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# JUDICIAL CANDIDATES' RIGHT TO LIE

NAT STERN*

*A large majority of state judges are chosen through some form of popular election. In* Republican Party of Minnesota v. White*, the Supreme Court struck down a law forbidding certain judicial campaign speech. A decade later, the Court in* United States v. Alvarez *ruled that factually false statements do not constitute categorically unprotected expression under the First Amendment. Together, these two holdings, along with the Court's wider protection of political expression and disapproval of content-based restrictions, cast serious doubt on states' ability to ban false and misleading speech by judicial candidates. Commonly known as the misrepresent clause, this prohibition has intuitive appeal in light of judges' responsibilities and still exists in many states. Given the provision's vulnerability to challenge, however, states may be able to avert chronic fabrication by judicial candidates only by removing its ultimate source—judicial elections themselves.*

*"If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."*[1]

*"[A] State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."*[2]

## INTRODUCTION

It is virtually axiomatic that political candidates can lie with legal impunity.[3] At the same time, the scheme of separation of powers and intuitions

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1. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (alteration in original) (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

2. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).

3. This phenomenon is perhaps most vividly illustrated by campaigns for the Nation's highest office. *See* THOMAS E. PATTERSON, OUT OF ORDER 3–27 (1993); *see also* KATHLEEN HALL JAMIESON, PACKAGING THE PRESIDENCY: A HISTORY AND CRITICISM OF PRESIDENTIAL CAMPAIGN ADVERTISING 408 (3d ed. 1996) (discussing a campaign ad that misquoted candidate's opponent as saying, "nonproliferation of the control of nuclear weapons is none of our business"); Callum Borchers, *Why the New York Times Decided It Is Now Okay to Call Donald Trump a Liar*,

about justice point to a higher standard for those seeking election to judicial office. Accordingly, laws in twenty-two states contain a "misrepresent clause" barring deliberately false factual statements by judicial candidates.[4] The Supreme Court's decision in *Republican Party of Minnesota v. White*,[5] however, casts doubt on whether states may regulate judicial candidates' speech. While striking down only a single provision of Minnesota's restrictions on judicial campaign speech, *White* evoked much speculation about

WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/22/why-the-new-york-times-decided-it-is-now-okay-to-call-donald-trump-a-liar/ (pointing to candidate's repeated claims that the President was not born in the United States);LARRY J. SABATO, FEEDING FRENZY 102–03 (1991) (discussing candidate's lying about his age); Martin Schram, *Nation's Longest Campaign Comes to an End*, WASH. POST (Nov. 4, 1980), https://www.washingtonpost.com/archive/politics/1980/11/04/nations-longest-campaign-comes-to-an-end/6baf110a-2aa6-4c26-aa92-6434c60e138e/ (noting candidate's assertion that trees cause more pollution than automobiles). The First Amendment status of laws barring false statements by political candidates is discussed *infra* Part I.A.

4. ALA. CANONS OF JUDICIAL ETHICS Canon 7.B(2) (2004), http://judicial.alabama.gov/library/rules/can7.pdf; ALASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (2011), http://www.courtrecords.alaska.gov/webdocs/rules/docs/cjc.pdf; ARIZ. CODE OF JUDICIAL CONDUCT r. 4.3 (2009), http://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf; FLA. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(e)(ii) (2015), http://www.floridasupremecourt.org/decisions/ethics/Code_Judicial_Conduct.pdf; ILL. CODE OF JUDICIAL CONDUCT r. 67 (1994), https://www2.illinois.gov/sites/jib/documents/code%20of%20judicial%20conduct.pdf; KY. CODE OF JUDICIAL CONDUCT r. 4.300, Canon 5(B)(1)(c) (2015); MD. CODE OF JUDICIAL CONDUCT r. 4.4(d)(5) (2016); MISS. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (2002), https://courts.ms.gov/rules/msrulesofcourt/code_of_judicial_conduct.pdf; MO. CODE OF JUDICIAL CONDUCT r. 2-4.2(A)(5) (2012), https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/34f3bee06088a0fe86256ca600521235?OpenDocument; N.H. CODE OF JUDICIAL CONDUCT r. 4.2 (2011); N.M. CODE OF JUDICIAL CONDUCT r. 21-402(A)(2)(d) (2015); N.C. CODE OF JUDICIAL CONDUCT Canon 7.C(3) (2015); N.D. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (2012); OHIO CODE OF JUDICIAL CONDUCT Canon 4, r. 4.3 (2017), http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf; OKLA. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (2010); R.I. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (2017); S.C. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(iii) (2017); S.D. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2013); TEX. CODE OF JUDICIAL CONDUCT Canon 5(1)(ii) (2002), http://www.txcourts.gov/media/514728/TXCodeOfJudicialConduct_20020822.pdf; VT. CODE OF JUDICIAL CONDUCT Canon 5(B)(4)(c) (2011), https://www.vermontjudiciary.org/sites/default/files/documents/Text_of_A.O._10_Vt_Code_of_Judicial_Conduct.REFORMATTED.pdf; WIS. CODE OF JUDICIAL CONDUCT r. 60.06(3)(c) (2010), https://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=27626; WYO. CODE OF JUDICIAL CONDUCT r. 4.2(B)(6) (2009), http://judicialconduct.wyo.gov/home/how-to-file-a-complaint/wyoming-code-of-judicial-conduct. In addition, California directs a judicial candidate to "take appropriate corrective action if the candidate learns of any misrepresentations made in his or her campaign statements or materials." CAL. CODE OF JUDICIAL ETHICS Canon 5(B)(2) (2016).

5. 536 U.S. 765 (2002). The case is discussed *infra* Part II.B.

the potential invalidation of a broader swathe of such codes.[6] Notwithstanding this ominous outlook, though, the misrepresent clause was generally thought to be relatively secure from First Amendment challenge.[7]

Contrary to such sanguine assessments, this Article argues that states' attempts to bar falsehoods by judicial candidates stand on tenuous footing and are probably unconstitutional. Of course, this interpretation does not imply moral endorsement of the dishonesty that some who aspire to judicial office may practice. Indeed, it does not even assume the wisdom of selecting judges through popular vote; cogent arguments have been offered against this peculiarly American institution.[8] Rather, the thesis presented here reflects the extent to which the Court has shielded false expression and imported stringent protection of political speech into the judicial setting.

Part I of this Article examines principles that appear to afford broad protection to falsehoods by judicial candidates.[9] Of particular note is the Court's

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6. *See, e.g.*, Richard Briffault, *Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 208–09 (2004); Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After* Republican Party of Minnesota v. White, 48 S.D. L. REV. 262, 291–310 (2003); Roy A. Schotland, *Should Judges Be More Like Politicians?*, 39 CT. REV. 8, 9–10 (2002); Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 111–29 (2008); *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1134 (2006) (stating "the future looks bleak" for advocates of campaign speech restrictions); *see also infra* note 275 and accompanying text.

7. *See, e.g.*, Briffault, *supra* note 6, at 221–22 ("Even if the Misrepresentations Clause does trigger strict scrutiny, the interest in informed electoral decision making is a compelling one and ought to justify such a restriction on candidate speech."); Moerke, *supra* note 6, at 263 ("[T]he future of the misrepresent clause is the brightest of all."); *id.* at 310–12; Schotland, *supra* note 6, at 9–10 (omitting misrepresent clause from enumeration of provisions likely to face legal challenge); Walter M. Weber, *Judicial Campaign Speech Restrictions: Some Litigation Nuts and Bolts*, 68 ALB. L. REV. 635, 645 (2005) (describing misrepresent clause as "unassailable" as applied to provably false assertions); *see also* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004) (arguing in wake of *White* that availability of disqualification renders most or all restrictions on *truthful* campaign speech unconstitutional).

8. *See infra* notes 227–241 and accompanying text.

9. This reasoning applies only to restrictions aimed specifically at judicial candidates. Candidates' speech is not, of course, immune from valid general prohibitions on certain kinds of falsity: for example, defamation. Further, this Article does not discuss whether a state could specifically bar misrepresentations by sitting judges seeking reelection under canons of judicial conduct. As a preliminary observation, however, such a ban would still raise serious concerns. While the state generally exercises greater control over speech within its own sphere—see, for example, *Garcetti v. Ceballos*, 547 U.S. 410 (2006)—the constitutional vulnerabilities of the limitations on judicial campaign speech discussed in this Article—especially those arising out of the protection of political speech, see *infra* Part I.A.2—would still apply. In addition, disadvantaging one party in a political contest would presumably trigger the First Amendment's heightened skepticism of content discrimination. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015); R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992); Leathers v. Medlock*,* 499 U.S. 439, 447–49 (1991). Particularly apposite here is the Court's admonition that the state "has no . . . authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392; *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) ("[L]aws favoring some

holding in *United States v. Alvarez*,[10] which rejected the contention that factually false statements categorically receive no First Amendment recognition.[11] Part II traces states' widespread adoption of judicial elections, limitations on judicial campaign speech enacted to counter threats to due process posed by candidates' appeals to the electorate, and the reasoning in *White* that called such restrictions into question. Part III is the heart of the Article. It describes how specific themes emerging from authority discussed in the first two parts militate against the misrepresent clause. Finally, Part IV explains how two Court decisions that might be seen as bolstering the misrepresent clause—*Caperton v. A.T. Massey Coal Co.*[12] and *Williams-Yulee v. Florida Bar*[13]—are better viewed as discrete rulings designed to address exceptional circumstances.

## I. THE IMMUNITY OF FALSE POLITICAL CAMPAIGN SPEECH

The Supreme Court has issued no comprehensive doctrine to govern false statements by political candidates. This reticence is perhaps understandable in an area where two profound interests—shielding political discourse from factual distortion[14] and protecting that discourse from government interference—can collide.[15] Still, Court rulings and pronouncements in this area tilt decidedly in favor of campaign speech unhampered by official arbitration of the truth. Ultimately, the controlling principle appears to be that "[t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."[16]

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speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. . . .").

10. 567 U.S. 709 (2012).

11. *Id.* at 721–22.

12. 556 U.S. 868 (2009).

13. 135 S. Ct. 1656 (2015).

14. The impact that manufactured stories can have on political campaigns was highlighted by the unusual incidence of "fake news" during the 2016 presidential campaign. *See* Elizabeth Dwoskin et al., *Why Facebook and Google Are Struggling to Purge Fake News*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/business/economy/why-facebook-and-google-are-struggling-to-purge-fake-news/2016/11/15/85022897-f765-422e-9f53-c720d1f20071_story.html.

15. *See* Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("States have a legitimate interest in preserving the integrity of their electoral processes. . . . But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated."); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 199 (While political candidates' lies "pose . . . harms to their listeners . . . and may also . . . undermine public confidence in the integrity of the political process," laws forbidding such lies "threaten significant First Amendment harms because they regulate expression in a context in which we especially fear government overreaching and partisan abuse. . . .").

16. *Brown*, 456 U.S. at 60.

### *A. The Costs of False Political Campaign Speech and of Its Regulation*

The state possesses the authority to restrict false factual statements on a range of subjects as well as the grounds for asserting that power to combat the corrosive effects of political candidates' lies. Nevertheless, this authority is circumscribed by core First Amendment principles. Most conspicuously, the extreme solicitude long given to political debate resists holding candidates legally accountable for their misrepresentations.

#### *1. Grounds for Prohibition*

Numerous restrictions on factually false assertions have long been accepted as compatible with the First Amendment's protection of speech. The roster of false expression that government proscribes includes fraud,[17] perjury,[18] false advertising,[19] misrepresentation of material facts to the government,[20] impersonation of a government official,[21] misrepresentation of material facts in connection with the sale or purchase of securities,[22] and defamation.[23] Though some degree of mental culpability has typically been required to impose sanctions, government's power to ban these kinds of falsehoods has been firmly recognized.[24]

The rationale for permitting suppression of such expression is essentially twofold. First, unlike everyday lies and deceptions that could be considered innocuous or even beneficial,[25] the types of falsity that the government has the right to forbid inflict self-evident or demonstrable harm. An

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17. *E.g.*, 18 U.S.C. § 1341 (2012); ALA. CODE § 6-5-101 (LexisNexis 2014); N.M. STAT. ANN. § 30-16-6 (LexisNexis 2014).

18. *E.g.*, 18 U.S.C. § 1621 (2012); COLO. REV. STAT. ANN. § 18-8-502 (West 2013); GA. CODE ANN. § 16-10-70 (2011).

19. *E.g.*, 15 U.S.C. § 1125 (2012).

20. *E.g.*, 18 U.S.C. § 1001 (2012).

21. *E.g.*, 18 U.S.C. § 912 (2012).

22. 15 U.S.C. § 78j (2012); 17 C.F.R. § 240.10b-5 (2010).

23. *E.g.*, S.D. CODIFIED LAWS § 20-11-1 (2016); Elliott v. Murdock, 385 P.3d 459, 465 (Idaho 2016); Rice v. Alley, 791 A.2d 932, 936 (Me. 2002).

24. *See, e.g.*, Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (sustaining state law banning fraud where State was required to show that "defendant made the representation with the intent to mislead the listener"); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (permitting private cause of action for damages under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 where plaintiff can show defendant's "intent to deceive, manipulate, or defraud").

25. *See* United States v. Alvarez, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) (observing that "in social contexts," false factual statements may, *inter alia*, "prevent embarrassment, protect privacy, . . . or preserve a child's innocence"); United States v. Alvarez, 638 F.3d 666, 673–75 (9th Cir. 2011) (Kozinski, C.J., concurring) (reciting extensive catalogue of "white lies, exaggerations and deceptions," that serve various social purposes), *aff'd*, 567 U.S. 709 (2012). For the view that some types of lies—for example, "investigative deception"—warrant protection because they further the aims of freedom of speech, see Alan K. Chen & Justin Marceau, *High Value Lies, Ugly*

obvious instance is securities fraud, where a false or misleading statement or omission induces a buyer or seller to incur monetary loss; indeed, a showing of damages is requisite to recovery.[26] Even an injury like the offense that perjury gives to the integrity of the justice system,[27] which might appear somewhat more abstract, also involves thwarting a court's concrete goal of basing its judgment on accurate information.[28]

In addition, the harms produced by proscribable speech do not lend themselves to the First Amendment's normal corrective of open debate. Justice Holmes famously articulated the preference for the metaphorical marketplace over official arbitration as a means of seeking truth:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—[and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .[29]

As the Court has pointed out, however, false statements "interfere with the truth-seeking function of the marketplace of ideas."[30] Moreover, it is in the nature of falsehoods that the state may bar that counterspeech will not suffice to cure their impact. In many instances, the deception may go undetected before it causes serious or even irreparable harm. Thus, government may require sellers and advertisers to provide information that is not false or misleading rather than leave consumers to discover products' flaws through second-hand reports or personal experience.[31] In other instances, even prompt exposure may fail to avert or redress the injury. The law of libel, for

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*Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1454–56 (2015). *See also* Norton, *supra* note 15, at 164–68.

26. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754–55 (1975).

27. *See* United States v. Dunnigan, 507 U.S. 87, 97 (1993).

28. *See In re* Michael, 326 U.S. 224, 227 (1945). The requirement of harm as a crucial element in the power to suppress false speech is discussed in the analysis of *United States v. Alvarez*, 567 U.S. 709 (2012), *infra* Part I.B.

29. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Texas v. Johnson, 491 U.S. 397, 419 (1989) ("If there be time to expose through discussion the falsehood and fallacies, to avert the [feared] evil by the processes of education, the remedy to be applied is more speech, not enforced silence." (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) (stating as a principle justification for free expression that it is "the best process for advancing knowledge and discovering truth").

30. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

31. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

example, rests largely on the assumption that the taint of defamatory falsehood may persist in the face of even cogent rebuttal.[32]

The rationales for permitting government to prohibit certain species of false statements might be thought to apply to political candidates' misrepresentations.[33] Given the sharp constraint imposed by an election date, the marketplace of information may literally not have time to dispel false statements.[34] The definite date of a campaign's close provides incentive for issuing misinformation at a point where the candidate attacked cannot effectively counter the false claim.[35] Moreover, the capacity of modern media to bombard citizens with factual misstatements may "normalize" falsity to such an extent that many cannot distinguish it from truth.[36]

The effects of pervasive false campaign speech can be devastating, for they strike at the core premises of representative democracy.[37] Most obvious is the degradation and distortion of electoral discourse. One need not subscribe to a romanticized view of the nation's earliest political campaigns[38] to

32. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974) ("[T]he law of defamation is rooted in our experience that the truth rarely catches up with a lie.").

33. As used here, the term "misrepresentation" does not encompass campaign promises that are not fulfilled after the candidate attains office. Since it is impossible to objectively gauge the candidate's intent at the time the promise was made, the statement would not be susceptible to objective refutation. *See* Deupree v. Iliff, 860 F.2d 300, 303 (8th Cir. 1988) (statement about plaintiff's motive treated as protected by the First Amendment); Gregory v. McDonnell Douglas Corp., 552 P.2d 425, 430 (Cal. 1976) (same); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–20 (1990) ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least . . . where a media defendant is involved."). Even if the threshold for determining falsity were lowered, its demonstration would occur far too late for effective enforcement.

34. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1765 (1999) ("[T]he precise and temporal nature of an election places a premium on rules that promote careful and considered choice, a fair and effective electoral process, and a politically legitimate result.").

35. *See* William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321, 351 (2007) (describing this as a tactic of "the opportunistic liar").

36. *See* Xiaoyan Qiu et al., *Limited Individual Attention and Online Virality of Low-Quality Information*, NATURE HUMAN BEHAVIOR, June 26, 2017, at 1.

37. *See* Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 895–97, 913–14 (2008).

38. *See, e.g.*, Libby Copeland, *Stuck in the Muck*, WASH. POST (Oct. 13, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/12/AR2008101201966.html (discussing the presidential contest of 1800 between Thomas Jefferson and John Adams).

credit the Framers with envisioning that representatives to the national government would be chosen through informed, rational debate.[39] False campaign assertions, typically against an opponent, vitiate that model.[40] Moreover, attack ads of this nature can dominate campaigns, and not only because of their efficacy.[41] In addition, even candidates who would not have initiated such attacks may feel compelled to respond in kind lest their opponents succeed in defining them in negative terms.[42] The resulting barrage thus diverts campaigns from discussion of substantive issues.[43] At least partly because of this unhealthy allocation of time and resources, the most visible media in turn tend to neglect these issues.[44]

Of course, the ultimate damage that false campaign speech inflicts is not simply pollution of a high-minded ideal of political debate. Rather, dissemination of misinformation to the voting public threatens to defeat the very promise of democratic self-government. The success of this system depends on the ability of citizens to make reasoned choices about the alternative visions they are offered. Citizens who make these selections based on factually false beliefs are more likely to choose poor policies and inferior candidates.[45]

Further, frequent false or deceptive claims by candidates and their supporters generate subtler but profound harms transcending the outcome of a given election. Repeated exposure to such claims may breed attitudes that erode the robust citizen engagement on which democracy thrives. Citizens

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39. *See, e.g.*, THE FEDERALIST NO. 68, at 344 (Alexander Hamilton) (Ian Shapiro ed., 2009); *see also* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2004) ("Democracy is premised on an informed electorate.").

40. *See* Marshall, *supra* note 39, at 294 ("[T]o the extent that false ads misinform the voters, they interfere with the process upon which democracy is based.").

41. *See, e.g.*, Catherine Rampell, Opinion, *Americans—Especially but Not Exclusively Trump Voters—Believe Crazy, Wrong Things*, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/news/rampage/wp/2016/12/28/americans-especially-but-not-exclusively-trump-voters-believe-crazy-wrong-things/.

42. *See* Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1092–93 (2012) (explaining "the risk of being 'Willie Hortoned' or 'Swift-boated'" in the absence of a response).

43. *See* Louis A. Day, *Political Advertising and the First Amendment*, *in* POLITICAL COMMUNICATION 39, 41 (Robert Mann & David D. Perlmutter eds., 2011); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 179 (1992); *see also* Marshall, *supra* note 39, at 294 ("[E]ven if a candidate decides not to engage in similar tactics, except to 'correct' a misimpression created by an opponent, the result may be only to distract the voters from substantive issues.").

44. *See* Eric Boehlert, *The Media's Final Email Flop, A Fitting End to Journalism's Troubled Campaign Season*, MEDIA MATTERS FOR AM. (Nov. 7, 2016, 11:59 AM), http://mediamatters.org/blog/2016/11/07/media-s-final-email-flop-fitting-end-journalism-s-troubled-campaign-season/214357.

45. *See* Ashdown, *supra* note 42, at 1092 ("If [voters] are told lies about issues and candidates, these decisions [about what is best for them and the country] get skewed.").

may become so cynical and distrustful toward the electoral process[46] that they essentially tune out campaign speech regardless of its value.[47] In many instances, they may become so discouraged that they refuse to vote.[48] Such alienation may also dampen broader behaviors thought essential to self-government, from participation in local government to keeping informed on important public issues.[49] Of particular concern is the immeasurable but corrosive effect that an atmosphere of noxious political discourse may have on the caliber of public officials. Awareness that their character and positions may be subjected to harsh distortion has doubtless deterred many highly qualified individuals from assuming the already daunting burdens of pursuing office.[50]

Given these costs, it is not surprising that some observers have endorsed restrictions on false political campaign speech.[51] Indeed, one commentator has advocated that these laws sanction materially false campaign advertising that is made with negligence[52] rather than actual malice as typically found in

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

47. *See* Goldman, *supra* note 37, at 896 ("In a *USA TODAY/Gallup Poll*, seven out of ten persons 'said they believed "not much" or "nothing at all" of what they heard in political ads.'" (quoting Susan Page, *Nasty Ads Close Out a Mud-Caked Campaign*, USA TODAY, Nov. 2, 2006, at 11A)).

48. *See id.*; Hannah Griffin, *Keep It Clean? How Negative Campaigns Affect Voter Turnout*, 17 RES PUBLICA—J. UNDERGRADUATE RES., no. 1, 2012, at 1, https://digitalcommons.iwu.edu/respublica/vol17/iss1/6/.

49. *See* Sheryl Gay Stolberg, *For 'Millennials,' a Tide of Cynicism and a Partisan Gap*, N.Y. TIMES (Apr. 29, 2013), http://www.nytimes.com/2013/04/30/us/politics/for-millennial-voters-a-tide-of-cynicism-toward-politics.html; *see also* Ashdown, *supra* note 42, at 1094 ("If the heart of free speech is to foster participation in the making of policy choices in a self-governing system, then something is terribly misguided when the process actually discourages such involvement and engagement." (footnote omitted)).

50. *See* Goldman, *supra* note 37, at 896 ("The level of discourse and disrespect for politicians also discourages qualified candidates from seeking office.").

51. *E.g.*, *id.* at 914–15; Marshall, *supra* note 39, at 294; Michelle Roberts, *Ask Me No Questions and I'll Tell You No Lies: The First Amendment and Falsehoods in Ballot Question Campaigns*, 33 LOY. L.A. ENT. L. REV. 37, 40 (2013); Williams, *supra* note 35, at 341 ("Accurate information about legislation and candidates is essential for intelligent, rational lawmaking and voting."). It is worth noting that Professor Marshall's argument, while elegant and thorough, rests heavily on an extrapolation of the Supreme Court's reasoning in *McConnell v. FEC*, 540 U.S. 93 (2003), upholding a federal law restricting corporate political campaign expenditures. *See* Marshall, *supra* note 39, at 300–22. Whatever force this logic may have is severely undercut by the Court's overturning this ruling in *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010) (overruling portion of *McConnell* upholding restrictions on corporate independent expenditures).

52. *Goldman*, *supra* note 37, at 914–15.

state statutes.[53] The existence of such laws signals sympathy with the position of these scholars; a recent canvass determined that at least eighteen states penalize false political speech.[54]

Nor is this view without some foundation in opinions by the Court. In *Eu v. San Francisco County Democratic Central Committee*,[55] the Court declared that "[a] State indisputably has a compelling interest in preserving the integrity of its election process."[56] More to the point, the Court, in weighing a regulation of campaign literature in *McIntyre v. Ohio Elections Commission*,[57] recognized that "false statements [in election materials], if credited, may have serious adverse consequences for the public at large."[58] In even stronger terms, the Court in *Brown v. Hartlage*[59] recognized "the state interest in protecting the political process from distortions caused by untrue and inaccurate speech."[60] Such pronouncements might be viewed as signaling ample latitude by states to sanction candidates' false speech. At the same time, however, the Court in each case ultimately struck down the campaign regulation at issue.[61] This disjunction intimates the broader criticism of bans on false campaign speech discussed below.

### 2. *Infringement of Core First Amendment Values*

The fundamental objection to prohibition of false campaign speech is obvious and powerful: It constitutes a content-based restriction on expression at the apex of First Amendment protection. The Supreme Court's rulings have consistently reflected Alexander Meiklejohn's thesis that unhindered political speech is essential to self-government and therefore lies at the heart of the First Amendment.[62] Thus, the Court has time and again acknowledged

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53. *See, e.g.*, COLO. REV. STAT. ANN. § 1-13-109 (West 2009); FLA. STAT. ANN. § 104.271 (West 2015).

54. Margaret H. Zhang, Note, Susan B. Anthony List v. Driehaus *and the (Bleak) Future of Statutes That Ban False Statements in Political Campaigns*, 164 U. PA. L. REV. ONLINE 19, 20 & n.8 (2015).

55. 489 U.S. 214 (1989).

56. *Id.* at 231 (citing Rosario v. Rockefeller, 410 U.S. 752, 761 (1973)).

57. 514 U.S. 334 (1995).

58. *Id.* at 349.

59. 456 U.S. 45 (1982).

60. *Id.* at 61.

61. *McIntyre*, 514 U.S. at 349–51 (striking down ban on disseminating anonymous campaign literature); *Eu*, 489 U.S. at 222–29 (invalidating ban on endorsements of candidates in primary contests by state political parties); *Brown*, 456 U.S. at 61–62 (overturning enforcement of ban on candidates' factual misstatements where candidate's statement was made in good faith and swiftly disavowed upon realization of his error).

62. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65–66, 69–70 (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960) (The main purpose of the First Amendment

the privileged place of political expression in the hierarchy of First Amendment freedoms,[63] and has particularly emphasized the crucial place of speech about political candidates.[64] Accordingly, the Court has subjected restrictions on political expression to "exacting scrutiny."[65]

It is therefore unsurprising that the Court has struck down, for example, a ban on all anonymous political leafletting,[66] criminal penalties for publishing editorials on election day urging people to vote a certain way on issues on the ballot,[67] a prohibition against state party central committees' endorsing candidates in primary elections,[68] a requirement that circulators of petitions

"is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."); *see also* OWEN M. FISS, THE IRONY OF FREE SPEECH 2–3 (1996) (Under a democratic theory of free speech, the law is intended "as a protection of popular sovereignty . . . to broaden the terms of public discussion as a way of enabling common citizens to become aware of the issues before them and of the arguments on all sides and thus to pursue their ends fully and freely.").

63. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 329 (2010) ("[P]olitical speech . . . is central to the meaning and purpose of the First Amendment."); Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002) ("[Political speech] is 'at the core of our First Amendment freedoms.'" (quoting Republican Party of Minn. v. Kelly, 247 F.3d 854, 861, 863 (8th Cir. 2001))); Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (first quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); then quoting Carey v. Brown, 447 U.S. 455, 467 (1980)); Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause . . . ."); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

64. *See Citizens United*, 558 U.S. at 339–40 ("The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting *Eu*, 489 U.S. at 223)). *Accord McIntyre*, 514 U.S. at 347; *Brown*, 456 U.S. at 53; Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam); *see also Buckley*, 424 U.S. at 14 ("[D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.").

65. Meyer v. Grant, 486 U.S. 414, 420 (1988) (citing *Buckley*, 424 U.S. at 45). *Accord Citizens United*, 558 U.S. at 327 (Courts "must give the benefit of any doubt to protecting rather than stifling [political] speech." (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (plurality opinion))); *McIntyre*, 514 U.S. at 346 (reiterating that "[t]he First Amendment affords the broadest protection" to "[d]iscussion of public issues and debate on the qualifications of candidates" (quoting Roth v. United States, 354 U.S. 476, 484 (1957)); Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion) (A state must show that "a facially content-based restriction on political speech in a public forum" is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983))); *Brown*, 456 U.S. at 53–54 ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.").

66. *McIntyre*, 514 U.S. at 347.

67. *Mills*, 384 U.S. at 219.

68. *Eu*, 489 U.S. at 224.

supporting proposed state initiatives be registered voters,[69] and a verdict against a political candidate who falsely insinuated criminal conduct by his deputy sheriff opponent without verifying or investigating third-party assertions.[70] Only in rare instances, where a restriction clearly is narrowly tailored to serve a compelling interest and trenches on a modest amount of speech, does it survive the Court's rigorous scrutiny.[71]

Nor are proscriptions of false campaign speech exempt from this stringent review. Indeed, Charles Fried has asserted, "[i]n political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed."[72] Admittedly, the Supreme Court has not expressly affirmed this breadth of impunity. Nevertheless, support for it can be found in the Court's jurisprudence. A leading—if limited—holding on this question came in *Brown v. Hartlage*.[73] There, the Court held that a candidate's presumably false campaign promise did not fall outside the purview of First Amendment protection.[74] As a candidate for county commissioner, Brown had pledged to lower his salary if elected.[75] Upon learning that his promise arguably violated a state anti-corruption statute, Brown retracted his statement.[76] When Brown won the election, his opponent brought suit to have the election voided on the ground of Brown's alleged violation of the statute.[77] After rejecting two possible justifications for applying the statute to Brown,[78] the Court focused on the state's power to sanction factual misstatements. The opinion repeatedly emphasized the "special vitality" of free speech during election campaigns,[79] noting the First Amendment's promotion of an "atmosphere of free discussion" in political campaigns[80] and the "special force" with which the preference for counterspeech over censorship applies in this context.[81] In particular, the Court found the statute's provision for automatic voidability of

69. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 192 (1999).

70. St. Amant v. Thompson, 390 U.S. 727, 732–33 (1968).

71. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 205–06 (1992) (upholding ban on solicitation of votes and display of campaign materials within 100 feet of a polling place on day of election).

72. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992).

73. 456 U.S. 45 (1982).

74. *Id.* at 62.

75. *Id*. at 48.

76. *Id*. at 48–49.

77. *Id.* at 49.

78. *Id.* at 54–59 (rejecting application of the statute as method of preventing vote buying); *id.* at 59–60 (rejecting application of the statute as means to curb election of independently wealthy but less qualified candidates).

79. *Id.* at 53.

80. *Id.* at 61.

81. *Id.*

elections won by violators—irrespective of intent—"inconsistent" with the First Amendment's extreme solicitude for campaign expression.[82] Candidates' awareness that their misstatements would be subject to this strict liability would produce an intolerable "chilling effect" on their speech.[83] Instead, latitude for error must be supplied to allow free debate the "breathing space" that it needs to flourish.[84]

While *Brown* thus offers a strong measure of protection for false campaign speech, the precise scope of its legacy is ambiguous. The Court highlighted the absence of evidence that Brown had made the statement at issue "other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not,"[85] thereby substantially importing the actual malice standard for public official defamation plaintiffs into this setting.[86] Accordingly, the opinion might be viewed as condoning nullification of elections where the victor is shown to have spoken with actual malice. Still, the Court in *Brown* was not called on to decide whether even the actual malice standard would furnish adequate protection for false campaign speech. Moreover, the Court's tribute to the special value of counterspeech in political campaigns,[87] accompanied by its observation that "a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent,"[88] offers grist for the conclusion that nondefamatory false campaign statements lie beyond the reach of state regulation altogether.

This Article argues below[89] that the Court's decision in *United States v. Alvarez*[90] effectively resolved lingering questions about political candidates' right to utter falsehoods in favor of the more expansive view. It is first instructive, however, to review the extent to which lower courts were invalidating bans on false campaign speech even prior to *Alvarez*. As long ago as 1975, a federal district court panel struck down New York's prohibition on the "misrepresentation of any candidate's qualifications[,] . . . position[,] . . . party affiliation[,] or party endorsement" "during the course of any campaign for nomination or election to public office."[91]

82. *Id.* at 61–62.

83. *Id.* at 61.

84. *Id.* at 60–61 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964)).

85. *Id.* at 61.

86. *Cf. Sullivan*, 376 U.S. at 279–80. The Court was also troubled that Brown's offense was not mitigated by his having swiftly disavowed his statement upon learning of his apparent error. *See Brown*, 456 U.S. at 61–62.

87. *See supra* note 81 and accompanying text.

88. *Brown*, 465 U.S. at 61.

89. *See infra* Part I.B.

90. 567 U.S. 709 (2012).

91. Vanasco v. Schwartz, 401 F. Supp. 87, 88 (E.D.N.Y. 1975) (quoting N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1 (1974)), *aff'd sub nom.* Schwartz v. Postel, 423 U.S. 1041 (1976).

Faulting the statute's lack of an actual malice requirement,[92] the panel declared the statute overbroad.[93] Twenty years later, the Washington Supreme Court in *Rickert v. Public Disclosure Commission*[94] addressed a law forbidding persons "to sponsor with actual malice . . . [p]olitical advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office."[95] The court had earlier overturned a far broader predecessor of the statute[96] because it "presupposes the State possesses an independent right to determine truth and falsity in political debate."[97] In response, the Washington legislature confined the statute's reach to statements made about the candidates[98] other than by the candidates themselves.[99]

Nevertheless, the court held that this much-trimmed version of the statute also rested on the fatally flawed premise that "the government, rather than the people, may be the final arbiter of truth."[100] The court pointed out the chilling effect that the mere specter of a potentially politicized enforcement process might exert on campaign speech.[101] Moreover, even accepting—as the *Rickert* court did not[102]—that the statute served a compelling state interest, the exemption for false statements made about a candidate by herself or her supporters rendered the law underinclusive.[103] The court thus concluded that in this area as in others, "the best remedy for false or unpleasant speech is more speech, not less speech."[104] A few years later, on the eve of *Alvarez*, the Eighth Circuit similarly determined that a Minnesota ban on false advertising or campaign material about ballot initiatives would violate the First Amendment unless it could survive strict scrutiny.[105]

The Sixth Circuit in *Pestrak v. Ohio Elections Commission*[106] did uphold a provision of a statute that prohibited false campaign speech, but viewed in perspective, the decision offered little encouragement to efforts to

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92. *Id.* at 92.
93. *Id.* at 97.
94. 168 P.3d 826 (Wash. 2007).
95. *Id.* at 828 (quoting WASH. REV. CODE § 42.17.530(1)(a) (2007)).
96. The previous law had barred "[p]olitical advertising that contains a false statement of material fact." State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 694 (Wash. 1998) (en banc) (quoting WASH REV. CODE § 42.17.530(1)(a) (1998)).
97. *Id.* at 695.
98. *Rickert*, 168 P.3d at 827.
99. *Id.* at 828.
100. *Id.* at 827.
101. *See id.* at 832.
102. *Id.* at 830–31.
103. *Id.* at 831.
104. *Id.* at 832.
105. 281 Care Comm. v. Arneson, 638 F.3d 621, 633–36 (8th Cir. 2011).
106. 926 F.2d 573 (6th Cir. 1991).

suppress such expression.[107] Though striking down provisions authorizing the Ohio Elections Commission to impose fines and cease-and-desist orders,[108] the court permitted the commission to reprimand violators. This official chastisement represented a modest concession to state power compared to the more concrete provisions invalidated. Indeed, it did not rely on a peculiar power to regulate false expression at all. In sustaining the reprimand as an exercise in "truth-declaring,"[109] the court appeared to recognize this function as an instance of government speech exempt from the limitations of the First Amendment.[110]

### *B.* Alvarez *and the Elevation of Falsehood's Constitutional Status*

Prior to the Supreme Court's holding in *Alvarez*, even successful challenges to bans on false campaign speech were inhibited by the premise that factually false expression is not entitled to First Amendment protection.[111] Numerous assertions by the Court, at least when considered in isolation, had supported this proposition.[112] In *Alvarez*, however, the Court ruled that even intentionally false statements—lies—do not categorically fall outside the ambit of free speech.[113]

#### *1.* Alvarez*'s Two Routes to Invalidation*

The Court in *Alvarez* struck down the Stolen Valor Act[114] ("SVA") in a case involving a legally and morally egregious violation of the law.[115] Concerned that the existing ban on falsely purporting to have earned a military

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107. *Id.* at 575.

108. The court held that while the statute was constitutional on its face because false speech is not protected, the procedures used for its enforcement were flawed. *Id.* at 578. In a case decided after *Alvarez*, the Sixth Circuit acknowledged that the Supreme Court's ruling that false speech does not lie beyond the pale of First Amendment protection had abrogated *Pestrak's* holding that Ohio's political false-statements laws were facially constitutional. Susan B. Anthony List v. Driehaus, 814 F.3d 466, 471–72 (6th Cir. 2016).

109. *Pestrak*, 926 F.2d at 579.

110. *See* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009))).

111. *See supra* Part I.A.1 (discussing rationales).

112. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact.'" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974))); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech . . . ."); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Gertz*, 418 U.S. at 340 ("[T]he erroneous statement of fact is not worthy of constitutional protection . . . .").

113. United States v. Alvarez, 567 U.S. 709, 729–30 (2012) (plurality opinion).

114. 18 U.S.C. § 704 (2006).

115. *Alvarez*, 567 U.S. at 729–30.

medal had proved ineffective,[116] Congress attached legal penalties to this behavior in the Act.[117] Xavier Alvarez was prosecuted under the SVA for introducing himself as a member of a district water board in this manner: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[118] In fact, the entire narrative represented "a series of bizarre lies."[119]

At the outset, Justice Kennedy's plurality opinion[120] virtually determined the outcome by reciting the principle that content-based speech restrictions like the SVA were subject to "exacting scrutiny."[121] Under this stringent—if imprecise[122]—level of review, even a law serving the Act's weighty purposes[123] would be "presumed invalid."[124] Nor did the fact that the statute took aim at factual falsehoods salvage its validity. Justice Kennedy did acknowledge previous Court pronouncements affirming that the falsity of speech at issue had contributed to its susceptibility to restriction.[125] He was unwilling, however, to extrapolate from these specific instances of proscribability a hard rule that false statements receive no First Amendment protection.[126] On the contrary, even when considering certain types of unprotected speech, like defamation and fraud, the Court had been "careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment."[127] Thus, three examples of falsehood cited by the govern-

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116. Brief for Petitioner at 6, United States v. Alvarez, 567 U.S. 709 (2012) (No. 11-210).

117. 18 U.S.C. § 704(b) (2012) ("Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.").

118. *Alvarez*, 567 U.S. at 713–14.

119. United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012).

120. Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor. *Alvarez*, 567 U.S. at 713.

121. *Id.* at 715.

122. *See* Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499, 512–13 (2013) (describing "exacting scrutiny" as "a not very clearly defined level of scrutiny"). *But see* Vikram David Amar & Alan Brownstein, *The Voracious First Amendment:* Alvarez *and* Knox *in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 496 (2013) (describing plurality opinion as "[a]pplying strict scrutiny" to SVA).

123. *See Alvarez*, 567 U.S. at 724.

124. *Id.* at 717 (quoting Ashcroft v. ACLU, 542 U.S. 656, 660 (2004)).

125. *Id.* at 718–19.

126. *Id.*

127. *Id.* at 719; *see also id.* at 720 ("[The federal] prohibition on false statements made to Government officials . . . does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.").

ment—making false statements to a public official, perjury, and misrepresenting oneself as an officer of the government—caused serious disruption of governmental functions rather than being punishable solely for their falsity.[128]

Accordingly, these and other restrictions on falsity approved by the Court did "not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny."[129] On the contrary, the plurality squarely rejected the idea that false expression "should be in a general category that is presumptively unprotected."[130] Acceptance of such a principle would amount to recognition of a new category of unprotected speech[131] in deviation from the historical touchstone established for this highly limited list. Under this approach, permissible content-based restrictions have generally been confined to a "few 'historic and traditional categories [of expression] long familiar to the bar.'"[132] False statements per se had no such pedigree.[133]

Rather, only when falsity caused a "legally cognizable harm" was it subject to government proscription.[134] Justice Kennedy pointed to defamation and fraud as notable examples where this criterion was met.[135] By contrast, the SVA "targets falsity and nothing more."[136] Specifically, the opinion emphasized that the Act's prohibition was not confined to instances where misrepresentation of military honors secured "valuable considerations"[137] or other "material advantage[s]."[138] Justice Kennedy did acknowledge the government's valid interest in guarding the integrity of the military honors system, which "serve[s] the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and '"foste[rs] morale, mission accomplishment and esprit de corps' among service members."[139] The SVA's blunt ban on all false indications of having earned a military medal did not meet the "exacting" scrutiny to which it was subject.

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128. *Id.* at 720–21.

129. *Id.* at 720.

130. *Id.* at 722.

131. *Id.*

132. *Id.* at 717 (alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).

133. *See id.* at 722.

134. *Id.* at 719.

135. *Id.*

136. *Id.*

137. *Id.* at 723.

138. *Id.*; *see id.* at 714 ("[Alvarez's false] statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.").

139. *Id.* at 724 (quoting Brief for Petitioner, *supra* note 116, at 37, 38).

Under this level of review, the Act's prohibition foundered on two obstacles. First, the government failed to meet its "heavy burden" of demonstrating that false claims had diluted the public's perception of actual award recipients.[140] On the contrary, Justice Kennedy endorsed the assertion of the Veterans of Foreign Wars that "there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal recipients'] honor."[141] Moreover, even assuming that false claims had undermined the military honors system, the SVA's sweeping restrictions on speech were not narrowly tailored to avert this harm. Indeed, the government had not shown that suppressing speech was needed at all to preserve the luster of military medals.[142] Invoking famous maxims by Justices Brandeis and Holmes, the plurality pointed to counterspeech as the preferred remedy to false expression under the First Amendment.[143] Alvarez's own lie offered a powerful illustration of the efficacy of this response. Once the lie became known, the episode was reported by the media and Alvarez was ridiculed online.[144] Moreover, a more comprehensive form of counterspeech was also available. A government-created database listing Congressional Medal of Honor winners that is accessible to the public would presumably vindicate the government's interest in preserving the integrity of the military awards system.[145] Thus, in the words of two commentators, the government had "less restrictive means than criminally prosecuting liars" to achieve its goal.[146]

Finally, transcending the details of the plurality's analysis was concern with the ominous implications of government carte blanche to ban any species of falsity. Such authority would empower government to forbid false speech on a wide range of subjects and in whatever form the expression took—"whether shouted from the rooftops or made in a barely audible whisper."[147] Nor did Justice Kennedy mince words about the totalitarian potential

140. *Id.* at 726.

141. *Id.* (alteration in original) (quoting Brief for Veterans of Foreign Wars of the United States et al. as Amici Curiae Supporting Petitioner at 1, *Alvarez*, 567 U.S. 709 (No. 11-210)).

142. *Id.* at 726–27.

143. *Id.* at 727–28 ("The remedy for speech that is false is speech that is true. . . . ('If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence'). The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" (citation omitted) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), and then quoting and citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("If [a state] believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech [rather than restrictions] are their own correctives.").

144. *Alvarez*, 567 U.S. at 727.

145. *Id.* at 729.

146. Amar & Brownstein, *supra* note 122, at 496–97.

147. *Alvarez*, 567 U.S. at 723.

of permitting government this "broad censorial power."[148] He repudiated this power for its lack of a "clear limiting principle" and its resemblance to the dystopian system portrayed in George Orwell's classic novel, *Nineteen Eighty-Four*.[149] However "contemptible" Alvarez's lies, the First Amendment was designed to avoid the path to such a society; one of the provision's costs is that "it protects the speech we detest as well as the speech we embrace."[150]

While Justice Breyer concurred only in the judgment,[151] he was in broad agreement with the plurality on several points. Like the plurality, he refused to interpret the Court's past statements about falsity's unworthiness of protection as "mean[ing] 'no protection at all.'"[152] After all, false statements can serve constructive purposes not only in social contexts,[153] but also "in public[,] . . . technical, philosophical, and scientific" settings.[154] In addition, Justice Breyer shared the plurality's anxiety over the capacity for abuse inherent in empowering government to punish expression for its sheer falsity. In particular, he raised the prospect of government's selectively pursuing false claims by disfavored groups while leaving similar claims by members with sympathetic views unmolested.[155] Justice Breyer further echoed the plurality's caution that the very existence of this kind of power could chill deserving expression.[156]

Nevertheless, Justice Breyer would not sign onto the plurality's "strict categorical analysis."[157] Instead, he favored what he variously characterized as "intermediate scrutiny," "'proportionality' review," and "an examination of 'fit.'"[158] Under this approach, the Court assesses whether the law in ques-

148. *Id.*

149. *Id.*

150. *Id.* at 729–30.

151. *Id.* at 730 (Breyer, J., concurring). Justice Breyer's opinion was joined by Justice Kagan. *Id.*

152. *Id.* at 733.

153. *Id.*

154. *Id.*

155. *Id.* at 734.

156. *Compare id.* at 723 (plurality opinion) ("The mere potential for the exercise of that power casts . . . a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."), *with id.* at 733 (Breyer, J., concurring) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart.").

157. *Id.* at 730 (Breyer, J., concurring).

158. *Id.* Justice Breyer's adoption of this standard has evoked skepticism from scholars. *See, e.g.*, Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 492 (2016) (observing that Justice Breyer "[s]pen[t] very little time discussing the Court's prior history of applying strict scrutiny to content-based

tion "works speech-related harm that is out of proportion to its justifications."[159] The crucial consideration is whether the government could achieve its objective "in less burdensome ways"; here, Justice Breyer thought, it could.[160] As Justice Alito pointed out in dissent, however, Justice Breyer's sketch of this standard supplied slim guidance to legislators seeking to craft a permissible law advancing the SVA's aims.[161] Also left unsettled was whether future prohibitions of false expression would be governed by the concurrence's intermediate scrutiny[162] or the plurality's more demanding test.[163]

### 2. *Alvarez's Impact*

At least with respect to false campaign expression, the precise level of scrutiny to be gleaned from *Alvarez* may make little practical difference. General prohibitions of false political campaign speech[164] have fared poorly in the wake of *Alvarez*. Although these rulings have reserved the theoretical possibility of valid legislation in this area, it seems unlikely that meaningful laws of this sort could actually be crafted.

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laws"); Smolla, *supra* note 122, at 508 (asserting that Justice Breyer elected to apply intermediate scrutiny "without much real analysis or explication").

159. *Alvarez*, 567 U.S. at 730.

160. *Id.* at 737.

161. *See id.* at 744–45 (Alito, J., dissenting). This vagueness was not Justice Alito's principal critique of the decision. Citing the Court's past declarations that false statements of fact do not warrant constitutional protection, *id.* at 746–48, Justice Alito argued that the lies covered by the SVA could be banned because they had no value. *Id.* at 749–50. Conversely, these lies harmed both the nation's "system of military honors" and "medal recipients and their families." *Id.* at 739. Analogizing to trademark law, Justice Alito reasoned that "the proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps." *Id.* at 743–44. Thus, Alvarez could be punished for his "misappropriation" of the Medal of Honor. *Id.* at 754.

162. *See* People v. Morera-Munoz, 210 Cal. Rptr. 3d 409, 419–20 (Ct. App. 2016).

163. *See* O'Neill v. Crawford, 132 Ohio St. 3d 1472 (Ohio 2012) (decision referenced in the North Eastern Reporter, 970 N.E.2d 973).

164. Laws targeted at specific campaign abuses causing demonstrable harms could present a different case. *Compare* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 75 (2013) (arguing that after *Alvarez*, "interests supporting false campaign speech laws . . . [are] unlikely to trump the courts' concerns about censorship and partisan manipulation of these processes in speech at the core of the First Amendment"), *and* Staci Lieffring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After* United States v. Alvarez, 97 MINN. L. REV. 1047, 1061 (2013) (arguing that after *Alvarez*, "[i]t seems likely that the Court would strike down any attempt to regulate false, non-defamatory campaign speech"), *with* Hasen, *supra*, at 57, 69–77 (asserting that *Alvarez* permits bans on false election speech about the "mechanics of voting" such as when to vote where defendant is shown by clear and convincing evidence to have acted with actual malice), *and* Lieffring, *supra*, at 1078 ("Laws aimed at preventing false information about voter eligibility, polling places or election dates and times . . . would be deemed constitutional.").

As noted earlier, *Alvarez* added potency to the hostility toward bans on false political[165] campaign speech displayed by lower courts even before the Court's decision.[166] In *Susan B. Anthony List v. Driehaus*,[167] the United States Court of Appeals for the Sixth Circuit struck down an Ohio law barring persons from disseminating false information about a political candidate "knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."[168] The court's analysis began by acknowledging that *Alvarez* had abrogated the court's earlier holding in *Pestrak v. Ohio Elections Commission*.[169] It ended by noting that other courts encountering similar laws since *Alvarez* had likewise found them invalid.[170] With *Alvarez* having erased the fallacy that false speech is invisible to the First Amendment, the principle that restrictions on political speech are subject to strict scrutiny applied.[171] Here, the state had failed to demonstrate that its ban was narrowly tailored to protect its concededly compelling interest in protecting the integrity of its elections.[172] Rather the law forbade far too much speech and reached too many speakers, left untouched considerable damage to the interest it sought to serve, and was enforced by machinery fraught with potential for obstruction and mischief.[173]

In *281 Care Committee v. Arneson*,[174] the Eighth Circuit similarly rejected a Minnesota law that barred persons from

> participat[ing] in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.[175]

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165. Restrictions on judicial campaign speech are discussed *infra* Part II.

166. *See supra* notes 89–110 and accompanying text.

167. 814 F.3d 466 (6th Cir. 2016).

168. *Id.* at 469–70 (quoting OHIO REV. CODE § 3517.21(B)(10)).

169. *See id.* at 471–72 (citing Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991)). *Pestrak* is discussed *supra*, at notes 106–110 and accompanying text. The district court had made *Alvarez* the centerpiece of its analysis in its own invalidation of Ohio's statute. *See* List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 778 (S.D. Ohio 2014) ("*The response* to the unreasoned is the rational; to the uninformed, the enlightened; *to the straight-out lie, the simple truth.*" (quoting United States v. Alvarez, 567 U.S. 709, 727 (2012), (plurality opinion) (emphasis omitted)), *aff'd sub nom. Driehaus*, 814 F.3d 466.

170. *Driehaus*, 814 F.3d at 476.

171. *Id.* at 473.

172. *Id.* at 473–74.

173. *Id.* at 474–75.

174. 766 F.3d 774 (8th Cir. 2014).

175. *Id.* at 778 (second and third alterations in original) (quoting MINN. STAT. § 211B.06(1)).

More explicitly than in *Driehaus*, the Eighth Circuit characterized *Alvarez* as a doctrinal requisite for strict scrutiny rather than its source. The court noted that, while *Alvarez* "guides our analysis," it was the Supreme Court's proclamations on the protection of political speech that determined the level of scrutiny in this instance.[176] Even if Justice Breyer's application of intermediate scrutiny to the SVA was controlling in *Alvarez*, the court reasoned, Justice Breyer himself had indicated that a ban on false political speech would call for more stringent review.[177] At any rate, Minnesota's ban could not survive this harsh glare, for the statute was not narrowly tailored to attain the state's (presumed) compelling "interest in preserving 'fair and honest' elections and preventing a 'fraud upon the electorate.'"[178] Rather, the law suffered from multiple flaws. It was not necessary to the state's achievement of its purpose,[179] it was both overbroad[180] and underinclusive,[181] the law's potential for abuse could deter protected speech,[182] and a means less restrictive of speech—viz., counterspeech—was available to accomplish its goals.[183] In other instances as well, courts since *Alvarez* have ruled bans on false campaign speech insufficiently tailored to their aim of protecting the integrity of elections.[184]

### *3.* Alvarez *in Context*

Decisions like *Driehaus* and *281 Care Committee* can be viewed as reflecting more than special solicitude for political speech; they are also consistent with a broader hostility toward content-based restrictions displayed by the Supreme Court throughout this decade. This attitude has been especially evident in the Court's protection of speech widely considered to be of little or no value and repugnant to many.[185] In *United States v. Stevens*,[186] the

176. *Id.* at 784.
177. *See id.* at 783–84.
178. *Id.* at 787.
179. *Id.* at 788–91.
180. *Id.* at 791–92.
181. *Id.* at 794–95.
182. *Id.* at 794.
183. *Id.* at 793–94.
184. *See, e.g.*, Serafine v. Branaman, 810 F.3d 354, 361–62 (5th Cir. 2016) (citing *Alvarez* to support conclusion that counterspeech is prescribed remedy for misleading speech); Commonwealth v. Lucas, 34 N.E.3d 1242, 1251–57 (Mass. 2015) (applying strict scrutiny under Massachusetts Declaration of Rights to invalidate state statute criminalizing certain false statements about political candidates and questions submitted to voters); Magda v. Ohio Elections Comm'n, 58 N.E.3d 1188, 1205 (Ohio Ct. App. 2016).
185. *See generally* John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1 (2014) (charting the erosion of categorically unprotected speech).
186. 559 U.S. 460 (2010).

Court set the tone for a newly vigorous enforcement of its longstanding[187] suspicion of restrictions aimed at particular content. There, the Court overturned a conviction for selling videos of dogfighting under a federal ban on depictions of animal cruelty that the Court held facially invalid.[188] The Court rejected in strong terms the government's contention that this category of expression should be added to the roster of unprotected speech because its costs outweigh its value.[189] For the Court, this approach amounted to "a free-floating test for First Amendment coverage" that was "startling and dangerous."[190]

In the term between *Stevens* and *Alvarez*, the Court reaffirmed that unpopularity, presumably meager worth, and even putative harm would not overcome the First Amendment's aversion to restrictions aimed at specified content. In *Brown v. Entertainment Merchants Association*,[191] the Court struck down a California statute barring the sale or rental of "violent video games" to minors and requiring their packaging to be labeled "18."[192] The result was essentially preordained when Justice Scalia declared that the case would be governed by *Stevens*'s resistance to recognizing new categories of unprotected speech absent a compelling showing of historical sanction.[193] California contended that engagement with violent video games promoted aggression in juveniles in a way that exposure to traditional media did not, because the player "participates in the violent action on screen and determines its outcome."[194] Much like the plurality in *Alvarez* a year later, however, the Court found the government's evidence of a causal link between the forbidden speech and alleged harm inadequate to survive the strict scrutiny that prohibition of content required.[195]

The holding in *Brown* was in the spirit of—though not expressly reliant on—the Court's decision a few months earlier in *Snyder v. Phelps*.[196] There, the defendants had been held liable for intentional infliction of emotional distress for picketing the funeral of a soldier killed in the line of duty; their signs had asserted that deaths of American soldiers and other calamities reflected

187. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid." (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991))); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

188. *Stevens*, 559 U.S. at 464–67, 482.

189. *Id.* at 469–70.

190. *Id.* at 470.

191. 564 U.S. 786 (2011).

192. *Id.* at 789, 802–05.

193. *See id.* at 791–93.

194. *Id.* at 798.

195. *See id.* at 799–801.

196. 562 U.S. 443 (2011).

God's wrath for the nation's tolerance of homosexuality, particularly in the military.[197] By almost any ordinary reckoning, the sentiments expressed would be considered offensive if not odious,[198] and the Court intimated a low regard for the pickets' value.[199] Nevertheless, the Court vacated the damages award, finding that the distress complained of "turned on the content and viewpoint of the message conveyed."[200] Under the First Amendment's mandate "to protect even hurtful speech on public issues," the defendants could not be punished for the pain their speech inflicted on the decedent's family.[201]

More recently, the Court placed content-based restrictions in even further peril in *Reed v. Town of Gilbert*.[202] In *Reed*, the Court struck down Gilbert's sign code as a content-based regulation of speech.[203] The code had imposed disparate restrictions on size, location, and times of display for three relevant categories of signs.[204] Most striking about the decision was not its outcome,[205] but rather the Court's description of content-based speech regulation as "a law applie[d] to particular speech because of the topic discussed or the idea or message expressed."[206] On its face, this criterion appears to collapse the distinction between content regulation and subject-matter regulation.[207] Even if *Reed* did not have that drastic of an impact,[208] however, the Court unequivocally reaffirmed that restrictions deemed content-based would draw strict scrutiny.[209] There can be little doubt that bans on false campaign speech fall into this category.

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197. *Id.* at 448–51.

198. *See id.* at 448 (noting that signs stated, *inter alia*, "Thank God for 9/11," "Thank God for Dead Soldiers," and "God Hates Fags").

199. *See id.* at 460 ("[The defendants'] funeral picketing is certainly hurtful and its contribution to public discourse may be negligible."); *see also* United States v. Alvarez, 567 U.S. 709, 714 (2012) (plurality opinion) (describing protests in *Snyder* as "hateful").

200. *Snyder*, 562 U.S. at 457, 459.

201. *Id.* at 460–61.

202. 135 S. Ct. 2218 (2015).

203. *Id.* at 2224.

204. *Id.* at 2224–25 (describing requirements for "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs" (alterations in original)).

205. The Court voted unanimously to invalidate the code. *Id.* at 2223. Three Justices—Kennedy, Alito, and Sotomayor—signed onto an opinion concurring with Justice Thomas's majority opinion, while three others—Ginsburg, Breyer, and Kagan—concurred only in the judgment. *Id.*

206. *Id.* at 2227.

207. *See* Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (noting that "*Reed* effectively abolishes any distinction between content regulation and subject-matter regulation"); Cahaly v. Larosa, 796 F.3d 399, 405 (4th Cir. 2015); Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1133–34 (2016).

208. Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 2000 (2016) ("To the extent that lower court reception of *Reed* is beginning to define a doctrinal equilibrium, *Reed*'s impact has been narrow.").

209. *See Reed*, 135 S. Ct. at 2231; *see also id.* at 2233 (Alito, J., concurring).

## II. THE IMPACT OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE* ON JUDICIAL CAMPAIGN RESTRICTIONS

The broad immunity extended to false political campaign speech did not automatically translate to comparable protection for false judicial campaign expression. Indeed, decades of restrictions on judicial candidates' ability to make a range of statements assumed decisive differences between political and judicial campaign speech under the First Amendment. In 2002, however, the Supreme Court's ruling in *Republican Party of Minnesota v. White*[210] upended this premise by subjecting the restriction at issue there to strict scrutiny.[211] Since then, lower courts have invoked *White* to invalidate restraints on judicial candidates' speech besides the one struck down in that case.[212]

### A. *Judicial Campaign Speech Codes: The Attempted Separation of Elections and Politics*

An overwhelming majority of the nation's state judges must run the gauntlet of popular election. Citizens' votes determine the selection or retention of judges in thirty-nine states.[213] According to a frequently cited tally, about eighty-seven percent of state judges stand for election at least once to attain or hold their office.[214] These figures contrast starkly with the appointment[215] and lifetime tenure[216] of federal judges. Through these arrangements, the Framers sought to preserve judicial independence in the face of majoritarian pressures.[217] Beginning in the mid-nineteenth century, however, the

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210. 536 U.S. 765 (2002). The case is discussed *infra* Part II.B.

211. *Id.* at 774, 781.

212. *See infra* Part II.C.

213. *See* AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2013), http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

214. Robert C. Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1028 (2001); *see also* Rachel Caufield, *Judicial Elections: Today's Trends and Tomorrow's Forecast*, 46 JUDGES' J. 6, 6 (2007) ("Among state trial courts, 76 percent of judges are elected to their initial term, and 88 percent face the voters for subsequent terms on the bench. For state appellate courts, 53 percent of judges are elected to their initial term on the bench, and 89 percent face the voters for subsequent terms on the bench.").

215. U.S. CONST. art. II, § 2, cl. 2 (providing for appointment by the President with advice and consent of the Senate).

216. *Id.* art. III, § 1 (providing that judges shall hold office "during good Behaviour").

217. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Ian Shapiro ed., 2009); *see also* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 306 (2003) ("The protection of judicial independence is . . . perhaps the foundational principle . . . of Article III." (emphasis omitted)).

appeal of democratic accountability influenced the widespread adoption of direct election of state judges.[218]

In time, sentiment arose that allowing judicial candidates to conduct their campaigns in the same manner as their political counterparts posed dangers to the distinctive function and character of the judiciary.[219] Campaign expression and activity deemed appropriate for aspirants to a legislative or elective office could undermine judicial candidates' capacity to act as fair and impartial arbiters of the law once in office.[220] For example, commitments to adhere to specific positions are the lifeblood of traditional political campaigning. For judicial candidates, however, such commitments are said to undermine the impartial consideration of evidence and arguments expected of judges.[221] Regardless of their actual effect on judges' behavior, moreover, these commitments are viewed as impairing public respect for the judiciary by fostering the perception of judicial candidates as mere politicians.[222]

These kinds of concerns came to be embodied in limitations on the speech and political activities of judicial candidates. A milestone was the provision of the 1972 American Bar Association ("ABA") Model Code of Judicial Conduct[223] stating that a candidate for judicial office "should not make pledges or promises of conduct in office other than the faithful and

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218. *See* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 80–135 (1944).

219. *See* Gerald Stern, *The Changing Face of Judicial Elections*, 32 HOFSTRA L. REV. 1507, 1509 (2004) ("The argument in support of the restrictions [on judicial campaign speech] is that, unlike other public officials, judges play a unique role in deciding issues of fact and law, based on principles of established law. They are not the public's representatives in the political sense.").

220. Shira J. Goodman et al., *What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 862 (2010); *see* Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. FLA. J.L. & PUB. POL'Y 205, 214 (2004) ("Opinions which electioneering legislators are free to express and then to try to act upon may be totally out of bounds for elected judges and a threat to their duties of office.").

221. *See* Stephen Gillers, *"If Elected, I Promise [_____]"—What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 726 (2002) (describing commitments by judicial candidates as "the antithesis of the judicial process"); *see also* Megan Sloane Gordon & Matthew Edward Wetzel, *The Precarious Balance of Judicial Candidate Speech and Judicial Ethics: The Announce Clause in the Aftermath of* Republican Party of Minnesota v. White, 16 GEO. J. LEGAL ETHICS 613, 618 (2003) (arguing that campaign promises "are completely antithetical to the ideas of neutrality, unbiasedness, and cold impartiality that inhere to the judiciary").

222. *See* Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 214 (1987); *see also* Morial v. Judiciary Comm'n, 565 F.2d 295, 302 (5th Cir. 1977) (describing limitations on judicial candidates' speech as advancing "[t]he state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person"); Adam R. Long, Note, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 790 (2001) ("If the citizenry sees judges as politicians first . . . the public will question the validity and legitimacy of judicial decisions and, in fact, the judiciary as a whole.").

223. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 1972).

impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact."[224] By the time the Supreme Court issued its decision in *White*, states with elected judges had widely enacted campaign codes containing variations of these restraints.[225] The restrictions were justified as balancing due process's imperative of judicial impartiality with the interest in democratic accountability and protection of free speech.[226]

For many, however, speech restrictions are an imperfect solution to a more fundamental problem: the very existence of an elected judiciary.[227] The responsiveness to voters expected of legislators and executives is said to be incompatible with judges' duty to uphold the rights of unpopular groups and individuals.[228] Substantial evidence exists to support Justice O'Connor's observation that "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."[229] Another criticism is that voters are poorly positioned to

224. *Id.* Canon 7(B)(1)(c). The Code also imposed restraints on fundraising and involvement with political organizations. *Id.* Canon 7(A)(1).

225. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 880 nn.21–22 (8th Cir. 2001), *rev'd on other grounds sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

226. *See, e.g.*, Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 84–88 (1997); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1060 (1996). *See generally* Ferris K. Nesheiwat, *Judicial Restraint: Resolving the Constitutional Tension Between First Amendment Protection of Political Speech and the Compelling Interest in Preserving Judicial Integrity During Judicial Elections*, 24 QUINNIPIAC L. REV. 757 (2006).

227. *See generally* Martin H. Redish & Jennifer Aronoff, *The* Real *Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1 (2014) (arguing against all forms of judicial elections).

228. *See White*, 536 U.S. at 798 (Stevens, J., dissenting) ("[I]t is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."); Erwin Chemerinsky, Comment, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) ("The paramount function of courts is to protect social minorities and individual rights. But judges cannot be expected to perform this countermajoritarian function if their ability to keep their prestigious, highly sought after positions depends on popular approval of their rulings."); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 51 (2003); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 284 (2008); Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in the Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (comparing the situation of a judge deciding controversial cases while facing reelection to "finding a crocodile in your bathtub" in that "it's hard to think about much else while you're shaving"); *see also* Raban, *supra* note 220, at 214 (offering examples of statements that judges might make that might be popular but which would threaten the integrity of the legal system).

229. *White*, 536 U.S. at 789 (O'Connor, J., concurring); *see also* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793–94 (1995) (contrasting the rate of overriding a jury recommendation of life without parole and imposing the death penalty by judges subject to election

evaluate the credentials of judicial candidates.[230] In a similar vein, it is argued that qualities that make for an effective campaigner largely differ from those needed of good judges.[231]

Moreover, scholars worry that campaign contributions to judicial candidates may compromise their independence and impartiality when they ascend to the bench. Critics perceive an unvirtuous cycle in which judicial candidates solicit contributions from individuals and organizations who in turn expect favorable rulings from the judges they helped elect.[232] Justice O'Connor expressed this concern as well, further asserting that even "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."[233] Substantial data exist to support the inference that the operation of this dynamic extends well beyond possibility to apparent reality.[234]

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with the much greater incidence of overriding a jury recommendation of death in a state where judges did not stand for election); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (finding an increase in sentences handed down by judges as reelection approaches); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 648 (2009); CHRIS W. BONNEAU, FEDERALIST SOC'Y, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 7 (2012), https://fedsoc.org/commentary/publications/a-survey-of-empirical-evidence-concerning-judicial-elections ("[T]he evidence is pretty clear . . . that elected judges are responsive to their constituencies when it comes time to make decisions on the bench.").

230. *See* Richard A. Posner, Lecture, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006) ("It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently."); Pozen, *supra* note 228, at 293.

231. *See* Douglas D. Birk, *Stuck Inside of Minnesota Without Judicial Election Reform Again: A Contemporary Survey of the Political Movement to Preserve Judicial Impartiality from the Minnesota Judiciary's Point of View*, 32 HAMLINE J. PUB. L. & POL'Y 507, 541 (2011) (ascribing to a district judge the identification of the paradox of "selecting judges by the same process as is used for other public candidates while expecting distinctly different qualities and attributes in judicial candidates"); Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 434 (2005); Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 747 (2009); Nathan Richard Wildermann, Note, *Bought Elections:* Republican Party of Minnesota v. White, 11 GEO. MASON L. REV. 765, 788 (2003).

232. *See, e.g.*, David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 364–66 (2001); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 3 L. REV. MICH. ST. U. DET. C. L. 849, 852–57 (2001); Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence,* 38 U. RICH. L. REV. 615, 669–72 (2004).

233. *White*, 536 U.S. at 790 (O'Connor, J., concurring).

234. *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (compiling data indicating that in partisan judicial elections, a positive correlation exists between the amount of contributions received by a successful candidate and the probability that that judge will vote in favor of business interests); Shepherd, *supra* note 229, at 669 ("[Empirical evidence] shows that for judges elected in partisan elections, contributions from various interest groups have a statistically significant relationship with the probability that judges vote for litigants that the

Further, the scale of contributions—already a source of public attention when Justice O'Connor decried its impact[235]—has only skyrocketed since then.[236] This trajectory has been largely fueled by the Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission*,[237] which found that corporate independent campaign expenditures in elections constitute political speech protected by the First Amendment.[238]

Commentators also lament that the sharp increase in spending on judicial elections has been accompanied by deterioration in their tone; in the words of Roy Schotland, they have become "nastier, noisier, and costlier."[239] Attack ads, long a key tactic in political contests, have played an increasingly prominent part in judicial races.[240] A few examples from recent elections illustrate the edge exhibited by such ads.[241]

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interest groups favor."); Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 369 (2010) (discussing a study in which "[o]n average . . . justices ruled in favor of [their] contributors 70 percent of the time"). *But see* James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The* Sui Generis *Recusal Test of* Caperton v. Massey, 60 SYRACUSE L. REV. 305, 315 (2010) (finding the evidence of campaign contributions' influence on judicial decisions "weak[]").

235. *See, e.g.*, Sheila Kaplan, *The Very Best Judges That Money Can Buy*, U.S. NEWS & WORLD REP. (Nov. 29, 1999).

236. *See* Steele Trotter, Williams-Yulee *and the Changing Landscape of Judicial Campaigns*, 28 GEO. J. LEGAL ETHICS 947, 947 (2015) (noting the dramatic increase in judicial campaign contributions during the 2000s).

237. 558 U.S. 310 (2010).

238. *Id.* at 339–44. *See* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 30 (2012) ("[I]ndependent expenditures offer a political benefit to candidates that serve as the quids in a quid pro quo exchange nearly as well as a contribution. When those independent expenditures can be made without restriction in very large amounts, the risk of corruption may even be greater than the risk from capped contributions.").

239. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1081 (2007); *see also* David W. Earley, *When Bathtub Crocodiles Attack: The Timing and Propriety of Campaigning by Judicial Retention Election Candidates*, 68 N.Y.U. ANN. SURV. AM. L. 239, 252 (2012) (observing the influence of ugly partisan politics on judicial elections); Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1351 (2010); Scott Michels, *Judicial Elections Turn 'Bitter, Nasty' and Pricey*, abcNEWS (June 19, 2007), http://abcnews.go.com/TheLaw/story?id=3292991&page=1.

240. *See* Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 673 (2002) (concluding from studies of judicial elections in four states that candidates' ads "highlight easily absorbed negative messages about the opponent" (quoting STEPHEN ANSOLABEHERE ET AL., THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE 100 (1993)); Melinda Gann Hall, *Partisanship, Interest Groups, and Attack Advertising in the Post-*White *Era, or Why Nonpartisan Judicial Elections Really Do Stink*, 31 J.L. & POL. 429, 435–40 (2016). An early, classic instance of the effective use of such ads was the successful 1986 campaign to remove three justices from the California Supreme Court. *See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2038 (1988) (describing the campaign as "a blatant appeal to emotion and desire for revenge").

241. *E.g.*, Debra Cassens Weiss, *Judge Candidate Gets Law License Suspension for Attack Ads; Dissenters Cite Free-Speech Protection*, A.B.A. J. (Dec. 9, 2016, 8:00 AM), http://www.abajournal.com/news/article/judicial_candidate_gets_law_license_suspension_for_attack_ads_dissent-

An obvious alternative to the perceived ills of judicial elections would be emulation of the federal system of appointment. Indeed, some commentators have argued that judicial elections inevitably violate due process.[242] Barring such an unlikely ruling, however, problems posed by an elected judiciary must likely be addressed through reform rather than abolition. Whatever the deficiencies of judicial elections, they remain highly popular with the public. Voters across the nation have routinely and decisively rejected efforts to remove the selection of judges from their hands.[243] In particular, efforts to balance the presumed advantages of appointment with democratic accountability through the "Missouri Plan"[244] have failed to gain traction. Under this system—also known as merit selection[245]—a judge is selected by a high elected official from a list compiled by a nonpartisan nominating commission and then is subject to later unopposed retention elections in which voters decide whether to retain the judge.[246] A number of states besides Missouri have adopted this approach at least in part.[247] On the whole, however, voters have overwhelmingly rejected attempts to introduce this limitation on their ability to choose judges.[248] Indeed, recent years have been marked by efforts to modify or dismantle merit selection where it already exists.[249]

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ers_se (An ad run in 2014 "showed a robed, faceless judge pouring Jack Daniels whiskey and serving it to children. The voiceover said: 'Everyone knows that a judge would never serve alcohol to kids in a courtroom. But appellate judge Tim Cannon did something almost as bad.'"); Richard L. Hasen & Dahlia Lithwick, *Lousy Judgment*, SLATE (Oct. 31, 2014, 4:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/judicial_election_outrageous_ads_campaign_contributions_break_records.html (showing an ad run against judicial candidate in 2014 that asserted candidate said "child pornography is a victimless crime"); A.J. Vicens, *7 Incredibly Sleazy Ads Targeting Judges*, MOTHER JONES (Oct. 28, 2014, 10:00 AM), http://www.motherjones.com/politics/2014/10/videos-sleazy-attack-ads-judicial-elections-dark-money (showing, *inter alia*, an ad run against a state supreme court justice asserting that she "[s]ides with child predators").

242. *See, e.g.*, Redish & Aronoff, *supra* note 227, at 2; Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 188–89 (1996).

243. *See* Bopp & Woudenberg, *supra* note 234, at 307; *Unsuccessful Reform Efforts*, NAT'L CTR. FOR ST. CTS., http://judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state= (last visited Feb. 21, 2018).

244. *See* Croley, *supra* note 228, at 724.

245. *See* James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 92 (2013).

246. *Id.*

247. *See* AM. JUDICATURE SOC'Y, *supra* note 213 (reporting that twenty-three states and the District of Columbia use either merit selection alone or merit selection in combination with other methods).

248. *See* Michael E. DeBow & Brannon P. Denning, Williams-Yulee v. The Florida Bar*, the First Amendment, and the Continuing Campaign to Delegitimize Judicial Elections*, 68 VAND. L. REV. EN BANC 113, 123–24 (2015), https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2015/01/Williams-Yulee-v.-The-Florida-Bar-the-First-Amendment-and-the-Continuing-Campaign-to-Delegitimize-Judicial-Elections.pdf; *see supra* note 213 and accompanying text.

249. *See* Michael Linton Wright, Comment, Williams-Yulee v. Florida Bar*: Judicial Elections, Impartiality, and the Threat to Free Speech*, 93 DENV. L. REV. 551, 575 (2016).

### *B.* White*'s Application of Strict Scrutiny to Judicial Campaign Speech*

The persistent prevalence of electing judges infused the Court's holding in *Republican Party of Minnesota v. White*[250] with large import. The statute challenged in *White* had forbidden a candidate for judicial office—including incumbent judges—to "announce his or her views on disputed legal or political issues."[251] The prohibition encompassed a wide range of expressions, including criticism of a past court decision while intimating an openness to overturning that decision.[252] To justify the "announce clause," Minnesota pointed to two interests that the restriction served: judicial impartiality and the appearance of judicial impartiality.[253] In reviewing the provision, the Court accepted as "correct" the parties' stipulation that strict scrutiny was the pertinent standard.[254] This standard was based on the premise that the announce clause was a content-based restriction of speech "at the core of our First Amendment freedoms" since it concerned the fitness of candidates for public office.[255]

While the application of strict scrutiny alone probably doomed the announce clause,[256] the Court's elaboration of its rationale portended broader threats to limitations on judicial campaign speech. Under the First Amendment, as construed by Justice Scalia's majority opinion in *White*, the fact that judicial campaigns involve elections far exceeds in importance the result that the officials chosen are judges.[257] It is true that the Court disclaimed an intent to "assert []or imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[258] Viewed in the context of the Court's full opinion, however, this disavowal should be seen as a slight qualification of the Court's application of principles governing political speech to judicial elections. Responding to Justice Ginsburg's contention that the distinctive character of the judiciary warrants special latitude

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250. 536 U.S. 765 (2002).

251. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

252. *Id.* at 772.

253. *Id.* at 775.

254. *Id.* at 774. Justice Kennedy was prepared to go even further and apply a rule of per se invalidity to such a content-based restriction falling outside established exceptions. *Id.* at 793 (Kennedy, J., concurring) ("The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.").

255. *Id.* at 774 (majority opinion) (quoting Republican Party of Minn. v. Kelly, 247 F.3d 854, 861, 863 (8th Cir. 2001)).

256. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1451 (2d ed. 1988) ("When expressed as a standard for judicial review, strict scrutiny is . . . 'strict' in theory and usually 'fatal' in fact." (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))).

257. *White*, 536 U.S. at 781–84.

258. *Id.* at 783.

to regulate judicial candidates' speech,[259] Justice Scalia accused her of "greatly exaggerat[ing] the difference between judicial and legislative elections."[260] For the majority, the operative principle was the inextricability of elections and unhindered political speech.[261] Thus, the state could not "leav[e] . . . elections in place while preventing candidates from discussing what the elections are about"[262]; rather, it was "imperative that [candidates for public office] be allowed freely to express themselves on matters of current public importance."[263]

The operation of strict scrutiny was rendered even more potent by the Court's conception of the state's asserted interest in preserving the impartiality of its judges. As Justice Scalia explained, impartiality in this sense meant "lack of bias for or against either party to the proceeding."[264] The announce clause was not narrowly—or even appreciably—tailored to serve this interest because it "does not restrict speech for or against particular parties, but rather speech for or against particular issues."[265] While the Court was willing to entertain a second meaning of impartiality—"lack of preconception in favor

259. Justice Ginsburg, joined by the other three dissenters, argued that because "judges perform a function fundamentally different from that of the people's elected representatives," judicial elections need not possess "all the trappings of legislative and executive races." *Id.* at 803, 808 (Ginsburg, J., dissenting). A state was therefore entitled to place limitations on judicial campaign speech impermissible in other kinds of elections to buttress judges' obligation to keep above "the partisan fray." *Id.* at 807. Justice Stevens, also writing for all the dissenters, likewise accused the majority of ignoring the "fundamental distinction between campaigns for the judiciary and the political branches." *Id.* at 797 (Stevens, J., dissenting). He believed the Court had underestimated the state's interest in "judicial independence and impartiality" and wrongly equated judicial candidates' freedom to comment on public issues with that of political candidates. *Id.*; *see also* Briffault, *supra* note 6, at 184 ("If campaign practices that are unexceptionable (or even constitutionally protected) in the context of legislative or executive elections have a distinct and harmful impact on the judicial function, then they can be restricted in judicial election campaigns.").

260. *White*, 536 U.S. at 784 (majority opinion).

261. *See id.* at 788 ("If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." (alteration in original) (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting))); *see also id.* at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

262. *Id.* at 788 (majority opinion); *see also id.* at 794 (Kennedy, J., concurring) ("Minnesota may not . . . censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.").

263. *Id.* at 781–82 (majority opinion) (quoting Wood v. Georgia, 370 U.S. 375, 395 (1962)); *see also id.* at 796 (Kennedy, J., concurring) ("The State may not regulate the content of candidate speech merely because the speakers are candidates."); Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 736 (2003) ("If the voting public is to make reasoned choices [about judicial candidates], it should have more rather than less information than [current restrictions allow].").

264. *White*, 536 U.S. at 775 (majority opinion) (emphasis omitted).

265. *Id.* at 776 (emphasis omitted).

of or against a particular legal view"—the announce clause's effort to promote this interest failed the other prong of strict scrutiny.[266] Such a tabula rasa quality was neither attainable nor desirable, much less compelling; any candidate worthy of the judiciary will have considered legal issues sufficiently to have formed opinions on them.[267] By extension, the state's asserted interest in maintaining the appearance of this brand of impartiality also did not qualify as a compelling interest.[268] Finally, the Court dispensed with assessing impartiality as openness to entertaining views opposed to the judge's preconceptions because it did not believe that the Minnesota Supreme Court had adopted the announce clause for this purpose.[269] Rather, the breadth of settings in which judges could still state their views—including judicial opinions, writings, lectures, and instruction—left the clause's restriction "so woefully underinclusive as to render belief in that purpose a challenge to the credulous."[270]

### *C. Responses to* White

Reaction to *White*'s implications for other restrictions on judicial campaign speech varied among scholars, states, and—to a lesser extent—courts. One leading scholar believed that existing limitations of narrower scope and weightier justification than the announce clause remained valid in the wake of *White*.[271] A number of other commentators also voiced some level of confidence that the Court had not dealt a fatal blow to these restrictions.[272] Particular optimism was expressed about the prospects of the pledges or promises clause,[273] which forbids "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."[274] At the same time, some observers took a more ominous view of the future of

266. *Id.* at 777 (emphasis omitted).

267. *See id.* at 777–78.

268. *Id.* at 778.

269. *Id.*

270. *Id.* at 780.

271. *See* Briffault, *supra* note 6, at 209–33.

272. *See, e.g.*, Francisco R. Maderal, *Regulating Judicial Campaign Speech:* Republican Party of Minnesota v. White *on Remand*, 19 GEO. J. LEGAL ETHICS 809, 817–19 (2006); Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-*White *Landscape*, 56 MERCER L. REV. 971, 972 (2005); Tobin A. Sparling, *Keeping up Appearances: The Constitutionality of the* Model Code of Judicial Conduct*'s Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 444–45 (2006).

273. *See, e.g.*, Moerke, *supra* note 6, at 310 (describing the future of the clause as "fairly bright").

274. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (AM. BAR ASS'N 2004).

such restraints.[275] Revisions of state codes in the period following *White* similarly reflected diverse assessments of the ruling's impact. These included officially acknowledging the decision while leaving restrictions intact,[276] swift abrogation of the announce clause,[277] narrowing the reach of the commit clause,[278] and relaxing[279] or simply eliminating[280] the pledges or promises clause. In a kind of averaging of states' responses, the ABA loosened the restrictions in its Model Code of Judicial Conduct in the immediate aftermath of *White* and then again a few years later.[281]

In contrast to these mixed responses, lower courts overwhelmingly (if not uniformly[282]) invalidated judicial campaign speech restrictions challenged under *White*. Within just a few years after the ruling, various federal

275. *See, e.g.*, Friedland, *supra* note 7, at 570–71; Richard L. Hasen, *First Amendment Limits on Regulating Judicial Campaigns*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES FOR JUDICIAL ELECTIONS 15, 15–16 (Matthew J. Streb ed., 2007),

276. *See, e.g.*, Brian S. Faughnan & Lucian T. Pera, *First Amendment Shock Waves: Will Court's New Rules Help Tennessee Judicial Candidates Deal with Aftershocks of '*White*' Decision?*, TENN. B.J., June 2006, at 14, 20–21, 27 (describing Tennessee's replacing commentary of, but not text of, state's commit clause); Rick A. Johnson, *Judicial Campaign Speech in Kentucky After* Republican Party of Minnesota v. White, 30 N. KY. L. REV. 347, 383–84 (2003) (quoting memorandum of Kentucky Judicial Conduct Commission asserting that *White* did not affect state's canon on judicial statements).

277. *E.g.*, Amendment of Canon 7(B)(1)(c) of the Code of Judicial Conduct, 571 Pa. xxxvii (2002).

278. *See, e.g.*, CAL. CODE OF JUDICIAL ETHICS Canon 5(B)(1) & advisory committee's cmt. (1996) (amended 2003) (retaining prohibition on candidates' statements "that commit the candidate . . . with respect to cases, controversies, or issues that are likely to come before the courts" but rescinding ban on statements that "appear to commit" the candidate in these ways).

279. *See, e.g.*, Approval of Amendments to the Tex. Code of Judicial Conduct, No. 02-9167 (Tex. Aug. 22, 2002), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02916700.pdf (replacing ban on pledges or promises regarding judicial duties "other than the faithful and impartial performance of the duties of the office" with prohibition regarding "pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge").

280. *See, e.g.*, Order Amending Preamble to Georgia Code of Judicial Conduct (Ga. Jan. 7, 2004), http://www.gasupreme.us/rules/amendments-to-rules/jqc_7_27_or/ (deleting Georgia's pledges or promises clause); N.C. CODE OF JUDICIAL CONDUCT (amended 2006), http://www.nccourts.org/Courts/CRS/Councils/JudicialStandards/Documents/Amendments-NCJudicialCode.pdf.

281. *See* Stern, *supra* note 6, at 77–78.

282. *See, e.g.*, Bauer v. Shepard, 620 F.3d 704, 715–17 (7th Cir. 2010) (upholding, *inter alia*, Indiana's "commits clauses").

courts struck down the commit clause,[283] the pledges or promises clause,[284] the solicitation clause,[285] the partisan activities clause,[286] and the misrepresent clause.[287] Decisions by the highest courts of Florida[288] and New York[289] upholding restrictions departed from this pattern; however, the decisions' questionable status as outliers was compounded by the potential bias inherent in ruling on canons that the courts themselves had issued.[290]

## III. CONSTITUTIONAL INFIRMITIES OF THE MISREPRESENT CLAUSE

In the ABA's current formulation, the misrepresent clause forbids judicial candidates to "knowingly, or with reckless disregard for the truth, make any false or misleading statement."[291] The incorporation of defamation's actual malice requirement[292] is obviously designed to shield this prohibition from First Amendment attack. That strategy is consistent with the reasoning of courts that have invalidated state misrepresent clauses for setting excessively low thresholds of intent.[293] Under the logic, principles, and themes that animate *Alvarez* and *White*, however, even this barrier to liability appears to fall short of the protection required by the Court.

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283. *E.g.*, Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005), *vacated and remanded in part*, 504 F.3d 840 (9th Cir. 2007); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1228–34 (D. Kan. 2006), *vacated as moot sub nom.* Kan. Judicial Review v. Stout, 562 F.3d 1240 (10th Cir. 2009); Family Tr. Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 696–704 (E.D. Ky. 2004); N.D. Family All., Inc. v. Bader, 361 F. Supp. 2d 1021, 1042 (D.N.D. 2005).

284. *E.g.*, *Feldman*, 380 F. Supp. 2d at 1083; *Stout*, 440 F. Supp. 2d at 1228–34; *Wolnitzek*, 345 F. Supp. 2d at 696–704; *Bader*, 361 F. Supp. 2d at 1042.

285. *E.g.*, Republican Party of Minn. v. White, 416 F.3d 738, 763–66 (8th Cir. 2005); Weaver v. Bonner, 309 F.3d 1312, 1322–23 (11th Cir. 2002); *Stout*, 440 F. Supp. 2d at 1235–38.

286. *E.g.*, Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 88–90 (N.D.N.Y. 2003), *rev'd on other grounds*, 351 F.3d 65 (2d Cir. 2003).

287. *Weaver*, 309 F.3d at 1319–22.

288. *In re* Kinsey, 842 So. 2d 77, 86–87 (Fla. 2003) (upholding commit clause and pledges or promises clause).

289. *In re* Watson, 794 N.E.2d 1, 5–8 (N.Y. 2003) (per curiam) (upholding pledges or promises clause); *In re* Raab, 793 N.E.2d 1287, 1290–93 (N.Y. 2003) (per curiam) (upholding political activities clause).

290. *See In re* Code of Judicial Conduct, 643 So. 2d 1037, 1040 (Fla. 1994); *Rules Governing Judicial Conduct*, STATE OF N.Y. COMM'N ON JUDICIAL CONDUCT, http://www.scjc.state.ny.us/Legal.Authorities/rgjc.htm (last visited Feb. 21, 2018).

291. MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(11) (AM. BAR ASS'N 2011) (footnote omitted).

292. *See supra* note 86 and accompanying text.

293. *See infra* notes 295–304 and accompanying text.

### A. *The Misrepresent Clause in the Courts*

Even before the ruling in *White* cast doubt over restrictions on judicial campaign speech, the putatively sturdy misrepresent clause[294] encountered setbacks in court. Once armed with the strict scrutiny prescribed by *White*, challenges unsurprisingly increased in potency. The protection accorded falsity by *Alvarez* rendered states' misrepresent clauses still more vulnerable to litigation over their validity. Yet, even recent decisions have generally continued to focus on flaws in legislative draftsmanship rather than question the state's underlying ability to penalize judicial campaign speech officially branded untrue.

A harbinger of the wider trouble the misrepresent clause would face arrived two years before *White* in cases decided in three states. In *In re Chmura*,[295] the Michigan Supreme Court declared overbroad a canon stating that a candidate for judicial office:

> should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about the results the candidate can achieve.[296]

The court found that the canon chilled "core political speech" because its ban was not limited to statements "bear[ing] on the impartiality of the judiciary," reached not only false statements but also statements deemed "misleading or deceptive," and "extend[ed] beyond the candidate's actual statement to permit discipline for factual omissions."[297] To save the statute, the court narrowly construed it to provide that a judicial candidate "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false."[298]

A few months later, the federal district court in *Butler v. Alabama Judicial Inquiry Commission*[299] relied on *Chmura* as "well reasoned and persuasive authority"[300] in disapproving of an Alabama canon that in part barred judicial candidates from publishing "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable

294. *See supra* note 7 and accompanying text.
295. 608 N.W.2d 31 (Mich. 2000).
296. *Id.* at 36 (quoting MICH. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1974)).
297. *Id.* at 42.
298. *Id.* at 43.
299. 111 F. Supp. 2d 1224 (M.D. Ala. 2000).
300. *Id.* at 1233.

person."[301] On appeal, the United States Court of Appeals for the Eleventh Circuit certified three questions to the Supreme Court of Alabama and invited the court to consider whether the prohibitions violated the First Amendment.[302] Quoting extensively from the federal district court's opinion, the Alabama court ruled the canon not narrowly tailored to serve the state's interest in protecting the integrity of the judiciary.[303] Accordingly, the state court narrowed the canon to exclude the reference to deceptive or misleading statements and prohibit only "demonstrably false information" about a judicial candidate or an opponent disseminated with actual malice.[304]

Less than a month after *Butler* was decided, the district court in *Weaver v. Bonner*[305] struck down a Georgia canon that in part barred judicial candidates from engaging in public communication that "the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading."[306] Like the district court in *Butler*, the court in *Weaver* was persuaded by and drew heavily from the Michigan Supreme Court's reasoning in *Chmura*.[307] The court determined that the Georgia canon failed for overbreadth because its prohibition was not confined to "false statements that are knowingly made."[308] Rather, the proscription also encompassed "misleading, deceptive, and fraudulent statements"; "statements containing material misrepresentations of fact or law"; and "statements that omit a fact necessary to make the communication considered as a whole not materially misleading."[309] Indeed, the canon's scope was ruled so far beyond permissible

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301. *Id.* at 1227 (quoting ALA. CANONS OF JUDICIAL ETHICS Canon 7(B)(2) (1998)). The prohibition in full forbade candidates to:

> Post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.

*Id.* (quoting ALA. CANONS OF JUDICIAL ETHICS Canon 7B(2) (effective Jan. 1, 1998)).

302. Butler v. Ala. Judicial Inquiry Comm'n, 245 F.3d 1257, 1265–66 (11th Cir. 2001).

303. Butler v. Ala. Judicial Inquiry Comm'n, 802 So. 2d 207, 217–18 (Ala. 2001).

304. *Id.* at 218.

305. 114 F. Supp. 2d 1337 (N.D. Ga. 2000), *aff'd in part, rev'd in part*, 309 F.3d 1312 (11th Cir. 2002).

306. *Id.* at 1339 (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d)).

307. *See id.* at 1342–43.

308. *Id.* at 1342.

309. *Id.* Further aggravating the canon's overbreadth was its prohibition of "statements likely to create an unjustified expectation about results the candidate can achieve . . . [regardless of] whether [the statements] are made knowingly or negligently." *Id.*

bounds that it could not be rehabilitated by a narrowing construction without wholesale judicial revision of its text.[310]

The Supreme Court's later ruling in *White* furnished support for the approach taken in *Weaver*. Indeed, less than two months after *White* was handed down, the Eleventh Circuit pointed to the Court's decision in confirming the invalidity of the Georgia canon at issue.[311] In the eyes of the Eleventh Circuit, *White* "suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections."[312] Accordingly, the court looked to *Brown v. Hartlage*[313] in adopting strict scrutiny for regulation of judicial candidates' campaign speech[314] and the actual malice requirement for their false expression.[315] Georgia's restriction failed this standard because it prohibited false statements negligently made and true statements that were misleading or deceptive, thus depriving candidates of the "breathing space" mandated by the First Amendment.[316] The Eleventh Circuit's holding, however, did not trigger an immediate avalanche of invalidated bans on false or misleading judicial campaign speech. A year after *Weaver*, the Florida Supreme Court upheld discipline of a judicial candidate for misrepresenting her incumbent's revocation of a criminal defendant's bond.[317] Later, the Wisconsin Supreme Court deadlocked on a 3-3 vote over whether an incumbent judge's allegedly false campaign advertisement was protected under *White*.[318] Still, the stage was set for the Court's ruling in *Alvarez* to give further impetus to challenges to prohibitions on false judicial campaign speech.

While *Alvarez* is sometimes invoked in disciplinary proceedings for untruthful speech, its impact on these cases has been mixed. A federal district court recently drew on *Alvarez* in striking down an Ohio rule whose ban reached judicial campaign speech "that is not false and not even obviously misleading."[319] Hence, the rule clashed with the principle articulated by Justice Kennedy in *Alvarez* that the Constitution "stands against the idea that we

310. *See id.* at 1343 (declining to remove problematic negligence language).

311. Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002).

312. *Id.* at 1321.

313. 456 U.S. 45 (1982); *see supra* notes 73–88 and accompanying text.

314. *Weaver*, 309 F.3d at 1319.

315. *Id.* at 1319, 1321.

316. *Id.* at 1319 (citing *Brown*, 456 U.S. at 61).

317. *In re* Kinsey, 842 So. 2d 77, 82–83 (Fla. 2003).

318. *Compare In re* Judicial Disciplinary Proceedings Against Gableman, 784 N.W.2d 631, 647 (Wis. 2010) (Prosser, Roggensack, & Ziegler, JJ.) (finding that advertisement was protected under *White*), *with In re* Judicial Disciplinary Proceedings Against Gableman, 784 N.W.2d 605, 630 (Wis. 2010) (Abrahamson, C.J., Bradley & Crooks, JJ.) (concluding that advertisement was subject to discipline).

319. O'Toole v. O'Connor, No. 2:15-cv-1446, 2016 WL 4394135, at *14 (S.D. Ohio Aug. 18, 2016).

need Oceania's Ministry of Truth."[320] Similarly striking down Ohio's ban on a particular species of misleading campaign speech,[321] the Ohio Supreme Court prominently featured (as controlling[322]) the *Alvarez* plurality's stringent review of content-based restrictions.[323] By contrast, the Sixth Circuit during this same period ignored *Alvarez* while finding one Kentucky rule unenforceable as to the candidate in question and another facially invalid. In *Winter v. Wolnitzek*,[324] the court ruled constitutional a clause barring a judge or judicial candidate from "'knowingly' or 'with reckless disregard for the truth' making any 'false [ ] statements' during a campaign"[325]; its application was invalid in this instance, however, because the candidate's allegedly false statement could plausibly be construed as true.[326] Meanwhile, the state's ban on candidates' misleading statements failed altogether because "only a ban on conscious falsehoods satisfies strict scrutiny."[327] In *Attorney Grievance Commission of Maryland v. Stanalonis*,[328] Maryland's high court also did not rely on *Alvarez* in dismissing a charge against the defendant for false campaign speech.[329] Because the suit focused on whether Stanalonis had acted with reckless disregard of the truth or falsity of his statement rather than the pertinent rule's validity,[330] however, the omission was entirely understandable.

Unsurprisingly, courts upholding disciplinary action for false campaign speech since *Alvarez* tend to tacitly or expressly deny the relevance of the Court's decision to that action. In *In re Parish*,[331] the Review Department of California's Bar Court made no reference to *Alvarez* while determining that Parish was accountable for making a false allegation against his opponent.[332] The Ohio Supreme Court in *Disciplinary Council v. Tamburrino*[333] likewise

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320. *Id.* at *12 (quoting United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Centennial ed. 2003) (1949))).

321. The canon barred using the title of an office not currently held by a judicial candidate "in a manner that implies that the *judicial candidate* does currently hold that office." O'Neill v. Crawford, 132 Ohio St. 3d 1472, 1472 (Ohio 2016) (quoting OHIO CODE OF JUDICIAL CONDUCT Canon 4.3(C)).

322. *See supra* notes 162–163 and accompanying text.

323. *See O'Neill*, at 1472.

324. 834 F.3d 681 (6th Cir. 2016).

325. *Id.* at 693 (alteration in original) (quoting KY. CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(c)).

326. *Id.*

327. *Id.* at 694.

328. 445 Md. 129, 126 A.3d 6 (2015).

329. *Id.* at 146, 126 A.3d at 16.

330. *See id.* at 145–46, 126 A.3d at 15–16.

331. No. 12-o-15242, 2015 WL 514334 (Review Department State Bar Ct. Cal. Feb. 5, 2015).

332. *Id.* at *1.

333. No. 2016-0858, 2016 WL 7116096 (Ohio Dec. 7, 2016).

did not mention *Alvarez* when sustaining a sanction for violating a rule forbidding judicial candidates from disseminating false information about an opponent with actual malice.[334] The omission was clearly conscious; the dissent twice pointed to *Alvarez* in objecting that Tamburrino's statements were susceptible to truthful interpretations.[335] Finally, the District Court of Montana recently rejected a disciplined candidate's attempted reliance on *Alvarez* on the ground that the decision's reasoning did not apply to judicial elections.[336]

### *B. The Inherent Invalidity of the Misrepresent Clause*

The thrust of the misrepresent clause, whatever the provision's variations among states, is to forbid judicial candidates from knowingly or recklessly making false campaign statements. However laudable the goals of this prohibition, it is hard to reconcile with the premises of *White* and *Alvarez* or with broader First Amendment principles from which these decisions draw. While lower courts have faulted deficient wording to overturn canons barring falsity,[337] the entire enterprise may be futile under the Court's jurisprudence in this area. Several themes emerge that render such bans precarious.

#### *1. Rejection of Judicial Uniqueness*

The outburst of criticism that greeted *White* from some quarters focused in large part on the Court's asserted failure to recognize crucial distinctions between judicial and legislative elections.[338] In doing so, critics echoed objections by the dissenters in *White*.[339] The position criticized by scholars and dissenting Justices, of course, represents prevailing doctrine in this field. Although the *White* majority professed to "neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,"[340] the remainder of the opinion dilutes the significance of this isolated disclaimer. Similarly, while the Court later sustained an otherwise impermissible limitation on judicial campaign finances,[341] the special

334. *See id.* at *3 (setting forth OHIO CODE OF JUDICIAL CONDUCT Canon 4, r. 4.3(A)).

335. *Id.* at *13, *16 (French, J., dissenting).

336. Myers v. Thompson, 192 F. Supp. 3d 1129, 1140–41 (D. Mont. 2016).

337. *See supra* notes 165–184 and accompanying text.

338. *See, e.g.*, Margaret H. Marshall, Address, *Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence, and the Rule of Law*, 24 SYDNEY L. REV. 455, 467–68 (2002) (arguing that *White* "confuses judicial *accountability* with a politician's accountability"); White, *supra* note 232, at 624, 635–36.

339. *See supra* note 259.

340. Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002).

341. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015) (upholding rule barring judicial candidates from personally soliciting campaign funds).

dynamics of that context limit the holding's reach.[342] Arguments relying upon judicial exceptionalism thus appear to offer scant support for the misrepresent clause.

The Court's opinion in *White* culminates with a declaration of its core thesis: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[343] Throughout the opinion, the Court assumed and insisted that First Amendment principles governing democratic elections transcend the settings in which they take place.[344] In the same vein, Justice Kennedy's concurrence employed language that could just have readily applied to the election of legislators:

> What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State. The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.[345]

Indeed, the dissenting Justices vainly protested that the Court's reliance on decisions like *Brown* involving nonjudicial contests was "manifestly out of place."[346]

Nor was *White*'s vigorous protection of judicial campaign speech rooted only in its sweeping view of the scope of First Amendment standards governing electoral expression. In particular, the Court thought the distinctions between judicial and legislative officials insufficient to extend fewer safeguards to judicial campaign speech.[347] Rather, the Court regarded the resemblance of the judicial to the legislative function as grounds for subjecting elections to these offices to the same fundamental principle of democratic accountability.[348] Though in different ways, both kinds of officials forge state law; "[n]ot only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions

342. *See infra* Part IV.B.

343. *White*, 536 U.S. at 788 (alteration in original) (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

344. *See supra* notes 254–255 and accompanying text; *see also* Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After* Republican Party of Minnesota v. White*, Caperton, and* Citizens United, 64 ARK. L. REV. 1, 33 (2011) ("Once the state decides to have elections, that decision carries with it a certain amount of baggage. Part of the baggage is the First Amendment. The state should not be able to take the politics out of politics.").

345. *White*, 536 U.S. at 794 (Kennedy, J., concurring) (citation omitted).

346. *Id.* at 806–07 (Ginsburg, J., dissenting).

347. *Id.* at 783 (majority opinion).

348. *Id.* at 783–84.

as well."[349] Accordingly, as with legislative candidates, voters are entitled to learn the views and predilections of those who would govern from the bench.[350]

*White*'s discounting of the distinction between judges and legislators leaves the misrepresent clause peculiarly vulnerable to attack. If *Alvarez* implicitly confirms that candidates for legislative seats cannot be held to account for their dishonesty,[351] then a conception of judges and legislators as performing similar functions should confer a comparable immunity on judicial candidates. After all, the vice of lying and virtue of truth-telling do not alter their status when transplanted from the legislative to the judicial realm. On the contrary, there exists "a public interest in the honesty of all elected officials and in the public's confidence in the honesty of all those in power."[352]

### 2. *The (Limited) Value of Honesty*

Even putting aside comparisons with nonjudicial officials, it is not at all clear that curbing dishonesty by judicial candidates constitutes a sufficiently weighty interest to justify its suppression. The *White* Court was willing to recognize as compelling only the state's interest in preserving a narrowly confined form of impartiality.[353]

While *White* did not present an occasion for the Court to assess the state's interest in banning false campaign speech, the opinion's skeptical tone toward restrictions on such speech augurs poorly for the misrepresent clause.[354] Although false or misleading speech reflects poorly on the character of a judicial candidate, its bearing on the candidate's capacity to render impartial decisions is highly speculative. History offers ample examples of exceedingly capable office holders whose dubious past practices would not

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349. *Id.* at 784.

350. *See id.* at 781–82 ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." (quoting Wood v. Georgia, 370 U.S. 375, 395 (1962))); *see also* Dimino, *supra* note 217, at 363 ("The fact that judges do use their policy preferences to shape the law . . . makes it critical, from a democratic perspective, that the public be aware of the policy orientations of the judges it selects.").

351. *See supra* Part I.B.2.

352. Briffault, *supra* note 6, at 220. *Cf.* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–31 (1993) (striking down ban on distribution of "commercial" publications through newsracks on public property because non-commercial publications caused comparable harms to asserted government interests).

353. *See supra* notes 264–265 and accompanying text.

354. Republican Party of Minn. v. White, 536 U.S. 765, 781–82 (2002).

have anticipated such a career.[355] As already suggested, for example, it would be difficult to trace a systematic correlation between the veracity of presidential candidates and their success in office once elected.[356] In any event, *Alvarez* instructs not only that the state may not punish falsity qua falsity, but also that the First Amendment presumes that the appropriate response to false speech is counterspeech rather than censorship.[357]

*Alvarez* did recognize government's power to prohibit falsity associated with a specific harm, but the harms invoked to support the misrepresent clause appear no more able to sustain that ban than were the injuries cited in *Alvarez* to justify the Stolen Valor Act. There, the government unsuccessfully argued that statements proscribed by the SVA "compromised and frustrated" the "integrity and purpose" of the Congressional Medal of Honor.[358] Similarly, courts upholding the misrepresent clause have typically pointed to the interest in avoiding damage to the courts' integrity and its perception by the public.[359] If anything, however, this interest seems less palpable—and less connected to the statute's ban—than the SVA's goal of "'recognizing and expressing gratitude [through military medals] for acts of heroism and sacrifice in military service,'" and '"foste[ring] morale, mission accomplishment and esprit de corps' among service members."[360] It has also been suggested that the misrepresent clause can be understood as a means of averting the harm to informed judicial elections wrought by candidates' falsehoods.[361] This defense, however, is in tension with the insufficiency of that rationale in the political realm,[362] *Alvarez*'s prescription of counterspeech to address ills caused by falsity, and the Court's broader resistance to paternalistic rationales for restrictions on speech.[363]

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355. *See, e.g.*, DAVID NASAW, THE PATRIARCH: THE REMARKABLE LIFE AND TURBULENT TIMES OF JOSEPH P. KENNEDY 70–82, 213–37 (2012); RICHARD WINSTON, THOMAS BECKET 53–195 (1967).

356. *See supra* note 3 and accompanying text.

357. *See supra* notes 143–145 and accompanying text.

358. United States v. Alvarez, 567 U.S. 709, 716 (2012) (plurality opinion).

359. *See, e.g.*, Berger v. Supreme Court, 598 F. Supp. 69, 75 (S.D. Ohio 1984); *see also In re* Bybee, 716 N.E.2d 957, 960 (Ind. 1999) ("[T]he ability of judges to provide litigants due process and due course of law is directly and unavoidably affected by the way in which candidates campaign for judicial office."); *In re* Nadeau, 914 A.2d 714, 720 (Me. 2007) ("The Canon is designed to maintain and enhance public confidence in an independent, fair and competent judiciary . . . .").

360. Alvarez, 567 U.S. at 724 (quoting Brief for Petitioner, *supra* note 116, at 37–38).

361. *See* Briffault, *supra* note 6, at 221.

362. *See supra* Part I.A.2.

363. *See infra* Part III.B.3.

### *3. The First Amendment's Antipaternalism*

The aim of ensuring that false speech does not lead citizens to cast unwise votes is laudable, but the misrepresent clause is a constitutionally doubtful means of achieving it. As the Court has explained, "[a] 'highly paternalistic approach' limiting what people may hear is generally suspect."[364] Specifically, the Court has deemed "[t]he State's fear that voters might make an ill-advised choice" inadequate grounds for restricting speech.[365] Even in the sphere of commercial speech, the Court has rejected the "paternalistic assumption" that consumers must be shielded from information that the state fears they will misuse.[366] In one case invalidating a restriction on commercial speech, the Court's holding rested on the philosophy that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[367] Granted, the Court's rulings and pronouncements in these cases have assumed that the commercial speech in question is truthful.[368] However, the Court has long accepted that the distinctive attributes of commercial speech allow government special latitude to take measures to ensure its accuracy and clarity that would be impermissible in other realms of expression.[369] Campaign speech, lying at the core of First Amendment protection,[370] does not afford government such leeway.

Together, *Alvarez* and *White* reflect the principle that it is not for government to dictate what expression citizens are capable of processing. As Justice Kennedy pointed out in *Alvarez*, citizens showed themselves capable of exposing Alvarez's mendacity without the aid of an official truth commission.[371] This anti-paternalistic philosophy acquires heightened force when applied to judicial campaign speech—expression that the *White* Court located "at the core of our First Amendment freedoms."[372] As the Washington Supreme Court stated in striking down a ban on false political advertising, this type of law impermissibly "assumes the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth

364. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 223–24 (1989) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)).

365. Brown v. Hartlage, 456 U.S. 45, 60 (1982).

366. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996) (plurality opinion); *accord* Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 105 & n.13 (1990) (plurality opinion).

367. Thompson v. W. States Med. Ctr., 535 U.S. 357, 375 (2002) (quoting *44 Liquormart, Inc.*, 517 U.S. at 503).

368. *See id.* at 374; *44 Liquormart, Inc.*, 517 U.S. at 497; *Peel*, 496 U.S. at 108.

369. *See Va. State Bd. of Pharm.*, 425 U.S. at 772 n.24.

370. *See supra* Part I.A.2.

371. *See supra* note 144 and accompanying text.

372. Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002) (quoting Republican Party of Minn. v. Kelly, 247 F.3d 854, 861, 863 (8th Cir. 2001)).

or falsity in political debate, and it is the proper role of the government itself to fill the void."[373]

Moreover, Justice Kennedy's opinion in *Alvarez* recognized that paternalistic justifications for laws may mask less benign motives. History is replete with regimes of censorship based on the state's self-serving claim that it must shield its citizens from pernicious falsehoods. Thus, Justice Kennedy's dark reference to the specter of Orwell's *Nineteen Eighty-Four*[374] highlights that government's condescending view of citizens' capacity for divining falsehood is not only unnecessary but also dangerous. In addition, the danger of government overreaching in this area is exacerbated by the blurry line that can exist between provably false assertions and statements of belief, speculation, or opinion. The issue of whether a defendant's statement amounted to a factually demonstrable defamatory falsehood[375] has spawned legions of cases.[376] Of course, many statements can be proven to be definitively false. However, the calculus of interests that gives states latitude to provide a remedy for harm to private reputation from defamation[377] does not obtain in political debate.[378] Similarly, the government's power to treat what might be considered commercial puffery as a false claim about a product[379] does not extend to dubious statements by political candidates. While judicial candidates are obviously capable of uttering statements that are false, ceding to government the power of distinguishing truth from falsity in this arena poses a risk of tendentious enforcement intolerable under the First Amendment.[380]

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373. State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 699 (Wash. 1998); *see also* List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 776 (S.D. Ohio 2014) (concluding that a state law barring false statements about a proposed ballot initiative was actuated by an illegitimate interest in "*paternalistically* protecting the citizenry at large from 'untruths' identified by Government appointees"), *aff'd sub nom.* Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).

374. *See supra* note 149 and accompanying text.

375. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–20 (1990) (requiring that statement be provable as false before there can be liability under state defamation law (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986))).

376. *See* Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood as Fact*, 2008 UTAH L. REV. 875, 881–907.

377. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974).

378. *See supra* Part I.A.2.

379. *See, e.g.*, Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 39 (1st Cir. 2000) (allowing false advertising claim to proceed where court concluded that advertisement's statement that "'[w]hiter is not possible' . . . invites consumers to compare [the product's] whitening power against either other detergents acting alone or detergents used with chlorine bleach," and that it "may be literally false.").

380. *See* Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 140 ("The very power to make such determinations [of whether a political statement is false] invites abuse that could be profoundly destructive to public debate.").

### *4. The Double Bind of Strict Scrutiny*

Even assuming the sufficiency of the objectives underlying the misrepresent clause, the ban faces a daunting obstacle in the standard of review it would have to pass. The manner in which the Court applied strict scrutiny to strike down Minnesota's announce clause in *White* can be readily trained on the misrepresent clause. On the one hand, the Court faulted the limited scope of the announce clause's proscription as grounds for questioning the sincerity of the state's professed goal of promoting judicial open-mindedness.[381] That judicial candidates had so many other forums in which to express their views meant that open-mindedness could not have been the actual purpose being served by this selective restriction.[382] On the other hand, a ban that encompassed these other channels of communication—e.g., books and speeches[383]—would surely have failed for overbreadth.

The misrepresent clause is similarly (though not identically) vulnerable to charges of underinclusiveness whose cure would presumably entail suppressing large swathes of protected speech. A law targeting false and misleading statements by a judicial candidate leaves such statements by the candidate's supporters untouched, even though they also undermine an informed electorate and—if condoned by the candidate—judicial integrity. Yet, the combination of maximum protection for political speech and the presumption in favor of counterspeech under *Alvarez* makes highly suspect a wholesale ban on false and misleading judicial campaign speech. It is true that the Court has sometimes allowed government to address through a partial ban only a salient segment of a problem.[384] Such latitude, however, exists when the Court applies the lenient rational relationship standard.[385] This type of selectivity has little chance of surviving the heightened scrutiny the Court applies to restrictions on the content of speech.[386]

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381. Republican Party of Minn. v. White, 536 U.S. 765, 778–80 (2002).

382. *Id.* at 780.

383. *Id.* at 779.

384. *See, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969) ("[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed . . . to cover every evil that might conceivably have been attacked."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." (citing Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608 (1935))).

385. *See McDonald*, 394 U.S. at 809; *Williamson*, 348 U.S. at 491.

386. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384 n.4 (1992); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). A similar illustration of strict scrutiny trapping a law in the pincer of underinclusiveness and overbreadth can be found in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011). There, the Court found "wildly underinclusive" a ban on minors' access to violent video games because testimony relied on by the state to show that such games stirred feelings of aggression also asserted that exposure to children's cartoons on television portraying violence and pictures of guns stimulated similar feelings. *Id.* at 800–02. Yet the Court itself implicitly acknowledged that a ban encompassing these

*5. Misplaced Reliance on Defamation's Actual Malice Standard*

Both the ABA Model Code[387] and some state judicial codes[388] limit the misrepresent clause to false or misleading judicial campaign speech that is made with knowledge of falsity or reckless disregard for the truth. This qualification obviously draws from the level of intent known as actual malice that public officials[389] and public figures[390] must demonstrate to recover damages in libel suits.[391] While the actual malice requirement has proved a quite potent barrier to recovery,[392] its application to judicial campaign speech may still offer inadequate protection. *Alvarez* itself establishes that an actual malice requirement does not automatically confer validity on a prohibition of false expression; Alvarez's lie about receiving the Medal of Honor epitomizes actual malice.[393]

More importantly, the transplantation of even a generally speech-protective standard from its origin in defamation doctrine to judicial campaign speech ignores critical differences between the two types of expression.[394] Most conspicuously, of course, they lie at opposite ends of the hierarchy of expression. Defamation is one of those "'historic and traditional categories long familiar to the bar' . . . 'the prevention and punishment of which have

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communications would prohibit an unacceptable amount of protected speech. *See id.* at 801–02 ("California has (wisely) declined to restrict Saturday morning cartoons . . . or the distribution of pictures of guns.").

387. *See supra* note 291 and accompanying text.

388. *E.g.*, CAL. CODE OF JUDICIAL ETHICS Canon 5(B)(1)(b) (2016); *see also* N.C. State Bar v. Hunter, No. COA09-1014, 2010 WL 2163362, at *9 (N.C. Ct. App. June 1, 2010) (rejecting defendant's argument that limitation of state's misrepresent clause to intentional and knowing misrepresentations of judicial candidate's identity or qualifications furnished insufficient protection under First Amendment).

389. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

390. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 275–78 (describing how separate opinions produced this holding).

391. *See* Tiffany L. Carwile, Note, *Stop Restricting Speech and Educate the Public: A Review of the ABA's Proposed Campaign Activity Canon of the Model Code of Judicial Conduct*, 15 WM. & MARY BILL RTS. J. 1053, 1079 (2007) (asserting that a misrepresent clause confined to the actual malice standard has "no problem" with constitutionality).

392. *See* John A. Neuenschwander, *Is Fame Ever Fleeting?* Contemporary Mission v. New York Times Co., COMM. & L., June 1990, at 27 ("The constitutionally imposed 'actual malice' standard . . . is a most formidable barrier that few plaintiffs ever scale.").

393. United States v. Alvarez, 567 U.S. 709, 713–14 (2012) (plurality opinion).

394. *See* Commonwealth v. Lucas, 34 N.E.3d 1242, 1249–50 (Mass. 2015) (rejecting state's attempt to "shoehorn" a statute criminalizing certain false statements about political candidates into standards governing defamation); *In re* Judicial Disciplinary Proceedings Against Gableman, 784 N.W.2d 631, 643 (Wis. 2010) (Prosser, Roggensack, & Ziegler, JJ.) ("The Supreme Court's discussion of false statements in civil defamation cases is not appropriate to engraft onto cases addressing governmental regulations of political speech.").

never been thought to raise any Constitutional problem.'"[395] Indeed, it is only the need to assure that libel laws do not deter "speech that matters" that has prompted the Court to extend a degree of "strategic protection to defamatory falsehood."[396] By stark contrast, political campaign speech—a category encompassing judicial campaigns under *White*—occupies the highest tier of protection under the First Amendment. It should follow, then, that judicial candidates' nondefamatory falsehoods receive even greater protection than the actual malice standard provides.[397]

This conclusion is bolstered by the differing balance of interests implicated in defamation suits and state suppression of judicial candidates' alleged falsehoods. In maintaining a regime of libel law, the state asserts its interest in "compensating private individuals for wrongful injury to reputation."[398] The state thereby furnishes individuals a mechanism through which they can vindicate their interest in their good name—an interest that "reflects no more than our basic concept of the essential dignity and worth of every human being."[399] When the state provides sanctions for judicial candidates' misrepresentations, however, it is not helping individuals achieve compensation for the invasion of a private right. Rather, the state is limiting the exercise of a fundamental individual right in the service of important but unfocused interests in judicial integrity and an informed electorate.[400] Thus, the compelling alignment between state and individual ends that justifies libel law is absent from this setting.

### 6. *Intractable Problems of Manageability*

While the state has a valid interest in combatting false judicial campaign speech, that interest does not justify the First Amendment costs entailed by means of enforcing an outright ban. Sanctions for its violation would inevitably place government in the role of disrupting time-sensitive expression at the heart of the First Amendment. As a practical matter, a formal charge

395. United States v. Stevens, 559 U.S. 460, 468–69 (2010) (first quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); and then quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

396. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341–42 (1974); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (rejecting rule placing on critics of official conduct the burden of proving the truth of their statements because they might "be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so").

397. *Cf. N.Y. Times*, 376 US. at 293 (Black, J., concurring) (arguing that the actual malice requirement does not adequately protect defamatory speech by critics of official conduct because it is "an elusive, abstract concept").

398. *Gertz*, 418 U.S. at 348.

399. *Id.* at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

400. *See* Fried, *supra* note 72, at 238 ("[T]he First Amendment precludes punishment for generalized 'public' frauds, deceptions, and defamation.").

would cast a shadow over a candidate and force a diversion of campaign resources to rebutting the accusation.[401] Moreover, the very specter of being subjected to this sort of proceeding could discourage candidates from engaging in intrinsically protected expression.[402] Only the premise—rejected in *White*—that ordinary principles governing political speech are suspended for judicial campaigns[403] would validate this degree of interference.

The objection to such a scheme begins with the difficulties, in both principle and practice, of official determinations of the truth or falsity of campaign speech. It is disturbing enough under democratic theory and free speech doctrine to concede this power to government[404]—a tension compounded in this context by the danger of partisan abuse by those charged with responsibility for enforcement.[405] The problem is vastly exacerbated, however, by the processes of proof and refutation involved in assessing the truthfulness of a candidate's statement. The proliferation of libel suits concerning whether the statement in question can even be reasonably construed as conveying a provably false assertion[406] suggests the potential scale of mischief unleashed by allowing this inquiry in the middle of a political campaign.[407] At least in defamation actions ample time is afforded for the defendant's response, discovery, and a full-blown trial before arriving at a conclusion about meaning and factual falsity. This luxury is not available in a judicial campaign, and the compressed timetable would threaten to compromise both the integrity of the outcome and accused candidates' fair opportunity to conduct their campaign. Moreover, the impact of the proceeding begs the question of what relief it might provide. An official designation of the candidate's statement as false or misleading seems too slight a result to warrant such a massive intrusion into the campaign, while disqualification before the electorate has made its decision would be grossly—and likely unconstitutionally—disproportionate to the violation. Intermediate penalties (e.g., fines) are theoretically possible, but it is hard to conceive of how they could be calibrated and administered in a principled way.

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401. *See* 281 Care Comm. v. Arneson, 766 F.3d 774, 792 (8th Cir. 2014) ("For all practical purposes, the real potential damage is done at the time a complaint [of alleged falsity in political advertising or campaign material] is filed.").

402. *See N.Y. Times*, 376 US. at 279 (rejecting restriction on speech tending to cause those subject to it to "steer far wider of the unlawful zone" (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))).

403. *See supra* notes 254–255 and accompanying text.

404. See *supra* notes 100–101 and accompanying text.

405. *See* Marshall, *supra* note 39, at 299.

406. *See supra* notes 375–376 and accompanying text.

407. *See* Marshall, *supra* note 39, at 300 ("[T]he availability of a lawsuit [against candidates for allegedly false statements] could become as much a partisan campaign tactic as the problem it is designed to address.").

An alternative that addresses some of these difficulties but raises others would be to permit actions against successful candidates who allegedly owe their victory to campaign misrepresentations. While this approach would enable a more deliberate proceeding than one held in the heat of a campaign, it would raise vexing issues of proof and finality. *Alvarez* required that to uphold a ban on falsity, there must be established "a direct causal link between the restriction imposed and the injury to be prevented."[408] Surely it cannot be the case that every false utterance by a victorious judicial candidate is presumed to have tilted the race in that candidate's favor.[409] Thus, the presiding tribunal would need to determine not only whether the statement at issue was false, but also whether its falsity was decisive to the election's outcome. No readily apparent method exists for reliably making this determination.

Even if a state were to adopt such a post-election proceeding in the face of these obstacles, the presumed remedies for violation would impose exorbitant costs. That would, of course, be literally true if the outcome of a violation was invalidation of the election and the launch of a new one. Given the various expenses involved—as well as the absence of assurance that the second campaign would not spawn fresh misrepresentations—this seems an unlikely course. Additionally, even if these concerns were put aside, a larger one would loom. The institutional instability that would result from having judicial elections routinely open to doubt would undermine both the judicial and democratic systems. To a substantial extent, this same consideration applies even to the more modest and arguably more logical remedy of nullifying the winner's election and placing his or her opponent in the contested seat. The prospect of a second chance would virtually invite defeated candidates to cry foul, thus negating the finality of elections on which effective government depends. The preference voiced in *Alvarez* for counterspeech as a remedy for false expression,[410] then, not only comports with First Amendment values but also serves the state's own interests.

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408. United States v. Alvarez, 567 U.S. 709, 725 (2012) (plurality opinion); *see also* Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 357–58 (2009) (Under the marketplace of ideas approach to free speech, "it is incumbent on the government to defend laws restricting expression by demonstrating that the expression is linked to some extraneous harm, to some palpable invasion of a legally protected societal or individual interest, such as national security or individual reputation or privacy.").

409. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 885 (2009) ("[P]roving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion.").

410. *See Alvarez*, 567 U.S. at 726–28.

## IV. THE PERIPHERAL EXCEPTIONS OF *CAPERTON* AND *WILLIAMS-YULEE*

Two Supreme Court decisions in the last decade, *Caperton v. A.T. Massey Coal Co.*[411] and *Williams-Yulee v. Florida Bar*,[412] arguably throw into question this Article's assertion that the misrepresent clause is invalid. In both cases, the Court upheld restrictions that impinged on judicial campaign activity.[413] In both, the Court "recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'"[414] Neither ruling, however, amounts to a challenge to vigorous First Amendment protection of judicial campaign speech under *White*, much less to the strict scrutiny under *Alvarez* for bans on falsity not demonstrably linked to definite harm. Rather, each upholds the state's ability to enact narrowly defined measures to address distinctive dangers arising from judicial campaign contributions.

### *A.* Caperton *and Recusal*

While rather involved,[415] the dispute in *Caperton* boiled down to the question of whether Chief Justice Brent Benjamin of the West Virginia Supreme Court should have recused himself in a case involving his chief political benefactor, Don Blankenship. Blankenship was the chairman, CEO, and President of A.T. Massey Coal Company ("Massey"), which had suffered a $50 million jury verdict in a suit brought by Hugh Caperton and corporations that he controlled.[416] While the verdict was on appeal, Benjamin was elected to the West Virginia Supreme Court after a campaign in which Blankenship's expenditures on behalf of Benjamin—$3 million—exceeded the total number of contributions by Benjamin's other supporters and his campaign committee.[417] In response to a series of motions for recusal on Massey's appeal, Benjamin repeatedly refused to recuse himself and ultimately cast the decisive vote in a 3-2 decision overturning the jury verdict.[418]

On Caperton's appeal to the United States Supreme Court, the Court ruled that Benjamin's involvement in the decision violated due process.[419] Key to the outcome was the Court's application of an objective standard to determine whether a judge's participation in a ruling affecting a campaign donor presents a substantial risk of bias rather than a requirement that actual

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411. 556 U.S. 868 (2009).
412. 135 S. Ct. 1656 (2015).
413. *Id* at 1662; *Caperton*, 556 U.S. at 884–87.
414. *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Caperton*, 556 U.S. at 889).
415. *See Caperton*, 556 U.S. at 872–76.
416. *Id.* at 872.
417. *Id.* at 873.
418. *Id.* at 873–75.
419. *Id.* at 885–86.

subjective bias be demonstrated.[420] Thus, the Court would inquire whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[421] Under this analysis, two principal considerations—all pointing toward Benjamin's recusal—would govern whether a judge should step aside in a case. First, the Court would examine the scale of the donor's contribution relative to both the total amount of money contributed to the campaign and the total amount spent in the election, as well as the contribution's apparent role in securing the recipient's election.[422] Also crucial was the compression of relevant events. A contribution of such magnitude, made during the pendency of the case in question and followed by the judge's election, would raise a reasonable perception that the judge had been influenced by gratitude toward the donor.[423] In *Caperton*, the combination of these two elements sufficed to "offer[] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."[424]

Although Justice Kennedy's majority opinion took pains to emphasize the rarity of the circumstances presented in *Caperton*,[425] the four dissenters argued that the Court had opened the floodgates to a raft of "*Caperton* motions" by losing parties contending that the judge was probably biased.[426] By failing to articulate a standard for constitutionally compelled recusal, the Court had virtually invited allegations of bias on a frequent if not routine basis.[427] To underscore the uncertainty sewn by the vague new standard, Chief Justice Roberts posed forty questions that remained about the reach and operation of the Court's ruling.[428]

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420. *See id.* at 881–84.

421. *Id.* at 877 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

422. *See id.* at 884.

423. *See id.* at 884–86.

424. *Id.* at 886 (second and third alterations in original) (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).

425. *See id.* at 887 ("The facts now before us are extreme by any measure."); *see also* James Sample, Caperton*: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 293 (2010) (arguing that *Caperton* is "correct in its narrowness").

426. *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting); *id.* at 903 (Scalia, J., dissenting) (predicting that the Court's holding will "add[] to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim").

427. *See id.* at 890–91 (Roberts, C.J., dissenting); *id.* at 902 (Scalia, J., dissenting) (The decision "create[s] vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges."); *see also* Daniel Betts, *How High Is Too High?: Judicial Elections and Recusal After* Caperton, 15 TEX. REV. L. & POL. 247, 248 (2010) ("[T]he *Caperton* Court . . . failed to provide any guidance . . . .").

428. *Caperton*, 556 U.S. at 893–98 (Roberts, C.J., dissenting).

While *Caperton* undoubtedly upset settled doctrine governing due process requirements for judicial qualification,[429] its implications for the misrepresent clause are remote if not nonexistent. As grist for challenging the misrepresent clause, *Caperton* offers merely evidence that the First Amendment does not categorically discountenance every state restriction concerning judicial campaign activity. Other than this broad and unremarkable proposition, however, there appears little in *Caperton* that would empower the state to bar judicial candidates from engaging in false or misleading speech. Even if grounds for recusal are extended beyond the narrow scope envisioned by the *Caperton* majority,[430] the brunt of this development would fall on due process rather than free speech doctrine. This is especially true, of course, if any potential expansion remains within the *Caperton* rule's stated field of campaign contributions. Indeed, commentators have recognized that the Court's decision the following year in the landmark campaign finance case *Citizens United v. FEC*[431] overwhelmed any modest impact that *Caperton* might have in reducing the role of campaign spending.[432] Even under speculation that *Caperton* has some bearing on regulation of judicial campaign speech,[433] however, recusal in a case based on comments made during a campaign is a far cry from punishment for those comments.[434] Moreover, regulation of speech aimed at preserving judicial candidates' impartiality once in office—however vulnerable since *White*—stands on a surer footing than attempts to ensure candidates' honesty.[435]

429. *See* Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 247, 248 (2010) (stating that constitutional doctrine of mandatory disqualification "all changed" in *Caperton*).

430. *See* Andrey Spektor & Michael Zuckerman, *Judicial Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977, 994 (2011) ("[E]xpecting lower courts to be selective in applying the [*Caperton*] rule in only 'extreme' cases is not realistic . . . .").

431. 558 U.S. 310 (2010).

432. *See* Aviva Abramovsky, *Justice for Sale: Contemplations on the "Impartial" Judge in a* Citizens United *World*, 2012 MICH. ST. L. REV. 713, 729; André Douglas Pond Cummings, *Procuring "Justice"?:* Citizens United, Caperton, *and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 102 (2010); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584 (2011); Adam Liptak et al., Caperton *and the Courts: Did the Floodgates Open?*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 481, 495 (2015).

433. *See* Roy A. Schotland, Caperton *Capers: Comment on Four of the Articles*, 60 SYRACUSE L. REV. 337, 344 (2010) ("Litigation about judicial campaign regulation is bound to be affected, in major ways, by *Caperton*'s underlying holding.").

434. *See* Spektor & Zuckerman, *supra* note 430, at 1001–02.

435. *See supra* notes 232–234 and accompanying text.

### *B.* Williams-Yulee *and Solicitation*

Conceivable grounds admittedly exist for invoking *Williams-Yulee v. Florida Bar* to bolster the misrepresent clause.[436] Read in isolation, the Court's recognition of the difference between judicial and political elections, and of the state's strong interest in protecting public confidence in the nation's judiciary, furnish potent material for upholding a ban on false statements by judicial candidates.[437] Moreover, the *Williams-Yulee* Court's accommodating version of strict scrutiny offers additional encouragement to champions of this prohibition. Viewed in context, however, *Williams-Yulee*'s pronouncements and analysis do not appear to have a far-reaching impact on *White*'s legacy of robust protection for judicial candidates' campaign speech. Indeed, the opinion pointedly refrains from calling *White* into question. Rather, the holding should be understood in the light of distinctive concerns raised by judicial candidates' direct solicitation of funds. If the rationale for this restriction overlaps to any appreciable degree with the basis for other limitations on candidates' speech, it is with provisions other than the misrepresent clause.

*Williams-Yulee* addressed the constitutionality of Florida's solicitation clause providing that judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible persons" to raise money for election campaigns.[438] As a candidate for a county court seat, Williams-Yulee ("Yulee") had violated this prohibition by mailing and posting online a letter soliciting contributions to her campaign.[439] The Florida Supreme Court rejected Yulee's challenge to her reprimand and fine, concluding that the ban on candidates' solicitation advanced the state's compelling interest in "preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary,"[440] and was narrowly tailored to that interest because it "insulate[s] judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns."[441]

In affirming the Florida court's judgment, the Supreme Court approvingly noted the interests that that court had articulated to support the ban.[442] For the Court, speaking through Chief Justice Roberts, it was "intuitive" for

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436. *See* Myers v. Thompson, 192 F. Supp. 3d 1129, 1141–42 (D. Mont. 2016) (applying principle of *Williams-Yulee* in dismissing action under First Amendment for injunctive relief against enforcement of state's ban on false statements by judicial candidates).

437. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1659 (2015).

438. *Id.* at 1663 (quoting FLA. CODE OF JUDICIAL CONDUCT Canon 7(C)(1)).

439. *Id.*

440. *Id.* at 1664 (alteration in original) (quoting Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 384 (Fla. 2014)).

441. *Id.* (alteration in original) (quoting *Williams-Yulee*, 138 So. 3d at 387).

442. *Id.* at 1666.

Florida and other states to respond in this way to the prospect that "the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors."[443] Explaining the validity of a ban presumably unacceptable in legislative and executive elections, Chief Justice Roberts affirmed that "States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."[444] Because the judiciary is the branch most dependent on public respect for its authority, public perception of judicial integrity is "a state interest of the highest order."[445]

Chief Justice Roberts acknowledged, however, that the judiciary's distinctive character did not warrant suspension of ordinary First Amendment principles,[446] and that therefore strict scrutiny applied to this restriction on judicial candidates' speech.[447] Although few speech restrictions could survive this exacting review,[448] the narrowly tailored means through which the solicitation clause advanced the state's compelling interest in preserving public confidence in the judiciary's integrity made this one of those "rare cases."[449] In particular, the Court first dismissed Yulee's contention that the ban was underinclusive because it allowed activity inflicting comparable harm on judicial integrity and its appearance: e.g., solicitation of money by a judge's campaign committee.[450] Rather than insist that the state comprehensively address each possible threat to this interest, it sufficed that the ban "aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates."[451] The Court also rejected Yulee's argument that the restriction swept in too much speech.[452] Quite the opposite: The Court detailed the vast range of means by which judicial candidates could engage their supporters and the public.[453] Even the bar to direct requests for money could be

443. *Id.*

444. *Id.* at 1667 (citing Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002)); *see also id.* at 1662 ("[A] State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.").

445. *Id.* at 1666 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

446. *Id.* at 1667 ("[T]he First Amendment fully applies to Yulee's speech.").

447. *Id.* at 1665.

448. *Id.* at 1665–66 ("We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion))).

449. *Id.* at 1666.

450. *Id.* at 1668.

451. *Id.*

452. *Id.* at 1670.

453. *Id.*

largely circumvented by delegating this function to committees.[454] Moreover, any effort to selectively ban candidates' solicitation according to whether a particular mode threatened the state's interests would be unworkable.[455] Finally, the Court found similarly unfeasible Yulee's proposal of recusal rules that would remove from cases judges who might be compromised by a party's or attorney's contributions.[456] A liberal recusal policy would trigger a "flood of postelection recusal motions" and spur calculating litigants to make campaign contributions for the very purpose of later forcing recipients to recuse themselves.[457]

With differences aired by both the concurrence and the dissents, Chief Justice Roberts's opinion was criticized at once for being too hard and too lenient on judicial campaign speech restrictions. For her part, Justice Ginsburg renewed her argument from her dissenting opinion in *White*[458] for more authority by states to regulate judicial campaigns than other types.[459] In *Williams-Yulee*, she expressed particular anxiety about applying to judicial campaigns the same license to spend that the Court's intervening decisions in *Citizens United v. Federal Election Commission*[460] and *McCutcheon v. Federal Election Commission*[461] had granted in political campaigns.[462] Conversely, the four dissenters all accused the Chief Justice of applying a weak and spurious form of strict scrutiny—most vividly when Justice Alito characterized Florida's rule as "about as narrowly tailored as a burlap bag."[463]

454. *Id.*

455. *Id.* at 1671.

456. *Id.*

457. *Id.* at 1671–72.

458. *See supra* note 259 and accompanying text.

459. *Williams-Yulee*, 135 S. Ct.. at 1673 (Ginsburg, J., concurring). For this reason, Justice Ginsburg refused to join the portion of Chief Justice Roberts's opinion calling for the application of strict scrutiny. *Id.* at 1675 (arguing that rather than having to choose between "equating judicial elections to political elections" and "abandoning public participation in the selection of judges altogether," states should be permitted to "balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary" (quoting Republican Party of Minn. v. White*,* 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting))).

460. 558 U.S. 310 (2010).

461. 134 S. Ct. 1434 (2014).

462. *Williams-Yulee*, 135 S. Ct. at 1673–75.

463. *Id.* at 1685 (Alito, J., dissenting); *see also id.* at 1677 (Scalia, Thomas, JJ., dissenting) (attributing the Court's decision upholding the ban on solicitation to "applying the *appearance* of strict scrutiny" (emphasis added)); *id.* at 1685 (Kennedy, J., dissenting) (asserting that the Court's opinion creates a blueprint for "eviscerating strict scrutiny any time the Court encounters speech it dislikes").

If perhaps somewhat overstated,[464] the dissenters' objections were not without foundation.[465] At minimum, the Court seized upon a relatively generous formulation of strict scrutiny, plucking from an earlier opinion upholding a restriction subject to strict scrutiny the assertion that a limitation on speech need not be "perfectly tailored" to its objective.[466] More strikingly, in deflecting the charge of underinclusiveness with the proposition that "[a] State need not address all aspects of a problem in one fell swoop,"[467] the Court employed language more closely associated with the permissive rational relationship standard than with strict scrutiny.[468] The contrast with *White*'s stern application of strict scrutiny[469] is difficult to ignore.

Nor does the Court's analysis in *Williams-Yulee* square comfortably with *White* in other ways. *Williams-Yulee*'s embrace of shifting notions of judicial integrity bears little resemblance to the Court's methodical parsing of Minnesota's asserted interest in impartiality in *White*.[470] Additionally, the state's stake in preserving the appearance of judicial probity—at best a subsidiary interest in *White*[471]—takes center stage in Chief Justice Robert's justification of the solicitation clause.[472] Most fundamentally, the Court's opinion sharpens the line that had been blurred in *White* between judges and other elected officials under the First Amendment. This outlook is captured in the

464. *See, e.g.*, *id.* at 1676 (Scalia, J., dissenting) ("[T]he Court flattens one settled First Amendment principle after another.").

465. *See, e.g.*, *id.* at 1679–80 (presenting arguments to show that Florida failed to demonstrate that its ban restricted no more speech than necessary to achieve state's goal); *see also* Clay Hansen & J. Joshua Wheeler, *Free Speech, Elections, and Judicial Integrity in an Age of Exceptionalism*, 31 J.L. & POL. 457, 458–64 (2016) (describing the *Williams-Yulee* Court's "toothless application of strict scrutiny").

466. *Williams-Yulee*, 135 S. Ct. at 1671 (majority opinion) (quoting Burson v. Freeman, 504 U.S. 191, 209 (1992) (purality opinion)).

467. *Id.* at 1668.

468. *See supra* notes 384–386 and accompanying text; *see also* City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (per curiam) ("[A] 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . a legislature need not 'strike at all evils at the same time,' and . . . 'reform may take one step at a time . . . .'" (quoting Katzenback v. Morgan, 384 U.S. 641, 657 (1966))).

469. *See supra* Part II.B.

470. *See Williams-Yulee*, 135 S. Ct. at 1677–78 (Scalia, J., dissenting); Republican Party of Minn. v. White, 536 U.S. 765, 775–79 (2002).

471. *See, e.g.*, *White*, 536 U.S. at 778 ("[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either.").

472. *See Williams-Yulee*, 135 S. Ct. at 1671 (majority opinion) ("Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary."); Michael R. Dimino, Sr., *Image is Everything: Politics, Umpiring, and the Judicial Myth*, 39 HARV. J.L. & PUB. POL'Y 397, 398–99 (2016) (contrasting *Williams-Yulee*'s emphasis on appearance with *White*'s roots in "reality").

Chief Justice's blunt declaration that "a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians."[473]

Nevertheless, it would be overreading Chief Justice Roberts's opinion to conclude that it represents a repudiation of *White*'s underlying principles. On the contrary, the opinion cites *White* a half-dozen times. Indeed, Justice Ginsburg withheld her concurrence from Part II of the opinion for the express reason that that section endorsed *White*'s strict scrutiny standard.[474] Thus, *Williams-Yulee* should be seen rather as implementing *White*'s reservation of the possibility that judicial elections could be subject to heightened regulation in certain instances.[475]

It is easy to see why the Court would recognize solicitation by judicial candidates as one of those "rare cases."[476] The potential damage to impartiality and the appearance of fairness from candidates asking for money differs in kind from the dangers posed by the speech barred by the announce clause struck down in *White*. This may help to account for the presence of the solicitation clause in the judicial conduct codes of all thirty-nine states with judicial offices subject to some form of election[477]; only nine states had still retained an announce clause when *White* was decided.[478] Prohibition of judicial candidates' solicitation provides an unusually manageable remedy to a distinctive threat to the fact and perception of judicial impartiality.[479] Moreover, the concerns animating the solicitation clause bear even less resemblance to the rationale for the misrepresent clause than that of the announce clause.

The particular dangers posed by candidates directly requesting funds for their campaigns are even further removed from the evils to which the misrepresent clause are addressed. Personal solicitation by the candidate contains a coercive undertone that a third party's solicitation does not.[480] More broadly, states may act on the premise that a candidate's personal solicitation "creates a categorically different and more severe risk of undermining public

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473. *Williams-Yulee*, 135 S. Ct. at 1672. *But see id.* at 1683 (Kennedy, J., dissenting) (arguing that an incorrect premise of the Court's decision "is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would be unacceptable in other elections").

474. *See id.* at 1673 (Ginsburg, J., concurring).

475. *See supra* note 340 and accompanying text.

476. *Williams-Yulee*, 135 S. Ct. at 1666 (majority opinion).

477. *See* Petition for Writ of Certiorari at 2, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499).

478. Moerke, *supra* note 6, at 267–68.

479. *See* David W. Earley & Matthew J. Menendez, Williams-Yulee *and the Inherent Value of Incremental Gains in Judicial Impartiality,* 68 VAND. L. REV. EN BANC 43, 44–45 (2015).

480. *See Williams-Yulee*, 135 S. Ct. at 1669 ("The same person who signed the fundraising letter might one day sign the judgment.").

confidence than does solicitation by a campaign committee."[481] Thus, rather than granting states a free-float commission to monitor candidates to ensure their compliance with generalized notions of "integrity," *Williams-Yulee* specifically addresses "the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity."[482]

Nor does the Court's opinion amount to a categorical and unreflective acceptance of judicial exceptionalism. Rather, distinctive and devastating harm is inflicted on the judiciary's core mission by "a public perception that the judiciary is being bought."[483] Citizens accept—if grudgingly—the inevitability that donors to political campaigns will exert outsized influence on the candidates whom they help to elect. As *Williams-Yulee* recognized, however, it is an altogether more corrosive effect on a major branch of government when "the public may lack confidence in a judge's ability to administer justice without fear or favor [because] he comes to office by asking for favors."[484] Accordingly, the Court noted that "our precedents applying the First Amendment to political elections have little bearing on the issues here."[485]

Even if *Williams-Yulee* is not quite "much ado about nothing,"[486] then, its limited implications[487] do not reach the misrepresent clause. The purpose of the misrepresent clause includes no counterpart to the potential quid pro quo of a candidate's solicitation and the contribution it elicits. Likewise, the remedy of counterspeech as an alternative to censorship of alleged falsehoods cannot combat the potential harm to impartiality and its appearance inherent in candidates' personal requests for contributions. Nor does a bar to candidates' solicitation of money go to the heart of content-based restrictions in a

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481. *Id.*

482. *Id.* at 1667.

483. Earley & Menendez, *supra* note 479, at 43. The special dangers posed by solicitation have also influenced other areas of First Amendment doctrine. For example, the substantial measure of protection given to commercial speech has not extended to instances where targeted solicitation is thought to present particular hazards. *Compare* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647–49 (1985) (striking down prohibition of inclusion of illustrations in attorneys' advertising), *and* Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977) (invalidating ban on attorney's advertising about price of routine legal services), *with* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995) (upholding enforcement of prohibition on personal injury lawyers' sending targeted direct-mail solicitations within thirty days of an accident), *and* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978) (upholding state's authority to ban in-person solicitation of clients "for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent").

484. 135 S. Ct. at 1666.

485. *Id.* at 1667.

486. *See* Chris W. Bonneau & Shane M. Redman, *Much Ado About Nothing: The Irrelevance of* Williams-Yulee v. The Florida Bar *on the Conduct of Judicial Elections*, 68 VAND. L. REV. EN BANC 31, 31, 41 (2015).

487. *See* Mark Walsh, *A Pragmatic Turn*, A.B.A. J., July 2015, at 19, 20 (reporting that experts on American judicial elections considered the decision narrow).

way that a blanket ban on falsehoods does. Finally, the appearance of corruption that the solicitation clause is designed to avert—wholly outside the realm of the misrepresent clause—summons up an abiding principle of law: "justice must satisfy the appearance of justice."[488]

## V. CONCLUSION

To contend that the Constitution protects dishonesty by judicial candidates is not an exercise in cynicism. Rather, acknowledgement of this protection brings into focus the costs of the widespread practice of choosing judges by popular vote. Like the rising tide of spending and vitriol that have infected judicial elections, the license to lie throws into sharp relief the gap between ideals of justice and realities of politics. It is often observed that society can be required to pay a heavy price for freedom of speech. Permitting those who would administer the laws of the land to deploy falsehood as a tactic seems a particularly lamentable byproduct of the First Amendment. That this price could be avoided by choosing judges through other means may yet affect the modes of judicial selection.

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488. *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).