would then be unconstitutionally overbroad.

This latter reasoning is more similar to that which has appeared in other court decisions on the topic, and thus warrants consideration, but it is the vagueness of this particular statute which caused it to fail the test of constitutionality.

The ultimate reason that an unconstitutionally vague statute is problematic is that it acts to chill speech it may not have intended to lock out (or which should otherwise be allowed). Specifically, the court says:

A statute is unconstitutionally vague if it fails to clearly mark the boundary between permissible and impermissible speech. Statutes that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. Stated differently, a statute must be

sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited (2013).

All three of these reasons are in line with the fears of previously mentioned courts in rejecting these statutes: that they are unable to differentiate effectively between legal and illegal speech about candidates.

Nevada

Like the circuit court in *Care Committee v. Arneson*, the district court for Nevada in *Nevada Press Association v. Nevada Commission on Ethics* agreed that preserving the integrity of the election process was a “compelling, legitimate interest” but found that the shortened procedure created by the statute for the resolution of any complaint violated due process (2005).

The court concludes:

Plaintiffs were not unreasonable in their belief that the designation of the Nevada Commission on Ethics as the decision-maker could *chill protected speech* for some people, and defendants failed to indicate how the appointment of the Ethics Commission as the decision-maker was necessary to serving the state’s interest in preserving the integrity of elections (*Nev. Press Ass’n v. Nev. Comm’n on Ethics*, 2005).

The “extremely abbreviated process” that the court took issue with gave an alleged violator “two business days to file a response that must include evidence and arguments.” Failure to do so allowed “the Ethics Commission (1) to prohibit the alleged violator from presenting evidence at the hearing, and (2) to draw “appropriate conclusions” from the failure to submit evidence” (*Nev. Press Ass’n v. Nev. Comm’n on Ethics*, 2005).

In essence, the Nevada court found that while there was in fact a compelling interest in protecting the integrity of the elections process, this statute was again not narrowly tailored so as to further that interest without causing undue harm elsewhere, specifically by violating due process and, in doing so, chilling political speech.

The Nevada statute, prior to its overturn, did actually possess a number of aspects which other courts had declared statutes unconstitutional for lacking; most notably, it had a specific reference to the actual malice standard (Common Cause, 2008)

Shortly after the decision, Nevada chose to repeal the offending provisions of its campaign practices act, rather than amending them as other states had done in the wake of unfavorable judicial decisions. The Nevada Commission on Ethics explicitly declined to appeal the decision (Jennings, 2005).

New York

As mentioned previously, the New York statute regarding false statements about political candidates was actually on the books a very short time. Unlike some other states, when parts of the statute were declared unconstitutional, including the prohibition on false statements about political candidates, New York simply struck it from future versions of the law.

In the first move to find one of these laws unconstitutional, the court in *Vanasco v. Schwartz* declared the statute unconstitutionally overbroad for essentially two reasons: it was an unconstitutional content based restriction and the phrase “misrepresentation” could apply to nearly anything and limit out all campaign speech (*Vanasco v. Schwartz*, 1975). As Kruse (2001) notes, “prohibiting misrepresentation could encompass not only false speech, but also

innuendoes or inadvertent misstatements. While something such as party affiliation is necessarily a question of fact, qualifications and political stances are subject to opinion.”

Of particular note in this decision is a comment made within the opinion that “the panel determined that the public interest in hearing statements about opponents was more valuable than the alleged protection that the Code was intended to offer citizens by restricting misleading statements” (1975). Much as statutes such as Nevada’s were determined to advance a compelling interest but not be sufficiently narrowly tailored, the interest New York had in restricting misleading statements was seen to be secondary to the need for as much open political speech as possible. The statute also acted as an unconstitutional prior restraint on speech, an argument largely absent from more recent decisions.

Kruse (2001) succinctly examines the problems with the specificity of the New York statute in question in *Vanasco v. Schwartz*:

The New York statute prohibited attacks on candidates based on "race, sex, religion or ethnic background." While offensive, such attacks involve protected speech and to prohibit them would be unconstitutional. Even if one were to construe race, religion, and gender attacks as categories of fighting words, no fighting words law may be content-based and thus the statute would remain overbroad (Kruse, 2001).

A final argument for the overturn of the New York law was the lack of any language about intent within the statute, meaning that it failed to apply the *Times v. Sullivan* actual malice standard that the court in *Vanasco* would determine was applicable to the statute, since it was a specific version of defamation against a public figure (*Vanasco v. Schwartz*, 1975). As noted, other courts would later use this same logic.

Ohio

The Ohio case is of particular importance because it marks the first move by the Supreme Court to rule on one of these statutes. Although the Supreme Court only answered the question of standing before remanding the case to the district court for further proceedings, the very fact that the Supreme Court granted standing seemed to be an indication that it found the law problematic.

In determining standing, the Court found that the organizations had “had alleged a credible threat of enforcement where their intended future dissemination of information criticizing votes on the Affordable Care Act concerned political speech” and was potential subject to regulation under Ohio’s law (2014). Further, it found that since the law had been previously enforced, including against Susan B. Anthony List, and anyone could file a complaint, it was likely to affect future speech by plaintiffs SBA List and COAST. The Supreme Court went on to say:

The fitness and hardship factors of the prudential ripeness doctrine were easily satisfied as the issue presented was purely legal and denying prompt judicial review would have forced the organizations to choose between refraining from core political speech or risk costly proceedings and criminal prosecution (*Susan B. Anthony List v. Driehaus*, 2014).

The specific finding that there was a credible threat of future enforcement and that the organization would have to choose between allowing their speech to be chilled and risking “costly proceedings” seems to be an indication that the court saw the potential for the statute itself to have a chilling effect on speech; in essence, in order for Susan B. Anthony List and COAST to have standing, there was a demonstrable risk of a chilling effect on speech, which, as

noted in the previously examined decisions, is often a cornerstone in overturning one of these laws.

Election law expert Rick Hasen notes that the decision relies almost entirely on *Alvarez* (2014). Further, very much in accordance with language the Supreme Court used in determining standing, the court stated, “The chilling effect is more powerful, because the falsehoods concern politics, and even the truthful speaker is subject to substantial burdens and costs from the OEC proceedings, even if ultimately acquitted” (*Susan B. Anthony List v. Ohio Elections Commission*, 2014, p. 19). The decision actually goes on to criticize the knowledge and intent standards that other courts had lamented the lack of, arguing:

the fact that the speaker’s subjective knowledge bears on the liability actually becomes a basis for broad and hugely burdensome discovery into the speaker’s political communications and affiliations, such as strategic discussions with political parties, other candidates, or campaign allies. This type of discovery has a significant chilling effect (p. 19).

Much as the court in *Nevada Press Association v. Nevada Commission of Ethics* did in 2005, the *Driehaus* decision goes on to take issue with the process by which complaints are handled: “in practice, these procedural safeguards actually exacerbate the statute’s chilling effect because, for example, discovery often takes place in the critical days before the election, which distracts the speaker from its advocacy” (p. 19). It further found that the intent clause in this statute is virtually meaningless, since any statement about a political candidate or with regard to a campaign would be with the intent to affect the outcome of the election.

Once again drawing on *Alvarez*, the decision concludes that “counterspeech,” responding to the false statements with true ones, is not only the best remedy available but in fact the best possible for countering false statements with regard to political candidates.

Washington

As mentioned in Chapter 3, the Washington statute has been overturned and promptly reinstated several times. The 1998 Vote No! decision was significant, because it made the Washington State Supreme Court the first to apply the federal First Amendment to one of these statutes (Kruse, 2001). Earlier decisions had referenced the First Amendment equivalent on the books in the state in question.

In its decision, the court in Vote No! said of the provision that it “chills political speech, usurps the rights of the electorate to determine the merits of political initiatives without fear of government sanction, and lacks a compelling state interest in justification (RCW § 42.17A.335).

The Vote No! decision specifically and in detail deals with the question of whether or not states have the right to determine the truth or falsity of political (or any other) speech, which many of the other courts opted not to delve into (1998). The court argues that the claim that the state has a right to limit out false statements of fact in any political advertising “presupposes the State possesses an independent right to determine truth and falsity in political debate. However, the courts have “consistently refused to recognize an exception for any test of truth” (*State Public Disclosure Commission v. 119 Vote No! Committee*, 1998) Like Ohio, the Washington court posits that the purpose of the First Amendment is to give the public the right to determine the difference between truth and lies, perhaps most importantly with regard to politics.

In declaring the statute unconstitutional, the court made reference to the chilling effect created in 1798 by the Sedition Act. Perhaps because of ensuing language in the majority decision that the statute “restricts political speech absent the competing interest present in defamation cases,” the Washington state legislature came to the conclusion that what the court must have meant was that if the act was more similar to a defamation statute, specifically invoking falsehoods about candidates, then it would no longer be unconstitutional (*State Public Disclosure Commission v. 119 Vote No! Committee*, 1998 and RCW § 42.17A.335.). Thus, the 1999 amendment to the statute was born.

The ensuing decision in *Rickert v. State, Public Disclosure Commission* isolated three areas of explanation for the amended statute also being unconstitutional. First, it deemed the interest in protecting political candidates (the court here notes that this would include the legislature itself) was not a compelling interest. Second, if it were a compelling interest, there was no requirement that the statements be defamatory to be prohibited. Finally, the enforcement procedures were flawed and likely to have a chilling effect (2007).

The legislature ignored the court commentary about the self-serving nature of a candidate protection law and instead focused on the second reason, found in the concurring decision, that if there were to be a compelling interest the statute was still not narrowly tailored because its scope was not limited to defamation. The legislature quickly jumped back in the game with a new amendment, complete with a defamation clause, and clarified that its intent was now to fall in line with this concurring decision.

Comparison of Court Decisions

The examination of reasons for rejecting these statutes above sought to act in part as an articulation of trends and distinctions among these decisions. Notably, nearly every one of these decisions has at its heart the idea that these statutes chill free political speech, and that that speech is more important to the political process, democracy, and fundamental rights than regulating it is to the state's interest in the integrity of elections. Even those decisions which did not directly or in a place of prominence refer to the chilling effect of the law ultimately boil down to constitutional presses which at their core are about chilling effects.

There appears to be a developing consensus that as these laws are all about public figures, they must all use the actual malice standard in determining whether or not a crime has been committed. Washington in particular seemed to take issue with the notion that this was a crime rather than case of civil damages to the injured party (*State Public Disclosure Commission v. 119 Vote No! Committee*, 1998).

There is some discrepancy among the states where these laws have been overturned about whether or not the preservation of the integrity of elections (or in some cases, the protection of candidates) is a compelling interest. In the case of states which did overturn these laws, even those which found this to be a compelling interest were not persuaded that the laws were narrowly tailored to achieve their goals. Of course, states which ultimately determined that such laws were constitutional may have found that the provisions in the statutes were in fact sufficiently narrow.

Three states, Nevada, Ohio, and Washington, had at least one decision which made specific reference to the nature of the review process as being a component of the unconstitutionality of the statute. In Nevada, the bulk of the decision was based on this.

This overview of the relevant court decision answers the descriptive question “why have some of these laws been overturned” (RQ4) and creates a fairly straightforward process by which to analyze the constitutionality of these statutes. Although some states have “disagreed” with the decisions discussed here (by congressionally reenacting these laws once overturned by a court), it is much more important to consider whether there are flaws in the structure of these laws or in the presumption that the state has a right to regulate falsity which could justify a sweeping decision to overturn all such statutes. The concluding chapter will address the texts and intents of these statutes, located within the broader frame of the debate on whether states have a right to regulate falsity, to formulate a response to this question.

CHAPTER 5

A RIGHT TO LIE IN POLITICAL CAMPAIGNS

Who has the authority to distinguish between truth and lies? In the context of political campaigns, the research in this thesis demonstrates that such authority is unlikely to exist at all. Perhaps more importantly, if such authority does exist, it is unenforceable and functionally useless.

State legislatures across the country have developed statutes to regulate false campaign speech, but it is not possible to narrowly tailor those statutes to achieve their goals. The core problem of such laws is that if they adhere to due process, their decisions do not occur in time to be beneficial to candidates, and if their decisions occur in time to be beneficial to candidates (such as before the relevant election), then the abbreviated procedure is in violation of due process. As such, the only genuine legal solution for a victim of false campaign speech is to default to a state's libel laws. Any law which is constitutional would look almost identical to a libel statute anyway, and therefore having a specific law actually has little or no value.

The fundamental question which all of these statutes are premised around is identified clearly in *119 Vote No!*: does the government have the responsibility, or even the right, to regulate the veracity of political speech (1998)? If the state does not have that right, then it logically follows that no statute regulating truth and lies in political speech could ever be constitutional, because its very nature such a statute would infringe upon undeniably protected speech.

If, however, a state does have some right to regulate truth and lies in political speech, the situation becomes much more complicated, because designing the ideal statute to put such regulations into practice becomes a matter of striking the appropriate balance between the interest of the state in ensuring the integrity of elections and the free speech rights of the public, as well as creating an appropriate mechanism by which to adjudicate complaints under the statute without infringing upon an individual's right to due process under the law. The preponderance of state court decisions on this topic suggest that no such statute exists and aggrieved parties should default to libel laws as a means of legal recourse, as shown in Chapter 4.

In seeking to examine the constitutionality of these statutes and answer RQ7, this section will first address the initial premise, that of the right of the state to regulate truth. Although this thesis has been focused on the right to regulate truth with regard to false statements about political candidates, it would be extremely relevant to expand the scope of this to other false statement regulations, such as those about ballot initiatives, to truly find an explanation for the desire to regulate false speech. This thesis will conclude by assuming for the purpose of argument that a right to regulate truth does exist and evaluate constitutional issues and assumptions of the statutes in an effort to determine what a constitutional statute might (or might not) look like.

Regulating Truth

“We are not arguing for a right to lie. We’re arguing that we have a right not to have the truth of our political statements be judged by the Government,” wrote plaintiffs Susan B. Anthony List and COAST (as cited in *Susan B. Anthony List v. Ohio Elections Commission*, 2014).

Do citizens have a right not to have the truth of their political statements judged by the state? In the same vein, does the state have the right to evaluate and regulate the truth of political statements?

Chapter 2 suggests that the Supreme Court has taken a very narrow view of the state's ability to act as the arbiter of truth. Although Hasen's prediction that *Alvarez* would largely settle this dispute has only partly come true, the case does seem to have set a trend in motion (2012a). If Chapter 2 is correct in its assessment that the Supreme Court believes that attempts to act as the arbiter of truth inevitably chill legal and truthful speech, then it follows that there can be no statute which prohibits false statements about political candidates, because any such statute would be unconstitutionally overbroad due to the chilling effect.

As such, it would seem that the comparison of state laws and relevant court decisions should lead one to the inevitable conclusion that an attempt to create a statute specifically regulating false statements made about political candidates is little more than an exercise in futility. If the goal of such statutes is genuinely to protect the elections process, voters, and candidates by creating mechanisms for quickly evaluating the truth of political speech and doling out effective punishments, then any statute would fall woefully short, since the immediate response of the individual or group on the receiving end of the punishment is logically to challenge the constitutionality of the law. Further, the law would necessarily violate due process, so the final court decision could never be in favor of the state.

A more reasonable goal of such statutes is therefore to dissuade false statements of fact about political candidates by creating such inconvenience via the proceedings that only reasoned statements which the speakers genuinely believe to be true are ever uttered. This, however, would mean that the goal of the statute is literally to chill speech, and it is difficult for one to

locate the bright-line between the chilling of undesirable and invaluable speech, namely, false statements of fact, and desirable political contestation. Moreover, deliberately chilling speech would be seen as unacceptable given First Amendment rights.

Many statements by the Supreme Court and its justices support the interpretation that any attempt at regulating false statements about political candidates will inevitably fall prey to the chilling effect argument. In *Times v. Sullivan*, the Court determined that free speech was the foremost of rights, for it was a defense against infringement upon other rights (1964). The logic goes that the response to infringement upon the rights of an individual or group of individuals would be for such persons to speak out against the government, which is only possible with a vigorously defended right to free speech.

While the *Gertz* contention that there is “no constitutional value in false statements of fact” seems to be the go-to for anyone attempting to regulate false statements about political candidates, the Court in *Gertz* argued that it is worse to chill true speech than it is to allow false statements of fact (1974). While *Gertz* suggests that opinions can never be false, it is again difficult to determine the distinction between an opinion and a false statement of fact in the context of political candidates. In 2014, Judge Black of the District Court for the Southern District of Ohio writes, “The problem is that, at times, there is no clear way to determine whether a political statement is a lie or the truth” (*Susan B. Anthony List v. Ohio Elections Commission*). Furthermore, the Washington State Supreme Court in *119 Vote No!*, while evaluating the validity of the premise that states have the right to regulate falsity, suggests:

The Supreme Court has recognized that to sustain our constitutional commitment to uninhibited political discourse, the state may not prevent others from “resort[ing] to

exaggeration, to vilification of men who have been, or are, prominent in church and state, and even to false statement (1998).

The court went on to say, “at times such speech seems unpalatable, but the value of free debate overcomes the danger of misuse.”

If all of this is held to be true, and thus the contention that the right to free speech outweighs almost all other considerations is equally held true, then there would be only an extremely limited set of circumstances in which a false statement statute could be constitutional. Based on an aggregation of the court decisions discussed in Chapter 4, a constitutional statute would have to explicitly use the actual malice standard and be narrowly tailored to use the least restrictive means possible, all before a consideration of the enforcement process happened. The enforcement itself would then need to be rigorous standards of due process.

This, however, still rests on the supposition that states have a right to regulate falsity. The Supreme Court decisions discussed in Chapter 2 seem to patently deny the existence of such a right, and this is before the political nature of these statutes is even considered. The very fact that these statutes attempt to regulate political speech would make it seem less likely that states would be found to have a right to regulate such falsity, for fear of a slippery slope into a dystopia whereby any criticism of the government is automatically false and thus illegal. Courts have also suggested that the decisions of regulating bodies will be inherently partisan and biased. Thus, it is next to impossible that any such statute could be found to be constitutional, because there is always a risk of a chilling effect or a slippery slope.

As time has passed, technology has only complicated this question. Does the internet affect the right to lie? White (2009) argues that “the Court’s regulation of [the internet] as it relates to political speech has been sparse” (p. 22). Since it fundamentally changes the way we

communication, there exists a possibility that it could affect the right to speech, if it's held that online speech is particularly damaging. The internet is distinct from earlier methods of communication, because "the 'lonely pamphleteer' has a soapbox to express opinions of thousands of interested readers. Individuals without the political or social clout to be heard on television can use the Internet to express a wide variety of viewpoints" (White, 2009, p. 22).

However, this appears to presuppose what it sets out to prove. There is no theoretically sound argument for why the pamphleteer who would have been unable to broadly project his or her speech prior to the existence of the internet is thus not entitled to do so. After all, there is no First Amendment stipulation that the right of free speech only applies to those with political or social clout. While there may, historically and currently, be limitations on the extent to which certain individuals are able to access and exercise their right to free speech, that in no way justifies unwarranted infringement upon such speech or suggests that such individuals no longer are entitled to those speech rights. It therefore becomes a burden of the state to prove that its infringement on such speech is warranted, which is where the discrepancies between the states which find protecting the integrity of elections to be a compelling interest and those which do not becomes an incredibly salient and even potentially determinative issues.

If the history of Supreme Court protection of false statements is ignored and it is presumed that the state has the right to act as the arbiter of truth, there are still a number of difficulties in enacting a constitutional version of the statute. As mentioned previously, any such statute must use the actual malice standard. Most of the state laws which currently exist use similar wording to this standard already (White, 2009, p. 49). A constitutional statute must also be narrowly tailored to advance the compelling interest, in this case, the protection of the integrity of the elections process.

Then, the enforcement mechanism would need to be put in place in such a way as not to violate due process. White argues that the appropriate way to do this is to use the actual malice standard to require “a mandatory retraction to ensure political speech is not chilled, to protect media defendants from ruinous lawsuits, and to give politicians a remedy that will limit damage to their reputation and deter future false ads” (2009). This could all be true, but it does not quite solve the due process problem. Any enforcement process that occurred quickly enough to reverse damage to a candidate’s reputation within the same election cycle would likely be a version of the abbreviated process with which the court in *Nevada Press Association v. Nevada Commission on Ethics* took issue. Further, a component of such a process is that the government regulation must either be an elected position itself, subject to the existing concerns, or it is by definition a potentially biased or partisan panel of unelected regulators, “allowing these government bureaucrats to unfairly influence an election” (Nese and Mancil, 2014).

Of course, there are some limitations to the practice of free speech, and these could be used to carve out room for enforcement. Libel, obscenity, and fighting words receive no protection under the First Amendment. However, political speech is treated as fully protected speech. If false statements about a candidate are independently able to be proven to be libelous, then they would be illegal for that reason. Given this, why would it be necessary to have an additional statute regarding false statements about candidates? Nese and Mancil argue that libel and slander laws are clearly sufficient for candidates to recoup damages, because some candidates have empirically done so (2014).

In fact, many states currently have statutes which read as though they are a specific form of defamation. The Oregon statute, for example, seems to simply articulate that a publication which “contains a false statement of material fact relating to any candidate, political committee

or measure” is cause for a civil action, and allows for the victim to recoup both economic and noneconomic damages (ORS § 260.532). It is unclear why this result would not otherwise be covered by the state’s libel statute. In addition, the Utah statute, which is cited in its entirety in chapter 3, essentially adds an intent clause about the integrity of elections to its defamation statute and makes it a criminal offense. These examples demonstrate that the penalties of these statutes, at minimum for the civil statutes, could likely be equally achieved via each state’s defamation law.

However, in the previous discussion of the intent of these laws, the possibility was considered that the goal is not to punish violations of these laws but rather to create incentives not to violate them in the first place. That is to say, the goal may not be to provide damages to the victim of political false statements but rather to create a mechanism by which to dissuade individuals from making such statements, thus making damage payments unnecessary. If this is the case, then the argument states have made in defense of their falsity statutes, such as in *Nevada Press Association v. Nevada Commission of Ethics*, that the laws are necessary to an expedited process which guarantees a result by the election begins to make sense. If the goal is not punishment, but persuasion, as seems likely, then decisions which happen in time to limit the effects of false statements on elections are necessary for such persuasion to be effective. This could explain why the response to Nese and Mancil’s suggestion that states turn to defamation laws is frequently that defamation cases take too long, and thus are ineffective in the political context.

And yet the necessity of the expedited process and the mechanism developed to make it happen may be precisely why these laws are unlikely to be constitutional. Any law which is efficient enough to be net-better at preventing false statements against candidates as compared its

state's defamation statute must necessarily create an abbreviated trial process which violates due process. Thus, we return again to the notion that while the goals of these statutes are arguably admirable, achieving them in a way that avoids the tendency to do more harm than good is extremely unlikely.

To avoid constitutional trouble, a state would need to be able to demonstrate a compelling interest in regulating false political speech about candidates which overwhelmed the aversion of the United States Supreme Court and various state supreme courts to truth commissions. Absent that, even an otherwise perfect statute would still fall to the onslaught of the fundamental question of whether the state has the right to determine truth and falsity at all, let alone in the context of political speech. The current academic debate and range of court decisions suggest that while false speech may not be granted constitutional protections, any effort to regulate it creates broader structural harms. It therefore would be unlikely that any current or potential prohibition on false statements about political candidates is constitutional. That these laws continue to be passed by state legislatures suggests much more about the nature of separation of powers than it does about the legality of such statutes. Libel laws are a sufficient, if not ideal, both as a deterrent for false speech and as a remedy for aggrieved parties. Only laws very closely resembling libel laws would avoid violating due process, and thus it is superfluous to have a false campaign statement law.

Further Research

In answering the primary research questions posed, this thesis has touched on new questions which practical limitations prevented it from immediately answering. This work has focused primarily on the regulation of false statements made about candidates by anyone,

including non-candidate entities. It would be interesting to look further into the legality of regulations on false statements made about candidates by other candidates only, such as the Florida law, which may find themselves on friendlier terms with the First Amendment. Further, states which have attempted to limit lying in campaigns for referenda or ballot proposals could be added into this research for a more complete picture of regulations on political lies.

Limitations on the availability of information may mean that ballot proposals would need an entirely separate body of research before the two could be reasonably combined. A more quantitative approach to this research could involve repeating this study for each of the four mentioned tools of direct democracy, including ballot initiatives, and comparing use rates for each. Finally, noteworthy trends may be uncovered by comparing states which have passed candidate false statement laws to those which debated but never passed these laws and those which never considered such a law. Again, limited records availability may inhibit the ability to accurately assess the existence of states which have debated passing candidate laws, and it would render the party analysis impossible, since there would be no year of reference for states which did not pass a law. However, such research might enable the researcher to discover other interesting trends in the development of regulations on false statements in the United States.

REFERENCES

- 2012 Presidential election results. (2012, November 19). Retrieved from <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president/>
- 281 Care Committee v. Arneson (United States Court of Appeals for the Eighth Circuit September 2, 2014).
- 9 NYCRR § 6201.1, Fair campaign code, New York Codes, Rules and Regulations (LexisNexis 2014).
- Alaska Stat. § 15.56.010, Campaign misconduct in the first degree (Justia 2013). Retrieved from <http://law.justia.com/codes/alaska/1994/title-15/chapter-15-56/sec-15-56-010>
- Alaska Stat. § 15.56.014, Campaign misconduct in the second degree (LexisNexis 2014).
- ALM ch. 56 § 42, False Statements, Annotated Laws of Massachusetts (Lexis Nexis 2014).
- Alman, A. (2014, September 11). Judge strikes down Ohio's false statement campaign law as unconstitutional. Retrieved from http://www.huffingtonpost.com/2014/09/11/ohio-false-statement-law_n_5807278.html
- Anderson, J. M. (2014). Re: Cease and desist demand letter [Letter written September 15, 2014 to Wendy Holmes, Program Director, KCNC CBS4]. Retrieved from <http://blogs.denverpost.com/thespot/files/2014/09/KCNC-CBS4-.pdf>
- Bill of Rights Institute. (2010). Alien and Sedition Acts. Retrieved from <http://billofrightsinstitute.org/resources/educator-resources/americanpedia/americanpedia-documents/alien-and-sedition-acts/>
- Brief history of fair elections victories. (2008). Retrieved from <http://www.publiccampaign.org/briefhistory>
- Burns Ind. Code Ann. § 3-14-3-22 (Lexis Nexis 2014).
- Common Cause. (2008). *Deceptive Practices 2.0: Legal and Policy Responses* (Issue brief).

Crownhart, C. H. (1921). *Wisconsin Statutes* (Vol. 1) [Google Books Digital Archive]. Retrieved from

https://ia600406.us.archive.org/21/items/wisconsinstatut00wiscgoog/wisconsinstatut00wiscgoog_djvu.txt

Fla. Stat. § 104.271, False or malicious charges against, or false statements about, opposing candidates; penalty (LexisNexis 2014).

Florida Elections Commission. (n.d.). Florida Elections Commission frequently asked questions. Retrieved December 20, 2014, from www.fec.state.fl.us/

Furst, R. (2014, September 3). Appeals court strikes down 101-year-old Minnesota law that makes lying about ballot initiatives a crime. *StarTribune.com*. Retrieved from www.startribune.com/

Gertz v. Robert Welch, Inc. (June 25, 1974) (Justia, Dist. file).

Haas, S., & Smith, A. (1981). *A background report on false representation in election campaigns* (Rep.). Retrieved from books.google.com

Harris, E. (2011, July 14). On This Day: Sedition Act of 1798 Becomes Law. Retrieved from <http://www.findingdulcinea.com/news/on-this-day/July-August-08/On-this-Day--Sedition-Act-of-1798-Becomes-Law.html>

Hasen, R. L. (2012a). A Constitutional Right to Lie in Campaigns and Elections? *Montana Law Review*, 74(1).

Hasen, R. L. (2012b, January 10). Opinion: Has SCOTUS OK'd campaign dirty tricks?

Hasen, R. L. (2014, September 11). Breaking: Federal court strikes down Ohio false campaign speech statute: Analysis. Retrieved from <http://electionlawblog.org/?p=65323>

Independence Hall Association. (2008). The Alien and Sedition Acts. Retrieved from <http://www.ushistory.org/us/19e.asp>

Indiana §§ 3-14-3-1-14-3-24, Interference with Free and Equal Elections (FindLaw 2013).

- Jennings, S. M. (2005, May 5). AB 546 [Letter written April 27, 2005 to Members of the Senate Legislative Operations and Elections Committee]. Retrieved from ethics.nv.gov/
- Kestenbaum, L. (2014, December 15). The Political Graveyard: Index to Politicians: Vann to Vanvranken. Retrieved from <http://politicalgraveyard.com/bio/vann-vanvorhis.html#874.48.07>
- Lair v. Murray (United States District Court for the District of Montana October 10, 2012) (LexisNexis, Dist. file).
- La. R.S. § 18:1463, Political material; ethics; prohibitions (Lexis Nexis 2014).
- Lanier, D., Kyle, L., Myers, D., Wilcox, D., & Bahrych, L. (1980). *Presidents and speakers of the Colorado General Assembly: A biographical portrait from 1876* (2013 Revised ed.) (M. Mauer & M. Otto, Eds.). Denver, CO: The Council.
- Listes, M., & Underhill, W. (2014, October 29). Campaign fair practice laws (Is there a right to lie?).
- MCA § 13-37-131, Misrepresentation of voting record, Montana Code Annotated (LexisNexis 2014).
- McIntyre v. Ohio Elections Commission (April 19, 1995) (Cornell University Legal Information Institute, Dist. file).
- MCLS § 168.931, Prohibited Conduct; violation as misdemeanor; "valuable consideration" defined., Michigan Compiled Laws Service (Lexis Nexis 2014).
- Minn. Stat. § 211B.06, False Political and Campaign Material; Penalty; Exceptions, Minnesota Statutes (Lexis Nexis 2014).
- Miss. Code Ann. § 23-15-875, Prohibitions against ch

argues with respect to integrity of candidate; proceedings against violators (Lexis Nexis 2014).

Mississippi. (2008, October 5). In *New World Encyclopedia*. Retrieved from

<http://www.newworldencyclopedia.org/entry/mississippi>

Montana Right to Life Ass'n v. Eddleman (United States District Court for the District of

Montana February 3, 1998) (LexisNexis, Dist. file).

Moore, M. (2012, April 10). *Briefing on Laws Related to Campaign Advertising Disclaimers in Other States for the State Administration and Veterans' Affairs Interim Committee* (Issue brief).

Moser, B. (2013, June 4). The end of the Solid South. Retrieved from

<http://prospect.org/article/end-solid-south>

Murray v. Hollin (Court of Appeals of Tennessee December 10, 2012) (FastCase, Dist. file).

N.C. Gen. Stat. § 163-274, Certain acts declared misdemeanors (LexisNexis 2014)

N.D. Cent. Code § 16.1-10-04 Publication of false information in political advertisements -

Penalty, North Dakota Century Code (LexisNexis 2014)

Nese, M., & Mancil, B. (2014, July 17). State false statement laws: Should the Government act as the Truth Police? Retrieved from

<http://www.campaignfreedom.org/2014/07/17/state-false-statement-laws-should-the-government-act-as-the-truth-police/>

Nev. Press Ass'n v. Nev. Comm'n on Ethics (United States District Court for the District of

Nevada March 28, 2005) (LexisNexis, Dist. file).

New York Times v. Sullivan (March 9, 1964) (Cornell University Legal Information Institute, Dist. file).

Ohio Elections Commission. (2013, October 8). History. Retrieved from

<http://elc.ohio.gov/History.stm>

ORC Ann. § 3517.21, Infiltration of campaign prohibited; false statements, Ohio Revised Code Annotated (LexisNexis 2014)

- Oregon law on elections facing test. (1938, November 30). *The Bulletin*. Retrieved from <http://news.google.com/newspapers?nid=1243&dat=19381130&id=eCpPAAAAIIBAJ&sjid=zh8EAAAAIIBAJ&pg=1798,1252690>
- ORS § 260.532, False publication relating to candidate or measure; civil action; damages; other remedies; limitation on action, Oregon Revised Statutes (LexisNexis 2013).
- The Oyez Project IIT Chicago-Kent College of Law. (2014, April 22). Susan B. Anthony List v. Driehaus. Retrieved from http://www.oyez.org/cases/2010-2019/2013/2013_13_193
- Petition for Writ of Certiorari, 281 Care Committee v. Arneson, U.S. Briefs 535 (no. 11-535), 2011 Lexis Nexis.
- RCW § 42.17A.335, Political advertising or electioneering communication — Libel or defamation per se., Revised Code of Washington (Washington State Legislature n.d.). Retrieved from <http://apps.leg.wa.gov/rcw/default.aspx?cite=42.17A.335>
- Rickert v. State, Public Disclosure Commission (October 4, 2007) (LexisNexis, Dist. file).
- Rodell, S. A. (2008). False Statements v. Free Debate. *Florida Law Review*, 60.
- Rose, V. (2012, July 25). Summary of United States v. Alvarez.
- Simon, S. (2014, September 10). *2014 Campaign Manual - Revised Edition* (United States, Minnesota, Secretary of State). Retrieved from www.sos.state.mn.us
- State ex rel. Hampel v. Mitten (May 17, 1938) (LexisNexis, Dist. file).
- State Public Disclosure Commission v. 119 Vote No! Committee (June 11, 1998) (FindLaw, Dist. file).
- State v. Burgess (May 1, 1989) (LexisNexis, Dist. file).
- State v. Jude (Court of Appeals of Minnesota October 15, 1996) (LexisNexis, Dist. file).
- Steward, T., & Watchdog Minnesota Bureau. (2014, September 10). Federal appeals court overturns MN ballot campaign speech restrictions. *Watchdog.org Minnesota Bureau*. Retrieved from www.watchdog.org
- Susan B. Anthony List v. Driehaus (June 16, 2014) (LexisNexis, Dist. file).

Susan B. Anthony List v. Ohio Elections Commission (United States District Court for the Southern District of Ohio September 11, 2014).

Tenn. Code Ann. §2-19-142, Knowingly publishing false campaign literature (LexisNexis 2014).

Thornton v. Johnson (May 16, 1969) (LexisNexis, Dist. file).

Tomeo, J. (2005). Oregon's progressive democracy. Retrieved from www.angelfire.com/alt/jtomeo

Underhill, W. (2012, September). Initiative and Referendum states.

Underhill, W. (2013, September 11). Recall of state officials.

United States v. Alvarez, No. 11-210 (June 28, 2012) (Cornell University Legal Information Institute, Dist. file).

Utah Code Ann. § 20A-11-1103, False statements in relation to candidates forbidden. (LexisNexis 2014).

Vanasco v. Schwartz (United States District Court for the Southern District of New York July 14, 1975) (LexisNexis, Dist. file).

W. Va. Code §3-8-11, Specific acts forbidden; penalties (LexisNexis 2014).

Warnock, K. (2015, February 4). State Partisan Composition. Retrieved from <http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx>

Whitney v. People of State of California (May 16, 1927) (FastCase, Dist. file).

Wis. Stat. § 12.05, False representations affecting elections (LexisNexis 2014).