Spring 2009 www.lawtechjournal.com Volume 13, Issue 1

UCLA Journal of Law & Technology

THE STRAIGHT TALK EXPRESS: YES WE CAN HAVE A FALSE POLITICAL ADVERTISING STATUTE

Colin B. White

The American public has grown weary of political advertisements that manipulate the truth and focus on out of context quotes instead of substantive issues. Politicians continue to use false political ads because they are effective and virtually unregulated. Requiring a politician to endorse his own advertisement no longer deters him from defaming his opponent. While the *New York Times v. Sullivan* actual malice standard for defamation of public officials has been a part of free speech jurisprudence for four decades, the lack of a remedy that redeems the victim and deters future assailants has prevented more politicians from filing suit.

This article reexamines the *New York Times v. Sullivan* actual malice standard for defamation against a public official in the age of the Internet campaign. First, it provides recent examples of misleading political advertisements that illustrate the need to provide politicians with a timely remedy. Next, it discusses the historical background on defamation as it pertains to public officials and summarizes the regulations of Internet speech that relate to defamation of a public official. It then examines Congress' recent approach to the regulation of false advertising through campaign finance reforms that indirectly attempt to regulate potentially defamatory campaign ads before demonstrating that the actual malice standard should be retained because: 1) it can be adapted to modern times, 2) it does not violate the rulings of the Court regarding Internet speech or campaign finance, and 3) it adequately protects political speech. Finally, this article proposes the creation of a federal statute that retains the actual malice standard and requires a mandatory retraction to ensure political speech is not chilled, to protect media defendants from ruinous lawsuits, and to give politicians a remedy that will limit damage to their reputation and deter future false ads.

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INTRODUCTION

Thomas Jefferson was a madman,[1] Abraham Lincoln was a traitor,[2] and Andrew Jackson was a bloodthirsty brawler.[3] While these published remarks about three of America's greatest Presidents seem blasphemous, political opponents and the press subjected each to such accusations both during the campaign and after the election.[4] As the previous examples illustrate, negative attacks, whether true or false, have been a part of American politics from the birth of our country.[5] The election of 2008 was no different.[6] Elizabeth Dole, the incumbent

* J.D. expected May 2010. The author would like to thank his mother, Christine White, and his father, William P. White III, for their love, support, and encouragement.

[1] Jack Winsbro, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 853 (1987).

[2] *Id*. at 854. President Lincoln was described in no more flattering terms as "an ape, a buffoon, a fiend, a ghoul, a lunatic, a robber, a savage . . . and a weakling." *Id*. *See generally* JEFFREY MANBER & NEIL DAHLSTROM, LINCOLN'S WRATH: FIERCE MOBS, BRILLIANT SCOUNDRELS AND A PRESIDENT'S MISSION TO DESTROY THE PRESS (2005) (describing the destruction of the pro-southern *Jeffersonian* and the conspiracy involving President Lincoln's involvement in silencing the press).

[3] Winsbro, supra note 1, at 853-54. President Andrew Jackson was purported to have murdered or executed eighteen people, thus demonstrating his cruelty. *Id*. *See also* JOHN MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 4 (2008) ("The floodgates of falsehood, slander, and abuse have been hoisted and the most nauseating filth is poured, in torrents, on the head, of not only Genl [sic] Jackson but all his prominent supporters . . . ." (quoting William B. Lewis)).

[4] A 2005 Wall Street Journal and Federalist Society Poll of professors of history, economics, law, and political science ranked Presidents Jefferson, Lincoln, and Jackson as the fourth, second, and tenth best Presidents, respectively, of all time. *Presidential Leadership: The Rankings*, WALL ST. J., Sept. 12, 2005, http://www.opinionjournal.com/extra/?id=110007243.

[5] *See* BRUCE L. FELKNOR, DIRTY POLITICS (1966), (discussing the history of negative campaign attacks in politics).

[6] *See* Mark Silva, *Campaign Ads Going Negative*, CHI. TRIB., Oct. 10, 2008, http://archives.chicagotribune.com/2008/oct/10 (summarizing the attack ads of Barack Obama and John McCain). *See also* Liz Halloran, *McCain's Political Ads Go Negative Against Obama*, U.S. NEWS & WORLD REP., July 30, 2008, http://www.usnews.com/articles/news/campaign-2008/2008/07/30/mccains-political-ads-go-negative-

Senator from North Carolina, ran an advertisement entitled "Promise," telling viewers that challenger Kay Hagan attended a "secret" fundraiser held "in her honor" by the leader of a political action committee called Godless Americans.[7] The advertisement then showed clips of Godless Americans lobbyists proclaiming "there was no Jesus" and "there is no God to rely on" before saying Kay Hagan "hid from cameras, took Godless money," and finally asking, "What did [she] promise in return?"[8] The advertisement ended with a woman's voice stating, "There is no God."[9] The advertisement was one of the most controversial of the 2008 election, and most people inferred that Elizabeth Dole was suggesting Kay Hagan either did not believe in God or would advocate for the Godless Americans, which directly contradicted Hagan's history of teaching Sunday school classes.[10] The advertisement was deliberately misleading and was considered to be slanderous by many.[11] Hagan filed a defamation lawsuit, but later dropped the

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against-obama.html (finding that one third of John McCain's ads are negative as opposed to ten percent of Barack Obama's).

[7] Seth Walls, *Dole Ad Fabricates Audio of Opponent Yelling "There Is No God"*, HUFFINGTON POST, Oct. 29, 2008, http://www.huffingtonpost.com/2008/10/29/dole-ad-fabricates-audio_n_138874.html. *See generally* Godless Americans Political Action Committee, http://www.godlessamericans.org (last visited Jan. 2, 2009).

[8] Walls, *supra* note 7; Dole's "Promise" Ad on Hagan, http://www.youtube.com/watch?v=1lf2vDk-4Ag (last visited Apr. 11, 2009) [hereinafter "Promise" Ad].

[9] Walls, *supra* note 7. The required endorsement "I'm Elizabeth Dole and I approve this message" appears at the beginning of the commercial. "Promise" Ad. *See infra* Part II.B.1 for an in depth examination of the Bipartisan Campaign Reform Act, which requires a candidate to identify himself and approve the communication. Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, sec. 305(a)(3), § 315(b)(2)(C), 116 Stat. 81 (2002) (amending 47 U.S.C.A. § 315).

[10] Walls, *supra* note 7; About Kay, http://www.kayhagan.com/about/about-kay (last visited January 3, 2009).

[11] Press Release, Kay on Dole Ad Attacking Her Christian Faith: A Fabricated, Pathetic Ad (Oct. 29, 2008), http://www.kayhagan.com/press/kay-on-dole-ad-attacking-her-christian-faith-a-fabricated-pathetic-ad.

> I don't know what things were like when she grew up in North Carolina, but the North Carolina I was raised in would never condone this kind of personal slander . . . . I do not share [Godless Americans'] beliefs. This was an event with nearly forty hosts, including an ambassador and a sitting U.S. Senator (John Kerry).

Id. See also Lisa Zagaroli, *Hagan Disputes Dole Ad in Court Papers*, CHARLOTTE OBSERVER, Oct. 31, 2008, at A1 ("The idea that Kay Hagan is an atheist or promoting an atheist agenda is false.") (quoting Hagan's former Bible teacher, Rick Stone).

suit after she won the election.[12] North Carolina was not the only state in which controversial campaign ads aired: in Minnesota, the opponent of Indian-American congressional candidate Ashwin Madia allegedly darkened the skin tone of Madia in three pictures in an ad.[13]

Next year will mark the 200th year since Thomas Jefferson left office, and while the negative false attack ads of politics have not changed, the medium by which those attacks reach the voters has evolved dramatically.[14] Yet, the "actual malice" standard for proving defamation against a public official has remained unrevised from its creation in *New York Times Co. v. Sullivan.*[15] The Presidential campaign of 2008 has been called a seminal and transformative election that will influence the way campaigns are run for many years.[16] At the basis of this classification is the role the Internet played in the campaign; the Obama campaign, in particular, utilized YouTube to post campaign ads[17] and text messages to remind supporters to vote.[18] The

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[12] *See* Press Release, Kay Hagan Files Suit Against Elizabeth Dole, Elizabeth Dole Committee, Inc. for Defamation (Oct. 31, 2008) http://www.kayhagan.com/press/kay-hagan-files-suit-against-elizabeth-dole-elizabeth-dole-committee-inc-for-defamation); News14.com, Hagan Drops Lawsuit Against Dole, http://news14.com/content/local_news/triad/601474/hagan-drops-lawsuit-against-dole (last updated Nov. 14, 2008).

[13] Rebecca Dana, *TV Ad Stirs Controversy in Minnesota House Race*, WALL ST. J. BLOGS, Oct. 30, 2008, http://blogs.wsj.com/washwire/2008/10/30/tv-ad-stirs-controversy-in-minnesota-house-race/. A non-partisan political action committee posted versions of the original pictures next to the alleged doctored photos. *Id*.

[14] Biography of Thomas Jefferson, http://www.whitehouse.gov/history/presidents/tj3.html (last visited Apr. 11, 2009).

[15] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also infra* Part II.A (discussing the creation of the actual malice standard in *New York Times Co. v. Sullivan*).

[16] *See* Adam Nagourney, *The 08' Campaign: Sea of Change for Politics as We Know It*, N.Y. TIMES, Nov. 4, 2008, at A1.

> It has rewritten the rules on how to reach voters, raise money, organize supporters, manage the news media, track and mold public opinion, and wage – and withstand – political attacks, including many carried by blogs that did not exist four years ago. It has challenged the consensus view of the American electoral battleground, suggesting that Democrats can at a minimum be competitive in states and regions that had long been Republican strongholds.

Id.

[17] *See* Barack Obama's YouTube Channel, http://www.youtube.com/user/barackobamadotcom (last visited Jan. 4, 2009)*;* John McCain's YouTube Channel, http://www.youtube.com/user/johnmccaindotcom (last visited Jan. 4, 2009) (showing examples of President-Elect Barack Obama and Senator John McCain's campaign ads and

Internet has evolved from a network of military computers to "the most participatory marketplace of mass speech" in the world.[19] In 2008, more people than ever relied on the Internet to get information about political candidates.[20] The Internet also surpassed newspapers as the source in which people get their national and international news.[21]

Due to the rapid evolution of the Internet and content sharing websites like YouTube, false campaign ads with defamatory content reach more people more quickly and for a longer duration.[22] False campaign ads almost always take the form of negative attacks against an

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videos). As of January 4, 2008 President-Elect Obama had over twenty million channel views while Senator John McCain had just over two million. *Id*.

[18] Nagourney, *supra* note 16. Nagourney states that the use of the Internet in elections began in 2000 with President Bush's campaign to micro-target potential supporters and continued with Howard Dean's 2004 campaign, which was the first to use the Internet to sign up volunteers and receive donations. *Id.*

> But only 40 percent of the country had broadband back then. You know have people who don't have home telephones anymore. And Obama has done a tremendous waging a campaign through the new media challenge.
>
> I don't know about you, but I see an Obama Internet ad everyday. And I have for six months.

Id. (quoting Sara Taylor, White House political director during George W. Bush's reelection campaign).

[19] Amity Hough Farrar, *Virtual Politics and the 2000 Election: Does First Amendment Protection Extend to Political Speech on the Internet*, 7 J. INTELL. PROP. L. 395, 399-400 (2000) (discussing origin of the Internet as a military project); Diane Rowland, *Griping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 PENN ST. L. REV. 519, 519 (2006) (quoting ACLU v. Reno, 929 F. Supp. 824, 881-83 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997)); JOHN B. HORRIGAN PEW RESEARCH CTR., PEW INTERNET AND AMERICAN LIFE PROJECT, OBAMA'S ONLINE OPPORTUNITIES (2008), http://pewresearch.org/pubs/1047/obamas-online-opportunities (seventy-five percent of Americans are Internet users).

[20] PEW RESEARCH CTR. FOR PEOPLE & THE PRESS, INTERNET NOW MAJOR SOURCE OF CAMPAIGN NEWS, (2008), http://pewresearch.org/pubs/1017/internet-now-major-source-of-campaign-news (showing that the amount of people who get their presidential campaign news from the Internet is up 23% from 2004).

[21] PEW RESEARCH CTR. FOR PEOPLE & THE PRESS, INTERNET OVERTAKES NEWSPAPERS AS NEWS SOURCE, (2008), http://pewresearch.org/pubs/1066/internet-overtakes-newspapers-as-news-source. Over forty percent of people get their national and international news from the Internet, compared to thirty-five percent who use newspapers and seventy percent who use television. *Id*. Additionally, the Internet is now tied with television as the main news source for Americans between the ages of eighteen to twenty-nine. *Id*.

[22] *See supra* note 17. A search on the website YouTube.com for "campaign ads" yields 53,900 results ranging from political ads from 2009 to ads dating back the 1980's. Youtube.com, http://www.youtube.com (search "campaign ads") (last searched June. 4, 2009). A search for "Elizabeth Dole's Promise Ad" yields a video for the ad as the number one result. *Id.* (search for "Elizabeth Dole's Promise Ad") (last searched June. 4, 2009)

opponent because they get more coverage and are very effective.[23] In the 2006 Congressional midterm election, ninety percent of ads were negative, causing seven in ten Americans to believe "not much" or "nothing at all" of what they heard in political ads.[24] The influx of negative, and many times false, campaign ads has lowered the discourse of political debate, misled voters, prevented actual issues from being debated, and alienated Americans from politicians and the political process.[25] Once a false and defamatory ad is broadcast, it is nearly impossible to repair the damage due to the lack of appropriate remedies available to politicians and the difficulty of prevailing in a defamation suit.[26]

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[23] *See* Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 895 (2008) ("The increase in the incidence and reach of false advertising has had disturbingly destructive consequences for our democratic system. . . . False advertising, usually negative, lowers the quality of political discourse and debate.") *and* MARK JURKOWITZ, PEW RESEARCH CTR., PROJECT FOR EXCELLENCE IN JOURNALISM, CAMPAIGN TACTICS AND TONE TRUMP ECONOMY IN MEDIA NARRATIVES (2008), http://pewresearch.org/pubs/994/campaign-tactics-and-tone-trump-economy-in-media-narratives. (showing that in the week of Oct. 6-12, 2008, more stories covered "harsher attacks by candidates" than any other issue, including the "financial crisis" and the "economy."). *See also* Kathleen Hall Jamieson, *Going Negative, Campaign 2008*, BILL MOYERS JOURNAL, Oct. 10, 2008, http://www.pbs.org/moyers/journal/10102008/profile2.html ("The bulk of negative campaigning rests on questioning the opponent's character and judgment.")

> Negative ads work and have their place. They are how the voters find truth in a morass of claims and counterclaims. With much of the media oriented toward the left or the right, negative ads are often the only way voters can penetrate the claims of the various campaigns and get the facts. Voters always tell pollsters that they hate negative ads, but politicians continue to run them. That's because the same polls show that they work. In a world with flawed politicians, we need negative ads; otherwise, we won't know candidates' defects until it's too late.

Id. (quoting Dick Morris, *Dick Morris: Negative Campaigning Is Good for America,* U.S NEWS & WORLD REPORT, Oct. 6, 2008, available at http://www.usnews.com/articles/opinion/2008/10/06/dick-morris-negative-campaigning-is-good-for-america.html.

[24] Susan Page, *Nasty Ads Close Out a Mud-Caked Campaign*, USA TODAY, Nov. 3, 2006, at 11A (describing the various negative campaigns on television during the last week of the 2006 Congressional midterm election).

[25] *See* Goldman, *supra* note 23, at 895-97. *See also* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2005) ("Democracy is premised on an informed electorate. Thus, to the extent that false ads misinform the voters, they interfere with the process upon which democracy is based.")

[26] Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 419-20 (1991) ("The vast majority of recent libel suits have ultimately failed in the courts. . . . One would be hard-pressed to find another area of the law in which so overwhelming a proportion of defendants brought into court are eventually vindicated.").

This Comment reexamines the *New York Times Co.* actual malice standard for defamation against a public official in the age of the Internet campaign.[27] It considers the application of *case law* to the regulation of defamatory political advertisements.[28] Its focus will be limited to false campaign ads aired on television and posted online by politicians.[29] Part II of this Comment provides historical background on defamation as it pertains to public officials and summarizes the regulations of Internet speech that relate to defamation of a public official.[30] Part III examines Congress's recent approach to the regulation of false advertising through campaign finance reforms that indirectly attempt to regulate potentially defamatory campaign ads.[31] Part IV demonstrates that the actual malice standard should be retained because it can be adapted to modern times, does not violate the rulings of the Court regarding Internet speech or campaign finance, and adequately protects political speech.[32] Finally, Part V proposes the creation of federal statute that retains the actual malice standard and requires a mandatory retraction to ensure political speech is not chilled, to protect media defendants from ruinous

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[27] *See* Part II.A.1 (discussing the *New York Times Co.* decision). Politicians were considered public officials for defamatory purposes in the Court's ruling in *New York Times Co*. *New York Times Co.*, 376 U.S. at 254. This Comment will not address "public figures" or how the Court determines whether a person is a public figure. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (defining "public figure").

[28] This Comment's proposal is limited in part by case law and in part by Federal Election Commission rules. *See infra* Part II-III (discussing the cases that have shaped the actual malice doctrine and the Federal Election Commission rules regulating political advertisements).

[29] The Federal Election Commission has sought to regulate advertisements not aired by the candidate, but aired on his behalf, as "coordinated communications." *See infra* note 217 (defining "coordinated communication").

[30] *See infra* Part II (summarizing the progeny of Supreme Court cases that define defamation law concerning public officials and briefly recapping the relevant sections of the Communications Decency Act ("CDA") and the case that interpreted it). This part will not focus on Internet anonymity issues or distributor issues, but is limited to instances in which a public official's opponent produces the defamatory advertisement.

[31] *See infra* Part III (analyzing the Bipartisan Campaign Reform Act of 2002 (BCRA), attempts to use it to regulate political ads, and the court decisions involving political ads that have interpreted the BCRA).

[32] *See infra* Part IV (discussing the reasons to adapt the actual malice standard to the modern era of political campaigns and addressing the dangers of infringing on political speech).

lawsuits, and to give politicians a remedy that will limit damage to their reputation and deter future false ads.[33]

I. BACKGROUND

The common law of defamation, and more specifically libel, against public officials began in a most unlikely place.[34] Before critically analyzing the actual malice standard, it is necessary to trace the origin of common law libel against public officials and its further constitutionalization in subsequent cases. Part II first discusses the landmark cases involving libel against public officials and then briefly summarizes the regulation, or lack thereof, of Internet speech.

a. Libel Against Public Officials

Libel is defined as "a method of defamation expressed by print, writing, pictures, or signs."[35] A statement is libelous *per se* if the words are of such character that an action may be brought upon them without the necessity of showing any special damage as the law will presume any one so slandered must have suffered some damage.[36] One would assume that a false advertisement against a public official would be libelous *per se*; however, the Supreme Court, in *New York Times Co.*, created an additional hurdle for public officials attempting to bring a libel suit: actual malice.[37]

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[33] *See infra* Part V (proposing a federal statute that gives defamed public officials greater recourse while protecting political speech).

[34] *See infra* Part II.A (discussing the foundation of common law libel and the cases following *New York Times Co.* in which the Court expanded and clarified the *New York Times Co.* decision).

[35] BLACK'S LAW DICTIONARY 1060 (4th ed. rev. 1968). Defamation is defined as "the offense of injuring a person's character, fame, or reputation by false and malicious statements." *Id*. at 505.

[36] *Id*. at 1062.

[37] *See infra* Part II.A.1 (discussing the Court's articulation of the actual malice standard in *New York Times Co.*).

i. New York Times Co. v. Sullivan

The Supreme Court's commitment to protecting speech that potentially defames public officials has its origins in a *New York Times* ("the *Times*") ad that did not mention a public official by name.[38] L.B. Sullivan was a Commissioner of the City of Montgomery Alabama.[39] Sullivan sued the *Times* and four ministers working on the civil rights movement for publishing an editorial advertisement that falsely described certain events as "a wave of terror."[40] Sullivan alleged that the advertisement falsely implicated him in several arrests of King, the bombing of King's house, and the attempted starving of students.[41] Such allegations reflected poorly on Sullivan.[42] Sullivan sent a letter to each minister and the *Times* demanding a retraction.[43] While

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[38] *See, e.g.,* Amanda Hyland, *The Taming of the Internet: A New Approach Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 87-91 (2008) (examining First Amendment foundations of libel law for publishers while emphasizing libel law applications on the Internet and discussing the policy implications of Section 230 of the Communications Decency Act) *and* Thomas Kane, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755 (1998) (summarizing the opinion of the Court in *New York Times Co.* and discussing the rationale for the Court's decision before citing the critics of the decision and proposing that courts issue a proclamation of truth in campaign slander cases).

[39] *New Times Co.*, 376 U.S. at 256.

[40] *Id*. at 256-57. The advertisement, entitled "Heed Their Rising Voices" was published on March 29, 1960, and never directly referred to Sullivan by name, although he alleged that the accusation that the police, armed with shotguns and tear gas (the "ringing"), had padlocked students of Alabama State College in their dining hall in an attempt to starve them into submission, referred to him as the Commissioner in charge of the police. *Id*. at 258.

[41] *Id*. at 258. The Supreme court also found that the advertisement contained a number of inaccuracies. For instance, Dr. King had only been arrested four times in the past, not seven, and the police were deployed near the Alabama State campus several times but had never "ringed" the campus. *Id*. at 259. *See generally* Kermit Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339, 343 (1991):

> The ad named no specific public officials in Alabama, but called attention in somewhat hyperbolic fashion to 'truckloads of police armed with shotguns and tear-gas [that] ringed the Alabama State College Campus' and 'padlocked' the dining hall in 'an attempt to starve them [the student protestors] into submission.' The ad portrayed the civil rights movement in general, and Martin Luther King, Jr. in particular, in a sympathetic and heroic manner. It left little doubt in reader's [sic] minds that unnamed Southern public officials were bent on King's and the movement's destruction.

Id.

[42] *New York Times Co.*, 376 U.S. at 260. Though he made no effort to prove actual pecuniary loss as a result of the alleged libel, a former employer testified that if the allegations in the paper were true, he would not want to associate with Sullivan and would probably not rehire him. *Id*. *See generally* Kermit Hall, *"Lies, Lies, Lies":*

none of the individual petitioners responded, the *Times* sent him a letter.[44] Sullivan filed suit days after receiving the correspondence.[45]

The trial judge instructed the jury that the advertisement was libelous *per se*, meaning that the *Times* would be liable if it was found that they had published the advertisement and the statements published concerned the respondent.[46] The jury took just over two hours to return a verdict of $500,000 in favor of Sullivan.[47] The Supreme Court of Alabama affirmed the lower court's decision, finding that the matter complained of subjected Sullivan to public contempt and was thus libelous *per se*.[48] The Court found it common knowledge that the commissioner

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The Origins of New York Times Co. v. Sullivan, 9 COMM. L. & POL'Y 391, 403 (2004) (stating Sullivan was rebuked by the African American press because he did not attempt to make any arrests in the Alabama State College incident).

[43] *New York Times Co.*, 376 U.S. at 261.

[44] *Id.* The *Times* did not publish a retraction but did write a letter in response stating they were "somewhat puzzled as to how you think the statements in any way reflect on you . . .[and] you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." *Id*.

[45] *Id*. *See* Hall, *supra* note 42, at 417:

> On April 9, Nachman gave instructions to Sullivan, James and Parks to write identical letters--not only to the *Times* but to each of the four Alabama preachers--demanding that they prepare a full retraction. The latter were joined as parties in order to keep the litigation in the Alabama courts and to block removal to the potentially more sympathetic federal courts.

Id.

[46] *New York Times Co.*, 376 U.S. at 262.

[47] *See* Kane, *supra* note 38, at 764-65.

> The *Times* rightfully feared that the verdict would be repeated in the five other Alabama cases that had been filed as a result of that single ad. The financially unstable paper could have faced up to $3 million in damages if all of those cases were successful. The paper's survival depended upon a successful appeal.

Id.

[48] New York Times Co. v. Sullivan, 273 Ala. 656, 673-76 (Ala. 1962), *rev'd*, 376 U.S. 254. (1964). The Alabama Supreme Court held that words are "libelous per se" when "the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt." *Id.* The Court further held that the effects of the publication should be determined by the "natural and probable effects on upon the mind of the average reader" and that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff." *Id.* (quoting White v. Birmingham Post Co. 172 So. 649, 652 (Ala. 1938)). Finally, the Court held that "[i]n libel action, where the words are actionable per se, the complaint need not specify damages, nor is proof of pecuniary injury required, such injury being implied." *Id*. at 676 (citation omitted).

controls police and fire personnel.[49] Against this backdrop and during the turbulent years of the civil rights movement, the United State Supreme Court granted certiorari.[50]

Justice Brennan delivered the landmark opinion of the Court and was joined by six other Justices.[51] Justice Brennan decided the case against the backdrop of a commitment to open, free, and biting attacks on government officials.[52] The Court, in reversing and remanding the decision of the Alabama Supreme Court, declared that the Constitution required a public official, in order to recover damages, to prove a statement about his conduct was made with actual malice.[53] From the beginning of the opinion, Justice Brennan stressed the long history of case law emphasizing the protection of freedom of the press.[54] The majority opinion based its holding on

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[49] *New York Times Co.*, 376 U.S. at 263.

[50] *See* Hyland, *supra* note 38, at 87 (summarizing the procedural history of *New York Co.* and the Court's reasoning in reversing the Alabama Supreme Court).

[51] *New York Times Co.*, 376 U.S. at 256. The decision of the Supreme Court was unanimous; Justice Black and Justice Goldberg each wrote a concurring opinion, both of in which Justice Douglas joined. *See generally id.*

[52] *Id*. at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."). *See generally* Hall, *supra* note 41, at 356:

> In this sense, Brennan contributed to the decay of community values associated with first amendment law since the 1930s. The decision helped to push American public life, at least where criticism of officials was involved, away from the idea of a New England town meeting, in which the quality of what was said was more important than the quantity.

[53] *New York Times Co.,* 376 U.S. at 279-80. Actual malice is defined as knowledge of the falsity of the statement or a reckless disregard as to whether the statement is true or not. *Id*. at 280. The petitioner has the burden of proving the charge was false and was made with actual malice. *Id. See infra* Part II.A.3 (examining a subsequent Supreme Court decision that further defines actual malice).

[54] *New York Times Co.,* 376 U.S. at 269. *See generally*, NAACP. v. Button, 371 U.S. 415, 429 (1963) (finding that the opportunity to speak one's mind should be afforded for "vigorous advocacy" as well as "abstract discussion); Roth v. United States, 354 U.S. 476, 484 (1957) (holding that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Bridges v. California, 314 U.S. 252, 270 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions"); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); United States v. Ass'd Press, 52 F. Supp. 362, 372 (S.D. N.Y. 1943) ("The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."), *aff'd*, 326 U.S. 1 (1945), *reh'g*

three distinct but interrelated rationales: (1) the analogy to seditious libel; (2) the concern with monetary damages; and (3) the fear of a "chilling effect" on political speech.[55] It is important to understand the basis of the Court's rationales before discussing subsequent cases that expand and clarify the Court's ruling in *New York Times Co*.

1. The Analogy to Seditious Libel

The *Times* sought to analogize the Alabama Statute[56] to the Sedition Act of 1798,[57] which allowed the government to penalize a publisher of libelous words.[58] On appeal to the Supreme Court, the *Times* successfully did just that.[59] Justice Brennan referenced the Sedition Act in his

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denied 326 U.S. 802 (1945), *reh'g denied*, 326 U.S. 803 (1945). This principle was best formulated in the concurring opinion of Justice Brandeis in *Whitney v. California*:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (footnote omitted), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[55] *See* Kane, *supra* note 38, at 265 (analyzing the Supreme Court's three rationales in *New York Time.* and discussing the subsequent cases that broadened the *New York Times Co.* opinion).

[56] ALA. CODE, tit. 7, § 914 (1964).

> Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply.

New York Times Co., 376 U.S. at 261 (citing ALA. CODE, tit. 7, § 914 (1964)).

[57] *See* Sedition Act of 1798, 1 Stat. 596 (1798).

[58] *New York Times Co.*, at 273-74. While the Supreme Court never considered the constitutionality of the Act, President Thomas Jefferson pardoned those convicted under it because he believed it was unconstitutional. *Id.* at 276.

[59] *Id*. at 283-84. The opening line of Weschler's petition for certiorari on behalf of the *Times* read:

> The decision of the Supreme Court of Alabama gives a scope and application to the law of libel so restrictive of the right to protest and criticize official conduct that it abridges the freedom of the press, as that freedom has been defined by the decisions of this Court. It transforms the action for

opinion, recounted its history, and proclaimed it unconstitutional.[60] He also stated that the Alabama statute was in fact worse than the Sedition Act or any criminal statute, because the monetary damages established by the Alabama statute were one hundred times greater than those provided by the Sedition Act.[61] The survival of not only newspaper editorials, but of the freedom of the First Amendment itself, was an additional concern for the Court.[62] While the backbone of Justice Brennan's opinion was the analogy to seditious libel, the analogy broke down when the Court expanded the scope of actual malice in subsequent decisions.[63]

> defamation from a method of protecting private reputation to a device for insulating government against attack.

ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 58, 107-08 (1991).

[60] *New York Times Co.*, 376 U.S. at 273-77.

> If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798 . . . which first crystallized a national awareness of the central meaning of the First Amendment.

Id. at 273.

[61] *Id*. at 277. *See also* Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment*," 83 COLUM. L. REV. 603, 606 (1983):

> What he was saying was that this was really akin to a case of seditious libel--of punishment for agitating against authority. And for reasons deep in English and American history, that is a concept particularly suspect under the first amendment. The Sedition Act . . . made truth a defense, a liberalizing change from the English law of seditious libel, and provided that juries should decide both facts and law. But despite those reformist features, the law was denounced by the Jeffersonians as a violation of the first amendment--and the criticism carried the day. The Act was allowed to expire after two years, and Congress repaid the fines of those convicted under it.

[62] *New York Times Co.*, 376 U.S. at 278 ("Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.").

[63] *See* Kane, *supra* note 38, at 767. *See also Curtis Publ'g Co.,* 388 U.S. at 153-54 (holding that the actual malice standard created in *New York Times Co.* applied to all public figures and was not limited to public officials). *See also infra* Part II.A.3 (discussing *St. Amant* and the Court's clarification of the meaning of actual malice).

2. Monetary Damages

Despite its historical comparisons to the Sedition Act and concern for First Amendment freedoms, *New York Times Co.* was about money.[64] The editorial in the *Times* was a paid advertisement.[65] Sullivan and the Alabama courts contended that freedom of speech guarantees did not apply because the purchased editorial was a commercial advertisement.[66] The Court did not accept the argument.[67] Justice Brennan classified the advertisement as non-commercial speech because it stated an opinion, protested alleged abuses, and asked for money.[68]

The fact that the four ministers had paid the *Times* for publishing the advertisement was immaterial, according to the Court.[69] Nevertheless, in making this assessment, the Court acknowledged that in the modern day, protected speech is intertwined with profit-making activities of newspapers, which must be protected.[70]

Additionally, the Court examined a second financial dimension in *New York Times Co.*: the size and nature of the damage awards.[71] An individual's interest in their reputation is not easily measured.[72] While the injury of defamation is a serious one, the Court was concerned that an abusive assessment of damages based on a tenuous connection between demonstrated harm

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[64] *See* Kane, *supra* note 38, at 769 (describing two financial issue over which the Court was concerned)

[65] *New York Times Co.*, 376 U.S. at 265.

[66] *Id*. The advertisement cost $4800. *Id*. at 260.

[67] *Id*. at 264-265.

[68] *Id*. at 266. Sullivan relied on *Valentine v. Chrestensen* to buttress his contention that the editorial was commercial speech. 316 U.S. 52, 62 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748 (1976). In *Chrestensen*, the Court upheld a city ordinance that prohibited street distribution of commercial and business advertising. *Id*.

[69] *New York Times Co*, 376 U.S. at 266.

[70] Kane, *supra* note 38, at 769 (The Court "was unwilling to punish the *Times* for this profit-making motive").

[71] *Id*.

[72] *Id*. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A, at 843 (5th ed. 1984)).

and awarded damages would result.[73] The high amount of damages, the Court feared, would threaten the very existence of the American press.[74]

3. Chilling Effect

Despite the Court's emphasis on the Sedition Act of 1789 and concern with monetary damages, the fear of chilling speech is the rationale cited as the basis for protecting it.[75] Until *New York Times Co.*, the truth of the statement separated the guilty from the innocent in libel cases.[76] Justice Brennan's majority opinion applied protection from libel suits to some types of speech that were potentially false.[77] Instead of the bright line true/false test, the Court looked at the subjective belief of the party who uttered the libelous remarks.[78] While untrue speech has no

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[73] At the time of this decision, four separate libel suits based on the advertisement had been filed, resulting in another $500,000 verdict and damages sought in the remaining cases were $2,000,000. *New York Times Co.*, 376 U.S. at 278. Justice Black stressed the possible "chilling" effect in his concurring opinion:

> There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press-now that it has been shown to be possible-is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state news-papers [sic] easy prey for libel verdict seekers.

Id. at 294-95 (Black, J., concurring).

[74] Kane, *supra* note 38, at 770-71.

[75] *See infra* Part II.B.2 (discussing *Reno v. ACLU* and the Court's concern that the CDA would chill protected speech). Reno v. ACLU, 521 U.S. 844 (1997), *aff'g,* 929 F. Supp. 824 (1996).

[76] *See* RESTATEMENT OF TORTS, § 581(a) (1976) (stating that the publisher of a defamatory statement of fact is not subject to liability).

[77] Kane, *supra* note 38, at 771.

[78] Justice Brennan addressed the efforts made by the *Times* to determine the accuracy of the advertisement:

> [T]here is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. . . . We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

value in its own right, the actual malice standard made untrue speech worthy of First Amendment protection only when it could not be regulated without "chilling" truthful speech.[79] Justice Brennan heavily emphasized the "chilling" effect in his opinion and this rationale provides a foundation upon which to create a federal campaign libel law.[80]

Originally, *New York Times Co.* narrowly applied to instances where the truth of the advertisement was not at issue.[81] In subsequent decisions however, the Court expanded the ruling in *New York Times Co.* by defining a public figure and applying the actual malice standard to private citizens and to criminal libel laws.[82]

New York Times Co, 376 U.S. at 287-88.

[79] *See St. Amant,* 390 U.S. at 732 (discussed *infra* Part II.A.2). *See also Va. State Bd. of Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

[80] *See infra* Part V (proposing a federal campaign libel statute that assesses damages to the candidate who utters the defamatory comments and not the publisher, thus securing the rights of the press to critique government officials).

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

New York Times Co, 376 U.S. at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958), *reh'g denied*, 358 U.S. 860 (1958)).

[81] *New York Times Co*, 376 U.S. at 279-80. *See* Goldman, *supra* note 23, 901-02 ("Obviously, the Court's definition of actual malice combined with the requirement of proof by clear and convincing evidence provides potent protection to those who defame public figures or public officials.").

[82] *See Curtis Publ'g Co.*, 388 U.S. 130 (extending the actual malice standard to cases involving media falsehoods about public figures who were not public officials). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (finding that even persons who "achieve such pervasive fame and notoriety" that they become a "limited purpose" public official must prove actual malice); Garrison v. Louisiana, 379 U.S. 64 (1964) (applying the actual malice standard of *New York Times Co.* to criminal libel laws).

ii. St. Amant v. Thompson – Clarifying Actual Malice

In *St. Amant*, the Court clarified the meaning of actual malice by defining reckless conduct.[83] This sub-part examines the Court's reasoning in *St. Amant* in preparation for a discussion of *Brown*, where the Supreme Court applied the actual malice standard of *New York Times Co.* and *St. Amant* to false campaign advertising.[84] This standard was first proclaimed in *New York Times Co.* and then clarified in *St. Amant* and *Brown*; the Court's reasoning in those cases legitimizes this Comment's proposal.[85]

The controversy in *St. Amant* involved a televised speech of a candidate for public office.[86] During the speech, St. Amant read an interview he had conducted with a member of a local union that implicated Thompson, the deputy sheriff for East Baton Rouge parish, in accepting money from the president of that union.[87] Thompson filed a defamation suit, claiming the publication of the speech had inferred gross misconduct on his part.[88] The trial court found for Thompson and awarded him $5,000 in damages; the Louisiana Court of Appeals reversed, noting that there was no proof of actual malice on St. Amant's behalf, which was required by the recently decided *New York Times Co.* case.[89] The Louisiana Supreme Court reversed the Court of Appeals because there was evidence that St. Amant recklessly disregarded the veracity of the

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[83] *St. Amant,* 390 U.S. 727, 730-31 (1968).

[84] *See infra* Part II.A.3 (summarizing *Brown* and discussing its significance). *See also*, Brown v. Hartlage, 456 U.S. 45 (1982).

[85] *See infra* Part V (summarizing a proposal for a federal campaign libel law).

[86] *St. Amant*, 390 U.S. at 728. The speech occurred in Baton Rouge, Louisiana on June 27, 1962, although the actual case was tried prior to the ruling of *New York Times Co. Id*.

[87] *Id.* at 728-29.

[88] *Id*. at 729.

[89] *Id*. at 730

statements against Thompson.[90] The United State Supreme Court granted certiorari and reversed.[91]

The Court, while admitting that "reckless disregard" could not be defined in one discrete definition, found that St. Amant had not recklessly disregarded the accuracy of his statements about Thompson.[92] The Court looked to case law for guidance as to a clear meaning of reckless publication.[93] The Court found that false publication is not reckless as measured by what a reasonably prudent man would publish or investigate.[94] Instead the publisher had to seriously entertain the truth of the publication but decide to publish nonetheless.[95] While acknowledging the possibility that such a standard would allow recovery in fewer situations, the Court resigned

[90] *Id*. The court based its ruling on several reasons, including St. Amant's lack of personal knowledge concerning Thompson's activities, his failure to verify the information given to him, his mistaken belief that he had no responsibility for the broadcast, and his lack of consideration as to whether or not the comments he read defamed Thompson. *Id*.

[91] *Id.* at 728.

[92] *Id*. at 730. *See* Edward Fenno, *Public Figure Libel*: *The Premium on Ignorance and the Race to the Bottom*, 4 S. CAL. INTERDISC. L.J. 253, 260-61 (1995) (summarizing the Court's ruling in *St. Amant* and stating a failure to investigate charges before broadcasting them was unimportant).

[93] *St. Amant*, 390 U.S. at 730-31 (discussing the opinions of *Garrison* and *Curtis Publ'g Co.*, which held that it was necessary to show a false publication was made with a high degree of awareness of probable falsity).

[94] *Id*. at 731. *See* Fenno, *supra* note 92, at 261 (detailing the Court's emphasis on the defendant's belief in his source of the allegations).

[95] *St. Amant*, 390 U.S. at 731. *See also* Kane, *supra* note 38, at 775 ("Like all subjective standards, it forces the plaintiff to prove a fact about the defendant's state of mind without reference to the proclivities of a reasonable person."); Price v. Viking Penguin, Inc., 881 F.2d 1426, *cert denied*, 493 U.S. 1036, 1445 (8th Cir. 1989) (holding that reckless disregard can be evidenced if there was sufficient reason to doubt the source of the information); Babb v. Minder, 806 F.2d 749, 755-56 (7th Cir. 1986) (quoting Fopay v. Noveroske, 334 N. E. 2d 79, 88 (Ill. App. Ct. 1975); Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir. 1982), *appeal'g remand*, 418 U.S. 323 (1974), *cert. denied*, 459 U.S. 1226 (1983)) ("[R]eckless conduct may be evidenced in part by failure to investigate thoroughly and verify the facts . . . . especially where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."); Woods v. Evansville Press Co., 791 F.2d 480, 485 (7th Cir. 1986) ("Recklessness may be found, for example, where there are clear reasons as to doubt the truthfulness of the informant or the accuracy of his reports or where a story is fabricated by the defendant or is based entirely on an unverified anonymous telephone call."). *But see* Evan Richman, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667, 677 (1998) ("[I]t must be noted that these definitions are illustrative and not limiting.").

itself to the fact that in order to protect publications that are true, the First Amendment must protect erroneous publications as well.[96]

iii. Brown v. Hartlage – Actual Malice Applied to False Campaign Speech

The Court in *St. Amant* further defined the actual malice standard of *New York Times Co.*, but it was not until *Brown* that the Court applied the actual malice standard to false campaign speech by a public official. While some scholars believe *Brown* was weak precedent and should not apply to false campaign advertisements, it is one of the few and most notable cases in which the Court applied the actual malice standard in *New York Times Co.* to false campaign speech.[97] The issue in *Brown* concerned a promise made by a candidate during a campaign that was against the law.[98] The Court, unlike in previous defamation cases, was asked to void an election because of the promise.[99] *Brown* illustrates a void in libel law that requires a federal statute to regulate false campaign advertising.[100]

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[96] *St. Amant*, 390 U.S. at 731-32;

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendants [sic] testimony that he published the statement in good faith and unaware of its probable falsity. . . . But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

Id.

[97] *See* Goldman, *supra* note 23, at 907-908 (arguing that the facts of *Brown* were so dissimilar to other defamation cases that the Court's analogy to such cases was "based on citation rather than analysis"). For criticism of the actual malice standard and *Brown* itself, *see infra* Part IV (summarizing the perceived weaknesses of the actual malice standard and some scholars' calls for a different standard for false campaign advertisements).

[98] *Brown*, 456 U.S. at 46-47.

[99] *Id*. at 47 Unlike the prior defamation cases discussed and cited, *Brown* did not involve defamatory comments made about another, nor did it seek to impose damages on the publisher of the statement. *Id*. *See supra* notes 38-96 and accompanying text (discussing *New York Times Co.* and *St. Amant*, two cases that did involve publishers).

[100] Goldman, *supra* note23, at 907 (arguing that *Brown* is distinguishable from other defamation cases and the Brown's choice of actual malice standard inappropriate for false campaign ads).

Brown sought a county commissioner seat in the general election in 1979.[101] During a televised press conference, Brown accused Hartlage of fiscal abuse.[102] To prove that he would act differently, Brown pledged to halve the salary of commissioner if he were elected.[103] Unbeknownst to Brown, promising to halve one's salary was against the law in Kentucky as a violation of the Kentucky Corrupt Practices Act.[104] After realizing that his words were illegal, Brown issued a retraction admitting his mistake and promising to take proper legal steps to decrease the salary.[105] Brown won the election by 10,151 votes and Hartlage filed action seeking the election to be declared void.[106] The trial court found that because Kentucky law fixed the salary of a commissioner, a candidate could not promise to reduce it without violating Kentucky law.[107] Nevertheless, the court refused to void the election, reasoning that because a retraction was made, Brown was fairly elected.[108] The Kentucky Court of Appeals reversed and stated that a new election should be held.[109]

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[101] *Brown*, 456 U.S. at 47.

[102] *Id*.

[103] *Id*.

[104] *Id*. *See* Ky. Rev.Stat. §§ 121.155 (2008) ("No candidate for nomination or election . . . shall expend, pay, promise, loan or become liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person.").

[105] *Brown*, 456 U.S. at 48. Peter H. Aranson and Kenneth A. Shepsle, *The Compensation of Public Officials as a Campaign Issue: An Economic Analysis of Brown v. Hartlage*, 2 SUP. CT. ECON. REV. 213, 214 (1983) ("Shortly after making this promise, Brown and Creech learned that it might have violated the Kentucky Corrupt Practices Act. The candidates thereupon held a second news conference, during which they withdrew their promise to reduce their salaries.").

[106] *Brown*, 456 U.S. at 49.

[107] *Id*. at 50.

[108] *Id*.

[109] *Id*. at 50-51. ("[T]he trial court was mistaken in believing that it possessed the discretionary authority to balance the gravity of the violation against the disenfranchisement of the electorate that would result from declaring the election void.").

The Supreme Court of the United States granted certiorari and reversed the Kentucky Court of Appeal's decision.[110] Once again, Justice Brennan wrote the majority opinion for the Court, and began by acknowledging a state's right to regulate its electoral process.[111] The Court emphasized the role that the free exchange of ideas has in a constitutional democracy.[112] The political candidate, the Court stressed, did not abandon the protection of the First Amendment when he ran for office.[113] In order to restrict such a fundamental right as free speech, the state must have a compelling interest in doing so.[114] The Court found that a political candidate's promise to reduce his salary may not be protected by the First Amendment if such a promise could be deemed a "corrupting agreement" or "solicitation."[115] Thus, electoral speech is protected where: (1) voters find self-interest in a candidate's commitment; (2) the benefit to the voter is achieved through a normal process of government, instead of a private arrangement; and (3) the statement is not made with a reckless disregard for the truth.[116] The Court found that

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[110] *Id*. at 52, 62. *See* Aranson, *supra* note 105, at 230-31 (discussing the Court's balancing the interest in preserving the integrity of the electoral process with the free speech requirements of the First Amendment).

[111] *Brown*, 456 U.S. at 52 (stating that the First Amendment limits a States attempts to regulate the electoral process by restricting speech).

[112] *Id*. at 53.

[113] *Id.*

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Id. (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).

[114] *Brown*, 456 U.S. at 53-54.

[115] *Id*. at 56-57. *See* Aranson, *supra* note 105, at 231 (distinguishing between promises from candidates that may be universally regulated by the states and those that may not be).

[116] *Brown,* 456 U.S. at 56, 61.

Brown satisfied the elements for protected electoral speech.[117] To nullify the election under these circumstances would be "inconsistent with the atmosphere of robust political debate protected by the First Amendment."[118]

The *New York Times Co.*, *St. Amant*, and *Brown* decisions provide the basis upon which the Court evaluates false campaign advertisement cases.[119] *New York Times Co.* created the actual malice standard, *St. Amant* defined "reckless disregard" to mean whether a person would entertain doubt as to the veracity of the statement, and *Brown* applied the actual malice standard to speech made by public figures. Next, this Comment will briefly explore the regulation of the Internet in regard to protected political speech.

b. Regulation of Political Speech on the Internet

Before this Comment examines the present state of the law regarding false political campaign advertising and the Internet's role in a remedy, this sub-part briefly examines the history of the Internet regulation that is relevant to political speech (including false campaign ads that may be posted on the Internet).[120] The Internet, as this sub-part will detail, is a relatively new medium of communication and the Court's regulation of it as it relates to political speech

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[117] *Id*. at 61 ("[T]there has been no showing in this case that petitioner made the disputed statement 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."). *See* Aranson, *supra* note 105, at 232:

> Justice Brennan argued that [Brown's promise] was not of a corrupt nature and therefore it was entitled to first amendment protection. In particular, Brown's promise was not offered in private to a distinct group of beneficiaries. Instead, it was made openly, in a public forum in which his opponent could attack it

[118] *Brown*, 456 U.S. at 62.

[119] *See infra* Part II.B.2 (discussing the application of the principals from these cases).

[120] For a more detailed analysis of common law regulation of the Internet *see* MADELEINE SCHACTER, LAW OF INTERNET SPEECH (2nd ed., Carolina Academic Press, 2002) (discussing the evolution of the Internet and the cases regulating various types of Internet content and speech).

has been sparse.[121] While the Internet removes the barriers of race, class, and religion from free speech forums, the anonymity of the Internet allows communication of defamatory, indecent, and immoral behavior with little or no consequences to the speaker.[122] Each forum of speech allows people to express their views, but only the Internet provides an instantly interactive forum that allows anyone with access to advocate their position to multitudes of people.[123] There is a delicate balance between enacting enough regulation to prevent the Internet from becoming a "Cyber wasteland" and enacting excessive regulation that has a chilling effect on free speech.[124]

At the heart of the Internet regulation debate is whether the Internet is most similar to broadcast or print media and should be regulated as such.[125] While Internet is unique in that it is mostly text based, yet allows for immediate interaction, similar to speech.[126] During its early years, the Internet was regulated solely by private entities that owned or controlled access to the

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[121] *See* Cara E. Sheppard, *Cyberpoliticking*, 4 COMMLAW CONSPECTUS 129 (1996) (exploring the growth of the Internet, the legal challenges technology represents with regard to political advertising, and concluding there is no need to regulate the Internet as a broadcast model due to the equal opportunities afforded to both candidates).

[122] *See* Rowland, *supra* note 19, at 520 ("[U]sers may not care if they hurt other users because they have little sense that others are real, little expectation that that their bad behavior has consequences for them and little expectation that they will have to interact with the other person in the future.") (quoting JP DAVIS, MICROSOFT RESEARCH, THE EXPERIENCE OF 'BAD' BEHAVIOR IN ONLINE SOCIAL SPACES; A SURVEY OF ONLINE USERS, 2 (200), at http://research.microsoft.com/scg/papers/Bad%20 Behavior%20Survey.pdf) (internal quotation marks omitted)).

[123] *See* Hyland, *supra* note 38, at 109 ("On the Internet, the 'lonely pamphleteer' has a soapbox to express opinions of thousands of interested readers. Individuals without the political or social clout to be heard on television can use the Internet to express a wide variety of viewpoints that enrich American dialogue." (quoting Branzburg v. Hayes, 408 U.S. 665, 703-04 (1972)).

[124] Rowland, *supra* note 19, at 520 (quoting ANTHONY G. WILHEM, DEMOCRACY IN THE DIGITAL: CHALLENGES TO POLITICAL LIFE IN CYBERSPACE 86-104 (Routledge 2000).

[125] *Id.* at 522:

> [S]hould [the Internet] be compared with a library; a postal service; a telephone system; broadcasting; a publishing house; a newspaper; a magazine; a scholarly journal; or even a conversation over the garden fence? The answer is, of course that the Internet shares characteristics with all of these – and may do so both simultaneously and independently.

See also Sheppard, *supra* note 121 at 133 ("The Internet does not fall neatly under the regulatory rubric of broadcasting, common carrier, cable, or print.").

[126] *See* Rowland, *supra* note 19, at 527.

Internet and the forums of free speech.[127] Regulation of speech by private entities was not limited to Internet Service Providers; Internet search engines have also regulated advertising links with political language in them.[128] On one occasion, Google removed a link that advertised a book about the detainees at Abu Ghraib and Guantanamo Bay.[129] On another, a link was removed that led to an article critical of President George W. Bush.[130] The Communications Decency Act was Congress's first attempt at regulating the Internet.

i. The Communications Decency Act

In 1996, for the first time, the United States Congress passed a law directly regulating speech on the Internet.[131] President Bill Clinton signed the Telecommunications Act of 1996, which included a provision entitled the Communications Decency Act ("CDA"), into law on February 8.[132] Although on its face the CDA did not regulate political speech, its vague language was interpreted to reach many forms of protected speech, including political ads posted on the Internet that were available to minors.[133] At the core of the controversy was the provision

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[127] Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKLEY TECH. L.J. 1115, 1121 (2005) ("Each of the major ISPs [(Internet Service Providers)] establishes and enforces Terms of Service by which it prohibits the expression of certain types of speech that fall within the protection of the First Amendment.").

[128] *Id*. at 1123. Google, the largest and most popular search engine, has pulled sponsored links (advertisements that take the Internet user to a specific website if clicked on) if they advocate against any group, individual or organization. *Id*. *See* Google AdSense Program Policies, https://www.google.com/adsense/login/en_US/ (follow link for "Program Policies"; then select "Full view content policies") (last updated Aug. 2008).

[129] Jon Perr, *Google's Gag Order: An Internet Giant Threatens Free Speech*, PERRSPECTIVES, June 20, 2004, http://www.perrspectives.com/articles/art_gagorder01.htm (discussing Google's advertising policy).

[130] *Id. See also* Nunziato, *supra* note 127, at 1124.

[131] Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263, 284-85 (1997) (tracing the regulation of various forms of media and examining the regulation of sexually explicit material on the Internet). *See also* Nunziato, *supra* note 127, at 1128-29 (summarizing the privatization of Internet regulation and analyzing the role served by public forums).

[132] Wu, *supra* note 132, at 284-85.

[133] *See* Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 8, 1996, at A16, available at www.nytimes.com/1996/02/08/us/protest-cyberspace-style-for-new-law.html?sec=&spon=&pagewanted=1 ("[O]pponents say the provision, known as the Communications Decency Act, goes too far by placing unconstitutional restrictions on speech over the global computer network known as the Internet, including an apparent ban on discussions of abortion issues on public computer networks.").

of the CDA that sought to protect minors from viewing offensive speech on the Internet.[134] The CDA was merely an update to the Communications Act of 1934, and its sponsor, Senator James Exon, sought to make the new "information superhighway" safe for children.[135] The CDA, despite containing a provision that protected Internet service providers and users from torts

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[134] *See* Wu, *supra* note132, at 283-86 ("The Communications Decency Act is targeted towards telecommunications in cyberspace.") *and* Nunziato, *supra* note 127, at 1128 ("In passing the Communications Decency Act of 1996 (CDA), Congress sought to remedy perceived ills caused by certain types of offensive Internet expression (primarily sexually-themed expression).").

[135] 47 U.S.C. § 223(a) (1996) states in full:

> Whoever--
> (1) in interstate or foreign communications-
> (A) by means of a telecommunications device knowingly-
> (i) makes, creates, or solicits, and
> (ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;
> (B) by means of telecommunications device knowingly-
> (i) makes, creates, or solicits, and
> (ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
> (C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
> (D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
> (E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or
> (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, United States Code, or imprisoned not more than two years, or both.

See also Wu, *supra* note 132, at 286 (stating that the CDA, a part of the Telecommunications Act of 1996, replaces the word "telephone" in § 223 subsection (a) of the Communications Act of 1934 with "telecommunications services").

committed by others,[136] was met with strong protest from free speech advocates.[137] In the political speech context, Section 230 of the CDA limits a politician defamed online to bringing suit against only one person: the original creator, which in most cases is his opponent.[138] It did not take long for the CDA to be challenged on free speech grounds. Less than one year after its enactment, a suit contesting the constitutionality of the CDA reached the Supreme Court.[139]

ii. Reno v. American Civil Liberties Union

At the heart of the controversy over the CDA was the use of and lack of a definition for the word "indecent."[140] When Congress passed the CDA it expected, or more accurately, predicted, that the CDA would be challenged, and so it included a provision that provided an expedited path from the district court to the United States Supreme Court for lawsuits challenging the CDA and seeking a preliminary injunction enjoining the Attorney General from

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[136] Section 230, also known as the "Good Samaritan" provision, states "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2000). *See* Allison Hayward, *Regulation of Blog Campaign Advocacy on the Internet: Comparing U.S., German, and EU Approaches*, 16 CARDOZO J. INT'L & COMP. L. 379, 384 (2008) ("This statute has also protected other types of intermediaries, such as search engines, online matchmaking services, online stores, and sites hosting message boards."). *See e.g.,* Ben Ezra, Weinstein & Co. v. AOL, 206 F.3d 980 (10th Cir. 2000) (finding § 230 of the CDA protected an ISP from being liable for defamatory material written by a private citizen on a website); Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997) (holding service providers immune from liability from lawsuits seeking to hold a service provider liable for exercising its editorial functions); Parker v. Google, Inc., 422 F. Supp. 2d 492, (E.D. Pa. 2006) (applying immunity to an online search engine); DiMeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006) (applying immunity to a website that hosts a message board); Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002) (applying immunity to an online dating service); Schneider v. Amazon.com, Inc., 108 Wash. App. 454 (App. Div. 2001) (applying immunity to an online retailer).

[137] *See* Lewis, *supra* note 134 ("Already, in what appears to be the largest organized protest on the Internet, hundreds of computer screens on the World Wide Web, the popular Internet service, have protested the act by switching to black backgrounds . . . .").

[138] *See* Hyland, *supra* note 38, at 82.

[139] Wu, *supra* note 132, at 287-88. *See Reno*, 929 F. Supp. 824 (holding that provisions of the Communications Decency Act of 1996 violated the First Amendment). On the very same day President Clinton signed the bill into law, the ACLU filed suit in the District Court for the Eastern District of Pennsylvania alleging the CDA violated the First Amendment. *Id.* at 287.

[140] *See infra* note 144 (summarizing the controversial sections of the CDA that were challenged by the ACLU and other plaintiffs).

enforcing it.[141] The American Civil Liberties Union ("ACLU")[142] alleged the CDA violated the First Amendment to the United States Constitution.[143] The ACLU focused its complaint on Sections 223(a) and 223(d) of the CDA.[144] The parties agreed that a modem should fall under the "telecommunications device" classification of Section 223.[145] The ACLU also challenged the section of the CDA inserted by Representative Henry Hyde of Illinois that criminalized speech about abortion transmitted over the Internet.[146] The district court ultimately granted the ACLU's motion for preliminary injunction finding that the word "indecent" was too vague and the affirmative defenses[147] were not economically or technologically feasible.[148] Janet Reno appealed directly to the Supreme Court.[149]

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[141] 47 U.S.C. § 561(a) (1996) pursuant to 28 U.S.C.A. §2284(a) (2008) ("A district court of three judges shall be convened when otherwise required by Act of Congress . . . ."). *See* Farrar, *supra* note 19, at 404 ("Because of the novelty and importance of this case, it was on an accelerated track from the beginning.")

[142] The plaintiffs numbered twenty in all, and include free speech advocates, Planned Parenthood, and AIDS education organizations. *Reno*, 929 F. Supp. at 827 n.2.

[143] *Id.* at 827. *See also* U.S. CONST. amend. I "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[144] Section 223(a) states:

> Whoever . . . in interstate communications . . . by means of a telecommunications device "knowingly . . . makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image or other communication which is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age . . . shall be fined under Title 18 or imprisoned not more than two years, or both.

47 U.S.C. § 223(a)(1)(B) (1996). Section 223(d)(1)(B) makes it illegal use an interactive computer service to send or display, to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, is obscene or child pornography, regardless of whether the user of such service placed the call or initiated the communication . . . ." *Id.* § 223(d)(1).

[145] *See Reno*, 929 F. Supp at 828-29 n.5

[146] *Id*. at 829.

[147] *Id*. at 856. Section 223(e)(5)(B) states that web sites can create credit card and adult verification services as defenses against prosecution. 47 U.S.C. § 223(e)(5)(B) (1996). Section 223(e)(5)(A) provides an affirmative defense for those who have "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections . . . including any method which is feasible under available technology." *Id.* at § 223 (e)(5)(A). The appellate court found that no such technology existed at the time. *Reno*, 929 F. Supp. at 856.

[148] *Reno*, 929 F. Supp. at 856. The government proposed a "tagging" scheme would imbed a string of characters in all websites that have arguably indecent material. The district court rejected this notion calling "tagging" purely

Justice Stevens began his opinion for the Supreme Court by summarizing the findings of the district court.[150] The Court recognized the uniqueness of the Internet and the diverse ways it allows users to communicate with each other regarding many different subjects.[151] Justice Stevens noted the control, or lack thereof, publishers have on who is able to view their material, but he also realized there was no centralized point that may block certain websites.[152] After examining age verification systems and the definition of sexually explicit material, the Court began its discussion of the CDA, "an unusually important legislative enactment."[153]

First, the Court addressed and dismissed each of the governments' arguments in favor of the constitutionality of the CDA.[154] The cases cited by the government, Justice Stevens found, raised doubts as to the constitutionality of the CDA.[155] Next, Justice Stevens distinguished cases

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hypothetical and reasoning that, even if technology caught up, there would be a significant burden attached to enacting a tagging defense. *Id.*

[149] *Reno*, 521 U.S. at 864 (explaining that the government appealed under the CDA's special review provisions).

[150] *Id*. at 849-57 (summarizing the extraordinary growth of the Internet, the development of email, the ease at which individuals can gain access to the Internet, and the ways in which those with access can take advantage of communication and retrieval methods including listservs, newsgroups, chatrooms, and the World Wide Web).

[151] *Id*. at 851-52 ("It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought."(quoting *Reno*, 929 F. Supp. at 842)).

> All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium - known to its users as "cyberspace"- located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

Id. at 851.

[152] *Id.* at 853 ("Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.").

[153] *Id*. at 855-58.

[154] *Id*. at 864-885. *See also* Marc Rohr, *Can Congress Regulate "Indecent" Speech On the Internet?*, 23 NOVA L. REV. 709, 717 (1999) (explaining the Court's rejection of the government's argument that the CDA is constitutional under prior Court decisions).

[155] *Reno*, 521 U.S. at 864. *See e.g.,* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult movie theaters from being located in residential neighborhoods), *reh'g denied*, 475 U.S. 1132 (1986); FCC. v. Pacifica Found., 438 U.S. 726 (1978) (upholding a declaratory order of the FCC holding that a tape of a monologue entitled "Filthy Words" that was originally played to a live audience could have been the subject of administrative sanctions), *reh'g denied*, 439 U.S. 883 (1978); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding the constitutionality of a New York statute that prohibited selling obscene

in which the Court had documented special justifications for broadcast medium regulations that were not applicable to other mediums.[156] The conditions present in the regulation of television and radio were not present in cyberspace, which had never been regulated by the government.[157] The Court found that the chances of a minor accidentally accessing sexually explicit content were slim due to the non-invasive nature of the Internet, a medium users must actively engage in.[158] The Court then attacked the vagueness of the CDA, citing the CDA's inconsistent use of the terms "indecent" and "patently offensive" to describe the same thing.[159] Due to the absence of a definition of either term, the Court reasoned there would likely be confusion as to which standard to use and what each standard means.[160] The vagueness of the CDA concerned the Court because of the CDA's content-based regulation of free speech and the fact that the CDA imposed criminal sanctions.[161]

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material to minors under the age of seventeen because the State had a compelling independent interest), *reh'g denied*, 391 U.S. 971 (1968).

[165] *See e.g.,* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662-63 (1994) (holding a statute that required a cable network to carry local broadcast stations on cable systems served an important government interest by promoting widespread dissemination of information and promoting fair competition), *reh'g denied*, 512 U.S. 1278 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969) (finding that an FCC order requiring a radio station to provide a person attacked in broadcast with tape and transcript of material and to allow time for a response without requiring the person attacked to claim or prove inability to pay for time was authorized by Congress and protected by the First Amendment).

[157] *Reno*, 521 U.S. at 868-70.

[158] *Id*. at 869.

[159] *Id*. at 870-71. *See also* John Dayton, *Free Speech, the Internet, and Educational Institutions*: *An Analysis of Reno v. ACLU*, 123 WEST'S. EDUC. L. REP. 997, 1006 (1998) (citing evidence of the CDA being "superfluous" in controlling obscenity).

[160] *Reno*, 521 U.S. at 870-71. "Indecent does not benefit from any textual embellishment at all. 'Patently offensive' is qualified only to the extent that it involves 'sexual or excretory activities or organs' taken 'in context' and 'measured by contemporary community standards.'" *Id.* at 871 n.35.

[161] *Id*. at 871-72. The court was particularly concerned with the CDA's failure to define both "indecent" and "patently offensive", terms that it viewed as interchangeable. *Id*. Additionally, the Court was concerned that the criminal classification of a violation of the CDA, which included potential jail time, would chill lawful speech. *Id.* at 872. *See also supra* Part II.A.1.c (describing the Court's concern with the chilling effect on free speech in *New York Times Co.*); Rohr, *supra* note 56, at 718 (stating that Justice Stevens "toyed with the arguable vagueness of the statutory provisions at issue" but did not ultimately rely on it for invalidating the CDA).

Next, the Court analogized this case to *Sable Communications of California. v. FCC*, in which the Court invalidated legislation enacted for the sole purpose of protecting children from gaining access to indecent communications because it did not accomplish its goal without imposing an unnecessary restriction on speech.[162] Justice Stevens further found that due to the size and nature of the Internet, the CDA created a burden on communication among adults.[163] Consequently, the lack of existing technology that could provide an effective way of preventing minors from accessing indecent materials or ascertaining the age of the user of a computer put an insurmountable burden on adult communication.[164] The fact that the CDA is not limited to commercial speech, but may cover large amounts of speech with serious educational value, the Court decided, further called its validity into question.[165] The Court found that beneficial speech could in fact be deemed "indecent," and thus would be prohibited.[166]

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[162] *See* Sable Comm. of Cal. v. FCC, 492 U.S. 115 (1989) (holding that the prohibition of obscene telephone messages was constitutional but the denial of adult access to telephone messages which were indecent but not obscene far exceeded that which was necessary to limit access of minors to such messages).

[163] *Reno*, 521 U.S. at 876 ("Knowledge that, for instance, one or more members of a 100-person chat group will be a minor-and therefore that it would be a crime to send the group an indecent message-would surely burden communication among adults.").

[164] *Id*. at 876-77. *See* Dayton, *supra* note 161 at 1008 (stating that one of the central issues underlying the debate about the CDA's regulation of the Internet was whether the children's parents should bear responsibility for protecting children from inappropriate materials).

[165] *Reno*, 521 U.S. at 878 (ruling regulation of indecent material "may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library").

[166] *Id*.

> Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

Id. (citation omitted). *See* 47 U.S.C. § 223(a)(2) (1996).

The Court also rejected the argument that the CDA left open other appropriate channels of communication for adults.[167] The Court reasoned that because the CDA regulated speech on the basis of content and not time, place, and manner, it foreclosed certain avenues for adults as well as children.[168] Finally, Justice Stevens stated that the CDA did not promote growth of the Internet because the CDA dissuaded citizens from using the medium as a form of communication.[169]

The reaction to the Court's ruling in *Reno* was mixed among politicians across party lines.[170] Many praised the Court for upholding free speech.[171] Others sought to enact a bill that would protect children and speech.[172] Nevertheless, the *Reno* decision was the first instance in

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[167] *Reno*, 521 U.S. at 879-80.

[168] *Id*. at 880 ("The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books."). *See* Schneider v. New Jersey, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

[169] *See id*. at 885 (stating there is a presumption that governmental regulation discourages the free exchange of ideas). *But see* Brief for Appellants at 19, *Reno,* 521 U.S. 844 (No. 96-511) (1997).

[170] *See Supreme Court Rules CDA Unconstitutional*, CITIZENS INTERNET EMPOWERMENT COALITION, June 26, 1997, http://www.ciec.org/.

[171] *See* Press Release, Congressmen Rick White (R-WA), White Praises Supreme Court for Realizing Potential of the Internet, (June 26, 1997), http://www.ciec.org/SC_appeal/970626_White.html ("This case will have a lasting impact on how the government treats the Internet. There is no question that we need to protect our kids from certain kinds of harmful materials - but we also need to protect our rights as Americans."); Press Release, Senator Patrick Leahy (D-VT), Statement on Supreme Court's Decision Declaring Unconstitutional the Communications Decency Act (June 26, 1997), http://www.ciec.org/SC_appeal/970626_Leahy.html ("The Supreme Court has made clear that we do not forfeit our First Amendment rights when we go on-line. This decision is a landmark in the history of the Internet . . . . Altering the protections of the First Amendment for on-line communications would have crippled this new mode of communication."); Press Release, Congresswoman Anna Eshoo (D-CA), Eshoo Praises Supreme Court Ruling on Internet Censorship (June 26, 1997), http://www.ciec.org/SC_appeal/970626_Eshoo.html ("The Supreme Court has demonstrated a far better understanding of free speech issues on the Internet than Congress did in its rush to address questionable online materials.").

[172] Press Release, Senator Patty Murray, Murray Outlines Plan to Protect Children From Material on Internet (June 26, 1997), http://www.ciec.org/SC_appeal/970626_Murray.html:

which the Court examined the regulation of Internet speech, and it provides a lens through which a federal statute regulating false campaign ads (including ads posted on the Internet), proposed by this Comment, should be examined.[173]

II. DISCUSSION

While the 20th century saw the creation and expansion of defamation law and Internet speech, in the 21st century Congress has attempted to regulate false, and potentially defamatory, political ads indirectly through campaign finance laws.[174] Congress created the Federal Election Commission ("FEC") over thirty years ago to enforce statutes that dealt with the financing of federal elections.[175] While the original statue, the Federal Election Campaign Act of 1971, sought to limit advertising, it was not until 2002 that Congress attempted to stop false attack ads by enacting the Bipartisan Campaign Reform Act ("BCRA").[176] States have attempted to deal

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> Today's ruling by the Supreme Court leaves open a large vacuum. No one wants to return home after work to find a child downloading pornographic material. . . .
>
> . . . .
>
> To meet this challenge, I will soon introduce the Childsafe Internet Act of 1997 -- a seven-point plan to protect children from harmful material on the Internet. My bill seeks to bring together the interests and concerns of parents, Internet service providers and industry.

Id.

[173] *See infra* Part V (proposing a remedy for politicians defamed by false political ads).

[174] *See* Goldman, *supra* note 23, at 890 ("The Bipartisan Campaign Reform Act (BCRA) was designed, in part to stop attack ads.") (citing McConnell v. FEC, 540 U.S. 93, 264 (2003) (Scalia, J., concurring in part and dissenting in part) ("With breathtaking scope, the Bipartisan Campaign Reform Act of 2002 (BCRA) directly targets and restricts core political speech . . . .").

[175] FEDERAL ELECTION COMMISSION, THIRTY YEAR REPORT 1 (Sept. 2005), available at http://www.fec.gov/info/publications/30year.pdf.

[176] *Id*. at 4, 7 ("The Federal Election Campaign Act . . . limited spending on media advertisements and limited spending from candidates' personal funds. . . . In an effort to address concerns about the effects of soft money and issue ads on the federal election process, Congress passed a comprehensive reform bill called the Bipartisan Campaign Reform Act of 2002 (BCRA)."). *See also* Jeremy Monteiro, *A Profile in Courage: The Bipartisan Campaign Reform Act of 2002 and the First Amendment*, 52 DEPAUL L. REV. 83 (2002) (examining the approaches of Congress and courts' responses to the Federal Election Campaign Act of 1971).

with false ads more directly, by enacting statutes that regulate political ads.[177] This section first examines the parts of the BCRA that pertain to the regulation of political advertisements as this illustrates the statutory approach to the problem of false campaign ads as opposed to the common law approach of the Court.[178] Next, this section examines the Court's constitutional interpretation of the BCRA, including the FEC's ability to regulate the Internet.[179] Finally, this section looks at the 2006 FEC's interpretation of the BCRA as it pertains to Internet politics.[180]

a. The Bipartisan Campaign Reform Act of 2002

"Soft money" has been the bane of many a politician's existence, so most were glad to see the BCRA of 2002 make the regulation of "soft money" its central focus.[181] "Soft money" is defined as money not given directly to political candidates, but to organizations or committees who work on behalf of the candidate.[182] While Congress's regulation of "soft money" pertained to various aspects of the political process, for the purposes of this Comment, this section discusses only Congress's regulation of the use soft money to fund issue ads and the

[177] *See* Goldman, *supra* note 23, at 890-91 ("States sought to remedy the problem by enacting statutes regulating false campaign speech . . . ."). For example, Alaska makes it a second-degree misdemeanor to "knowingly" make a communication "containing false factual information." ALASKA STAT. §15.56.014 (2006).

[178] *See infra* Part III.A (examining Congress' attempt to regulate false campaign ads through BCRA).

[179] *See infra* Part III.B-C (summarizing the Court's decisions in two cases involving the FEC's ability to regulate the Internet).

[180] *See infra* Part III.C (discussing the FEC's decision to not regulate most Internet political activity).

[181] *See* John McCain, *Introduction: Symposium on Campaign Finance Reform*, 34 ARIZ. ST. L.J. 1017, 1017 (2002) ("[I]t should come as no surprise that soft money raised outpaced even the amount raised during the presidential election cycle in 1999-2000."); Richard S. Duham, *This Campaign Reform Sure Beats None*, BUS. WK, Apr. 1, 2002, http://www.businessweek.com/bwdaily/dnflash/apr2002/nf20020341_6725.htm, ("The amount of money spent on campaigns has spiraled out of control, especially with the influx of unlimited 'soft money' contributions from corporations, labor unions, and wealthy individuals. In the 2000 election cycle, the soft-money take reached $495 million.").

[182] *See* Joshua Downie, *McConnell v. FEC: Supporting Congress and Congress's Attempt at Campaign Finance Reform*, 56 ADMIN. L. REV. 927, 929-33 (2004) (tracing the history of soft money and Congress's efforts to regulate it); Editorial, *A Campaign Finance Triumph*, N.Y. TIMES, Dec. 11, 2003, at A42 http://nytimes.com/2003/12/11/opinion/11THU1.html (hereinafter "A Campaign Finance") ("The Bipartisan Campaign Reform Act of 2002, widely known as McCain-Feingold, closed two gaping loopholes in campaign finance law. One was "soft money," the unlimited, and often very sizable, contributions to political parties that were then funneled into federal campaigns.").

endorsement requirement of Section 318.[183] The BCRA prohibits corporations and unions from financing broadcast advertisements that specifically refer to a candidate for office sixty days before the general election and thirty days before the primary.[184] Proponents of the BCRA hailed

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[183] For a more detailed description of the complete regulation of "soft money" by the BCRA, *see* THIRTY YEAR REPORT, supra note 177, at 7-8, (summarizing the history of soft money and the FEC's attempts to regulate it with the BCRA); Gregory Comeau, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253 (2003) (discussing the sections of the BCRA that pertain to soft money and the changes made by Congress).

[184] Bipartisan Campaign Reform Act of 2002 § 201, Pub. L. No. 107-55 (2002) (amending 2 U.S.C. § 434 (1971)).

> (3) Electioneering Communication.--For purposes of this subsection--
>
> (A) In general
>
> (i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which--
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within--
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.
>
> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. . . .
>
> (B) Exceptions
>
> The term 'electioneering communication' does not include--
>
> (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;
>
> (ii) a communication which constitutes an expenditure or an independent expenditure under this Act;
>
> (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
>
> (iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication

this section as a monumental step in stemming the tide of negative ads.[185] Critics pointed out the loopholes it provided and argued that it restricted the most basic free speech rights.[186] While the

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> may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.
>
> (C) Targeting to relevant authority
>
> For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons . . .

Id. *See also* THIRTY YEAR REPORT, *supra* note 177, at 7-8 (summarizing Section 201 and the challenges that followed the enactment of the BCRA).

[185] *See* 12 CONG. REC. H270 (Feb. 12, 2002) (statement of Rep. Lucas).

> The Shays-Meehan bill is the only campaign finance reform bill that effectively deals with soft money and the sham issue ads.
>
> In 1996, $262 million of unregulated soft money was spent on campaigns. Estimates of the 2000 election place that amount of money, soft, money at about one-half billion dollars. . . .
>
> This money from unrevealed sources has the effect of drowning out the voice of the average citizen, and it is often used to run the so-called issue ads funded by the wealthy interest groups which oftentimes flood a candidate's district just days before an election. These ads are put together by unknown, unaccountable sources and are often misleading or sometimes simply untrue. Of course, no one knows where the ad came from, so no one is called to task for these misleading, sham ads.

Id. *See also* 12 CONG. REC. H270 (daily ed. Feb. 12, 2002) (statement of Rep. Boyd) ("I think they are cynical because the public believes that the current system is skewed to give the wealthiest people in this country and the largest special interest groups a greater say in shaping our public policy.").

[186] *See* 33 CONG. REC. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin) ("Some argue that if we only close the soft money loophole to political parties, the money we cut off to the parties will be redirected to special interest groups. I believe it will not happen that way because candidates and public officials running for reelection and their agents will not be allowed to solicit it . . . ."). *See also* Charles Fried, *A Campaign Law That Curbs More Than Contributions*, N.Y. TIMES, Dec. 30, 2003, at A30, http://www.nytimes.com (search "a campaign law that curbs more than contributions" and follow the hyperlink);

> Imagine a law that made it a crime for a newspaper to publish any article or editorial that ''refers to a clearly identified federal candidate'' or ''supports'' or ''attacks'' a candidate within 30 days of a primary or 60 days of a general election. Few doubt that this would be a flagrant violation of the First Amendment. But Section 204 of the new Bipartisan Campaign Reform Act, known as the McCain-Feingold law, makes it a crime for the Sierra Club or the National Rifle Association to buy airtime to support or attack a candidate.

Id. *But see* Dunham, *supra* note 183;

> The second red herring of reform foes is that the new law violates the First Amendment by limiting freedom of speech through restrictions on advertising and donations. . . . [M]any issue-advocacy ads are simply campaign commercials masquerading as issue advocacy. If they had been campaign ads, they would be subject to federal regulation.

BCRA prohibits corporations and unions from running attack ads about politicians two months before the general election, it does not prevent organizations that register as 527 Political Action Committees because they do not advocate the election or defeat of a particular candidate.[187] In an attempt to regulate such organizations and limit the potential false attack ads, Congress inserted Section 318 into the BCRA.[188] The section, sponsored by Senator Ron Wyden, requires a candidate or organization to endorse the television or radio ad they sponsor.[189] It did not take

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Id.

[187] THIRTY YEAR REPORT, *supra* note 177, 7-8 (the law requires 527's to disclose their payments for ads and the source of the funds used). *See* John Samples & Patrick Basham, *Meet the New Loopholes*, N.Y. TIMES, Nov. 5, 2002, at A27, http://www.nytimes.com/ (Search "meet the loopholes", then follow "meet the loopholes" hyperlink) ("Soft money will stay in politics. . . .The new law will allow state and local party soft money fund-raising for purposes of generic voter registration and get-out-the-vote efforts.").

[188] Bipartisan Campaign Reform Act of 2002 § 318, Pub. L. No. 107-55 (2002) (amending 2 U.S.C. § 434 (1971)) (describing standards for identifying sponsors of election-related advertising);

> (1) COMMUNICATIONS BY CANDIDATES OR AUTHORIZED PERSONS.--
>
> (A) BY RADIO-- Any communication described in paragraph (1) or (2) of subsection (a) which is transmitted through radio shall include, in addition to the requirements of that paragraph, an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication.
>
> (B) BY TELEVISION.--Any communication described in paragraph (1) or (2) of subsection (a) which is transmitted through television shall include, in addition to the requirements of that paragraph, a statement that identifies the candidate and states that the candidate has approved the communication. Such statement--"(i) shall be conveyed by--"(I) an unobscured, full-screen view of the candidate making the statement, or"(II) the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate; and"(ii) shall also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.
>
> 2) COMMUNICATIONS BY OTHERS.--Any communication described in paragraph (3) of subsection (a) which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

Id.

[189] *Id. See also* Liz Sidoti, *Stating the Obvious In Political Ads Could Limit Negative Commercials,* UNION TRIB., Nov. 13, 2003, http://www.signonsandiego.com/news/politics/20031113-1403-standbyyourad.html (stating Senator Dick Durbin, a big proponent of the section, believed it would cause a decrease in negative ads while others claimed the provision was unconstitutional because it punishes free speech).

long for political action committees and politicians alike to challenge the constitutionality of both Sections 201 and 318.

b. McConnell v. FEC

Senator Mitch McConnell, the Senate majority whip, opposed the BCRA from the start.[190] Days after Congress passed the BCRA Senator McConnell and the National Rifle Association ("NRA") filed a complaint alleging a violation of the First Amendment.[191] A three-judge panel struck down nine of the twenty challenged provisions causing nearly every party to the lawsuit to appeal some part of the district court's ruling.[192] However, the Supreme Court, in a 5-4 decision, upheld almost every provision of the BCRA.[193] This section examines only the

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[190] *See* 148 CONG. REC. S2126 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell) ("Shays-Meehan restricts the free speech rights of individuals, parties and groups, but not the media. The issue ad restrictions are so onerous that many individuals and groups will choose not to speak. But, of course, the media will still be free to speak their mind."). Senator McConnell was not the only Senator adamantly opposed to the BCRA. *See also* 148 CONG. REC. S2106 (daily ed. Mar. 20, 2002) (statement of Sen. Stevens) ("In terms of this legislation, I have reached the conclusion that it, too, is unconstitutional. If the bill that was reviewed in Buckley v. Valeo was unconstitutional, this one surely is. It does not provide a level playing field.").

[191] *See* Trevor Potter, *McConnell v. FEC Jurisprudence and Its Future Impact On Campaign Finance*, 60 U. MIAMI L. REV. 185, 186 (2006) ("More than eighty plaintiffs were party to ten different lawsuits challenging virtually every provision of the law."); Linda Greenhouse, *Justices Hear Vigorous Attacks on New Campaign Finance Law*, N.Y. TIMES, Sept. 9, 2003, at A1, A25 (describing the arguments made by the appellants and the questions posed by Supreme Court Justices).

[192] McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C 2003) (per curiam), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003). A special provision in the BCRA provided for expedited review of the law and a quicker path to the Supreme Court. *Id.* at 202 n.31 (referencing §403(a)(1) of the BCRA); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(1) (2002). *See also* Potter, *supra* note 193, at 187 ("After the district panel issued its decision, parties on both sides filed notices of appeal with the U.S. Supreme Court and, pending review by the Supreme Court, the defendants and many of the plaintiffs asked the district court to stay all or part of its decision."); Greenhouse, *supra* note 193.

> [N]early every party before the Supreme Court was appealing part of the lower court's judgment and defending another part. To avoid linguistic confusion . . . the court called those who had filed the original lawsuits plaintiffs and those who opposed the lawsuits defendants -- labels that the Supreme Court, which speaks in terms of "petitioners" and "appellants," has hardly ever used.

Id. at A25

[193] The Supreme Court found Section 318 of the BCRA, which forbid minors less than 17 years of age from contributing to political campaigns, violated minors' First Amendment rights. *McConnell*, 540 U.S. at 108 (citing Tinker v. Des Moines Indep. Cmty. School Dist, 393 U.S. 503 (1969)).

Court's holding pertaining to its finding that the sections of the BCRA which relate to political advertisements did not violate the First Amendment.[194]

The Court held that Section 201 did not violate organizations' First Amendment rights even though Section 201 prohibited organizations from running issue ads sixty days before a general election.[195] The Court found that the express advocacy limitation created in *Buckley* was based on a statutory interpretation rather than a constitutional basis.[196] Today's most effective ads, the Court found, did not use the words "vote for" or "elect," but were no less intended to influence the election.[197] According to the Court, ads did not require an "express advocacy line."[198] According to the Court, rigidly requiring the restriction of ads that contained an "express advocacy line" had not combated real or apparent corruption.[199] Thus, the Court noted, Congress adopted the BCRA to remedy the weaknesses of this effect.[200] Finally, the Court stated that the

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[194] *See supra* notes 186 and 190 and accompanying text.

[195] McConnell v. F.E.C., 540 U.S. at 102-03 (finding that while a major premise of the plaintiff's argument is that *Buckley v. Valeo* provides a constitutionally mandated a line between express advocacy and issue advocacy and the First Amendment protects speakers who engage in issue advocacy, this argument misapprehends the Court's prior decisions"). *See Buckley*, 424 U.S., at 26-27 (holding that restrictions on individual contributions to political campaigns did not violate the First Amendment since they were designed to enhance the integrity of representative democracy by guarding against corruption).

[196] *McConnell*, 540 U.S. at 191-92. In *Buckley*, the Court wrestled with the difference between express advocacy and issue advocacy in political advertisements. *Id.* Express advocacy required financial disclosure of and reporting requirements, issue advocacy did not. *Id.* To assist with interpreting its opinion, the Court in *Buckley* provided examples of express advocacy such as "vote for," "vote against" or "elect," and these words became the basis of the "magic words" requirement. *Id*. at 191. *See also Buckley*, 424 U.S. at 45 ("It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.").

[197] *McConnell*, 540 U.S. at 193-94.

[198] *Id*.

[199] *Id*.

[200] *Id*.

restriction the BCRA had on free speech was minimal compared with the interest of Congress in preventing corruption.[201]

The *McConnell* Court took an important step in the prevention of false campaign ads by prohibiting corporations and unions from running issue ads on behalf of the candidate they were supporting.[202] However, only four years later, in *FEC v. Wisconsin Right to Life*, the Court limited the scope of Section 203 of the BCRA by ruling that it only applied to ads that specifically appealed to voters to vote for or against a specific candidate.[203] Among the Court's chief concerns was the chilling effect the ad would have on free speech.[204] The sections of BCRA regulating political advertising illustrated Congress's willingness to regulate potentially damaging political ads, while the Court's subsequent decisions provide evidence that the chilling effect rationale of *New York Times Co.* is alive and must be considered if a false political advertising statute is to survive constitutional challenges.[205] Next, this section examines the application of the BCRA to the Internet.

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[201] *Id*.

[202] *See* Editorial, *A Campaign Finance Triumph*, N.Y. TIMES, Dec. 11, 2003, at 42 (discussing the free-speech ramifications of the *McConnell* decision for corporations and unions who ran false "issue ads)

[203] FEC v. Wis. Right to Life, 551 U.S. 449 (2007) (holding that an ad may only be regulated in Section 203 of the BCRA if it can only be interpreted as advocating for or against a politician and due to the potential chilling effect on political speech an intent and effect test will not be allowed),

[204] *Id*. at 451 ("[T]he proper standard for an as-applied challenge to BCRA § 203 must be objective . . . . [and] must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation.")

[205] *See supra* note 161 and accompanying text (discussing the Court's concern with the vagueness of the CDA).

c. Shays v. FEC and the FEC's Response

In October of 2002, two members of the House of Representatives[206] filed a complaint against the FEC claiming, among other things, that the FEC was incorrect in its determination that the BCRA did not intend Internet communications to be classified as "public communications" and thus able to be regulated as "coordinated communications."[207] The FEC specifically determined "public communications" did not apply to the Internet despite broad language in the BCRA that could include the Internet.[208] The FEC believed that the Internet was not a public communication because the BCRA had not specifically mentioned it.[209] The district court concluded that the FEC's interpretation of the BCRA undermined the purpose of the BCRA.[210] The district court cited Congress's repeal of coordination regulations, since the existing rules were too limited in what kind of conduct classified a communication as coordinated, as a basis for its decision.[211] Not classifying the Internet as a public

[206] Shays v. FEC, 337 F. Supp. 2d 28, 38 (D.D.C 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005). Representative Christopher Shays from Connecticut and Representative Martin Meehan from Massachusetts were also the co-sponsors of the BCRA in the House of Representatives. *Id*.

[207] *Id.* at 65. *See also* THIRTY YEAR REPORT, supra Note 177, at 23. A "coordinated communication" is a communication that is coordinated with a candidate or party committee. Federal Elections Commission 11 C.F.R. § 109.21 (2008). Generally, in order to be "coordinated," the communication must be: (1) paid for by someone other than the candidate, (2) specifically advocate for or against a candidate, or (3) be at the request or suggestion of the candidate, his committee or the party committee. FEDERAL ELECTION COMMISSION, COORDINATED COMMUNICATIONS AND INDEPENDENT EXPENDITURES (June 2007), http://www.fec.gov/pages/brochures/indexp.shtml#CC.

[208] *Shays*, 337 F. Supp. 2d, at 66. *See* Bipartisan Campaign Reform Act, 2 U.S.C. § 431(22) (2002) (defining "public communication" as "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.").

[209] *Shays*, 337 F. Supp. 2d at 66.

[210] *Id.* at 71.

[211] *Id*. at 70.

communication, the court warned, would allow politicians to evade campaign finance laws and compromise the very purpose of the act.[212]

The FEC, in response to the district court's decision in *Shays*, solicited opinions from experts in campaign finance as to how to include the Internet into "public communications."[213] Eventually, it decided to amend the definition of public communications to include communications over the Internet placed for a fee on another person's website.[214] The decision of the FEC limits the scope of this Comment's proposal as it effectively immunizes bloggers and other online publications.[215] This Comment next explains why using the actual malice standard is appropriate to regulate false political ads, including those posted on the Internet.[216] Furthermore, it demonstrates that actual malice standard does not need to be reconciled with *Reno* or *McConnell* because its scope does not violate the Court's rulings in *Reno* or *McConnell*.[217] Finally, it dismisses other proposed remedies for defamed politicians.[218]

III. ANALYSIS

The Court's actual malice standard for defamation of public officials and Congress's limited regulation of political advertisements by campaign finance laws have not provided an

[212] *Id*. Two purposes of the BCRA were to regulate soft money and to regulate advertising. *See supra* Part III.A (describing the purposes of the BCRA).

[213] Internet Communications, 70 Fed. Reg. 16,967 (Apr. 4, 2005) (to be codified as 11 C.F.R. pt. 100, 110, 114). (stating FEC's proposed rules on Internet communications).

[214] 11 C.F.R. § 100.26 (2006).

[215] *See* David Pace, *FEC Won't Regulate Internet Politics*, RedOrbit News, Mar. 27, 2006, http://www.redorbit.com/news/technology/445102/fec_wont_regulate_internet_politics/ ("Internet bloggers and individuals will therefore be able to use the Internet to attack or support federal candidates without running afoul of campaign spending and contribution limits."). The FEC voted 6-0 to regulate only paid political advertising and includes the use of corporate computers for political activities as long as the person was not coerced into participating and the activity is done on the person's own time. *Id*.

[216] *See infra* Part IV.A (discussing the criticisms of *New York Times Co.* and the proposals of others and the questions that need to be resolved).

[217] *See infra* Part IV.B (explaining why the actual malice standard does not violate *Reno*).

[218] *See infra* Part IV.C (summarizing and rejecting alternative proposals to the actual malice standard).

appropriate remedy for politicians defamed by false ads.[219] They have not revived the American public that has grown jaded by politics either.[220] With a new age of campaigns and the utilization of the Internet in the dissemination of false ads, the actual malice standard of *Sullivan* has new meaning and should be kept to regulate false campaign advertisements.[221] Many critics of *Sullivan* remain, and the combination of common law and Congressional regulation of false political ads leave many questions unanswered, including: (1) whether the actual malice standard is appropriate for regulating false political advertisements? (2) What role does the Internet play in redefining the meaning of "reckless disregard for the truth"? And (3) How should an individual politician's false ad posted on his YouTube page or personal website be regulated? This Comment first demonstrates that the actual malice standard is appropriate for regulating false political advertisements.[222] This is true because a "reckless disregard for the truth" has new meaning with the evolution of the Internet, yet it can still prevent protected speech from being chilled.[223] Next, this Comment reconciles any conflict the actual malice standard has with the Court's regulation of the Internet in *Reno* and of campaign ads in the BCRA.[224] Finally, this Comment examines and critiques proposed alternatives of the actual malice standard.[225]

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[219] *See* Goldman, *supra* note 23, at 890-97 (stating that Congress's attempt to remedy the epidemic of negative advertising has been unsuccessful).

[220] *See id*. (stating Congressional action has not cured the epidemic of negative advertising nor prevented its destructive consequences, such as the public's loss of respect for politicians or the lower voter turnout). *See also* Kane, *supra* note 38, at 760 (arguing that negative political advertising is the biggest problem in politics today (quoting ED ROLLINS & TOM FRANK, BARE KNUCKLES AND BACK ROOMS: MY LIFE IN AMERICAN POLITICS 351 (1996)).

[221] *See infra* Part V (discussing a remedy that would consider the implications of the Internet for the actual malice standard while providing politicians with enough recourse to discourage further false ads).

[222] *See infra* IV.A (highlighting Justice Scalia and Justice White's critique of *New York Times Co.* but finding the actual malice standard to be appropriate for regulating false ads).

[223] *Id*. (describing the Internet's role in redefining the definition of "reckless disregard for the truth").

[224] *See infra* Part IV.B (discussing the effect the Supreme Court's ruling in *Reno* and Congress's passage of the BCRA had on the actual malice standard).

[225] *See infra* Part IV.C (examining alternative approaches to the regulation of political advertisements).

Alternate proposals ultimately either do not protect political speech enough or do not provide the defamed party with an appropriate remedy.[226]

a. The Actual Malice Standard Is the Appropriate Standard for False Campaign Ads

While many consider *New York Times Co.* a judicially sound decision that guarantees the rights of Americans to criticize politicians without fear of reprisal and symbolizes the Court's support of civil rights movement, Justice White and Justice Scalia believe the case should have been decided differently.[227] At the heart of their criticism is the belief that *New York Times Co.* goes too far in protecting the speaker.[228] The actual malice standard essentially protects the speaker from false statements of fact, which have no First Amendment value.[229] But it is important to protect speech that is clearly false in order to protect speech that appears false, but is actually true.[230]

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[226] *Id*.

[227] *See* Hall, *supra* note 39, at 392 ("S*ullivan* . . . was a necessary step in the legal confirmation of the [civil rights] movement, one that shielded its leadership from exposure to the constraining effects of state-administered, common law rules of political libel."); Carlo Pedrioli, *A Key Influence on the Doctrine of Actual Malice: Justice William Brennan's Judicial Philosophy at Work in Changing the Law of Seditious Libel*, 9 COMM. L. & POL'Y 567, 568 (2004) ("The opinion by Justice Brennan for the Supreme Court of the United States aided the news media in informing the U.S. public, without fear of legal retaliation, about the South's resistance to civil rights advocates like Martin Luther King, Jr."). *But see* Kane, *supra* note 38, at 786-788 (analyzing Justice Byron White's criticism of the *New York Times Co.* decision in his concurrence in *Dun & Bradstreet, Inc.* (citing Dun &Bradstreet, Inc. v. Greemoss Builders, Inc., 472 U.S. 749, 765-774 (White, J., concurring)*;* Dahlia Lithwick, *Target Practice: Justice Scalia Sets His Sights on New York Times Co. v. Sullivan*, SLATE, July 17, 2007, http://www.slate.com/id/2170309/ (quoting an interview of Justice Scalia where he describes his desire to overturn *New York Times Co.*).

[228] John Dean, *Justice Scalia's Thoughts, and a Few of My Own, on New York Times v. Sullivan*, FINDLAW, Dec. 5, 2005, http://writ.news.findlaw.com/dean/20051202.html (quoting a report in which Scalia said "[t]he press is the only business that is not held responsible for its negligence," and arguing that this is a clear allusion to *New York Times Co.*).

[229] *See Dun & Bradstreet, Inc.*, 472 U.S. at 771 (White, J., concurring) ("The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of fact.").

[230] *See supra* Part II.A.1.c. (discussing Justice Brennan's concern with chilling true speech in the interest of regulating false speech).

Justice White sought to balance the protection of the speaker to prevent chilling true speech with the opportunity for public officials to clear their name of false statements.[231] He believed in limiting damages a public official could recover.[232] However, this would allow wealthy defendants to continue to defame a person without suffering more than a slap on the wrist while less well-off defendants may be put out of business altogether.[233] This reasoning also applies to a federal false advertising law; a wealthy candidate would pay the fine and continue advertising while a less wealthy candidate would likely pull the advertisement.[234] Additionally, the actual malice standard would provide a high enough hurdle for plaintiffs to clear that if they did prevail, substantive damages would be one way of deterring future false advertising.[235]

The actual malice standard is very difficult to satisfy, and it likely deters many politicians from filing defamations suits even if they believe they have been defamed.[236] While the difficulty in proving actual malice plays a role in a politician's decision to file suit, the lack of an appropriate remedy more likely prevents candidates from suing their opponent.[237] However, with the evolution and expansion of the Internet, proving actual malice is no longer an

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[231] Kane, *supra* note 38, at 787 ("[Justice White] concludes that under a proper understanding of the *New York Times Co.* doctrine, there is still room for public officials to vindicate their reputation as long as the vindication comes in a form that is not likely to chill true speech.").

[232] *See Dun & Bradstreet, Inc.*, 472 U.S. at 771 (White, J., concurring) (illustrating Justice White's position on damages available for public officials).

[233] Kane, *supra* note 38, at 788. *See* Costantini, *supra* note 26, at 469-71 (describing economical and emotional toll a libel suit has on an individual).

[234] *See infra* Part V.A-B (proposing to retain the actual malice standard without capping damages but only applying damages to political candidates).

[235] *See infra* Part V.C (proposing a requirement that the candidate guilty of false advertising, in addition to paying damages, prominently publish a retraction).

[236] *See* Goldman, *supra* note 23, at 906 ("[It] is a daunting burden to meet the actual malice test when a false statement is made about an opponent, particularly when the defendant denies knowledge of the falsity.").

[237] *Id*. ("When the difficulty of proof of actual malice is combined with the time and expense of trial . . . and the complexity of proving damages, it is not surprising that few candidates bring challenges to false campaign advertising.").

impossible mountain to climb.[238] A "reckless disregard for the truth" does not mean the same thing in 2008 as it did in 1968.[239] In 1968, a politician had very few sources available to him to aid in his research of his opponent; today, everything from how a particular politician voted on a Congressional bill to the details of their platform can be accessed by a few clicks of the mouse.[240] While the Internet makes it easier for candidates to recklessly disregard the truth, one question remains: what defines truth?[241] Many political advertisements take quotes out of text, misstate voting records, or omit relevant details about their opponent's actions.[242] Which, if any of these actions could be classified as a reckless disregard for the truth? Arguably, all of them may be classified as such.[243] While there are existing websites devoted to ascertaining the veracity of politician's advertisements, speeches, and attacks on opponents, a statute regulating

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[238] *See infra* note 240 and accompanying text (discussing the ease at which a politician's voting record or stance on an issue may be researched).

[239] *See supra* Part II.A.3 (discussing the Court's clarification of the actual malice standard in *St. Amant*).

[240] *The Washington Post* keeps an online database of Congressional voting records including the roll call vote for each proposed bill. U.S. Congress Votes Database, WASH. POST, http://projects.washingtonpost.com/congress/ [hereinafter Votes Database] (last visited Jan. 23, 2009). Most candidates for federal office, and every member of Congress, has his or her own website stating his or her biography, stance on issues, and platform. *See e.g.,* Dick Durbin Senate Website, http://durbin.senate.gov/index.cfm. *See generally* United States Senate Web Site, http://www.senate.gov/general/contact_information/senators_cfm.cfm (listing individual Senators' websites); United States House of Representatives Web Site, http://www.house.gov (follow "Representatives" hyperlink) (listing individual Representatives' web sites).

[241] Truth is defined as "a general term ranging in meaning from a transcendent idea to an indication of conformity with fact and avoidance of error." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2457 (1986).

[242] A 2008 advertisement by Barack Obama, entitled "Sold Out", implied that John McCain was responsible for the closing of a Pennsylvania Corning manufacturing plant because he voted for tax breaks to ship jobs overseas, when in reality the plant closed because it made a technology, cathode ray tubes, that was no longer needed. *See* Justin Bank, *Obama's Trade Trickery*, ANNENBERG POLITICAL FACTCHECK, Sept. 26, 2008, http://www.factcheck.org/elections-2008/obamas_trade_trickery.html. An ad in the same year by John McCain alleged Barack Obama opposed clean coal because then Vice Presidential candidate Joe Biden told someone in Ohio, "We're not supporting clean coal." The Obama website had an energy plan that supported clean coal, and the Obama campaign claimed Biden's remarks were taken out of context. *See* Lori Robertson, *Not Coming Clean on Coal*, ANNENBERG POLITICAL FACTCHECK, Sept. 30, 2008, http://www.factcheck.org/elections-2008/not_coming_clean_on_coal.html.

[243] *See supra* notes 83-96 and accompanying text (describing the Court's attempt to define "reckless disregard for the truth" in *St. Amant*).

false political advertisements will need to be unambiguous in its definition.[244] While the actual malice standard is appropriate for a false political advertisement statute, it must not infringe on the Court's decision in *American Civil Liberties Union v. Reno* or the Federal Election Commission campaign rules. The next subpart thus addresses circumstances in which it would.

b. The Actual Malice Standard Can Be Applied to Non-media Defendants Without Violating Reno and Internet Campaign Laws

Narrowly interpreted, *New York Times Co.* prohibits public officials from recovering for defamation against media defendants without proving actual malice.[245] A large number of courts have only applied the actual malice standard to media defendants, but many others have held that the actual malice standard applies to both media and non-media defendants.[246] While the lower courts seem split as to whether *New York Times Co.* applies to non-media defendants, the Supreme Court, though never explicitly applying actual malice to non-media defendants, in its decision in *Brown*, effectively applied the actual malice standard to a non-media defendant.[247] Again, Justice White was among the many critics who did not believe the actual malice standard should apply to politicians.[248] Due to the damaging nature of a false political attack, some

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[244] The most popular of these, factcheck.org, is a non-partisan, non-profit "'consumer advocate' for voters that aims to reduce the level of deception and confusion in U.S. politics." *About Factcheck.org,* ANNENBERG POLITICAL FACTCHECK, http://www.factcheck.org/about/. Factcheck.org monitors politicians' speeches, ads, and debates. It gains its legitimacy from not accepting funds from corporations, unions, political parties, lobbying organizations or individuals. *Id*.

[245] *See supra* Part II.A (discussing the Court's analysis in *New York Times Co.* and the definition of actual malice).

[246] *See* Richman, *supra* note 95, at 692-95 (discussing cases in which courts have applied the actual malice standard solely to media defendants versus cases in which courts applied the standard to media and non-media defendants).

[247] *See supra* Part II.A.3 (discussing the application of actual malice to false campaign speech in *Brown*).

[248] *See Dun & Bradstreet, Inc.,* 472 U.S. at 749-74 (White, J., concurring);

> Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and

believe that politicians should be allowed to collect monetary damages without proving actual malice.[249] The standard of proving defamation is only part of the challenge politicians face, and a more lenient standard alone would not necessarily curb false ads.[250] Most notably, the lack of an appropriate remedy that vindicates the official in the public's eye and attempts to fix the damage caused by the false attack is a key reason politicians do not file defamation suits.[251]

Even if the Court proclaims the actual malice standard to apply to non-media defendants, a law using it must not violate the Court's decision in *Reno*, or the provisions of BCRA relating to political advertisements.[252] While *Reno* involved the Court striking down an act of Congress that sought to censor indecent material from children, at its core, it required a proven benefit from a government regulation to outweigh the interest in encouraging freedom of expression.[253]

> can be discharged only by expensive litigation. . . . Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests . . . .

Id. at 767-69 (White, J., concurring) (footnote omitted).

[249] *See Id*. (White, J., concurring) (arguing that "[n]othing in the central rationale behind *New York Times Co.* demands an absolute immunity from suits to establish the falsity of a defamatory misstatement about a public figure where the plaintiff cannot make out a jury case of actual malice."). *But see* Richman, *supra* note 95 at 697 (criticizing the *New York Times Co.* decision and arguing that by making the defamation standard for public officials less stringent, more suits will be won, causing candidates to be more careful in their ads).

[250] *See supra* note 239 and accompanying text (discussing the difficulty of satisfying the actual malice standard as one of many reasons politicians do not file more defamation lawsuits).

[251] *See* Kane, *supra* note 38, at 791-93 (proposing a judicial declaration of falsity as to the political advertisement); Peter May, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 207 (1992) (proposing an administrative agency to instantly review claims of defamation against political candidates).

[252] *See supra* Part II.A, B.2 (discussing the Court's finding the CDA unconstitutional and the BCRA, along with the FEC's rule adoptions to it).

[253] *Reno*, 521 U.S. at 885.

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id.

While CDA met its demise because it offered neither evidence of the benefit of censoring material nor any efficient and economic way for websites to prevent minors from viewing indecent materials, there is ample evidence that a law deterring politicians from airing false political ads would benefit American citizens.[254] Additionally, a statute using the actual malice standard to regulate false political advertisements by candidates and providing a valuable remedy would initially increase the number of defamation suits and thus reverse the negative effects of such ads, while not disturbing the First Amendment jurisprudence specifically shielding the press and protecting the freedom of expression interest illustrated in *Reno*.[255]

The final potential obstacle in using the actual malice standard to regulate false political advertisements is Section 318 of the BCRA.[256] Section 318 requires a candidate to endorse an advertisement as belonging to him; this would have no direct influence on a statute regulating false campaign advertisements, and the two do not need to be reconciled.[257] A federal statute requiring actual malice by a politician in creating an advertisement would complement the endorsement requirement of Section 318 and deter even more false advertisements without relying on it to be effective.[258] While many opponents of 318 believe it infringes on free speech

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[254] *See* Marshall, *supra* note 25, at 293-96 (stating that false ads distort the political process, lower the quality of discourse and debate, lead to voter alienation and lower turnout by fostering voter cynicism and distrust, inflicting reputational or emotional impact on the attacked individual). *See also supra* notes 24-26 and accompanying text (discussing the effects of false advertisements on voters).

[255] *See* Goldman, *supra* note 23, at 912-13 ("If anything the increased possibility of liability for false advertising may encourage greater discussion of the candidates' views on issues and ideas for change."). *But see* Marshall, *supra* note 25, at 297 ("[S]anctioning false campaign speech may not, in any event, be an effective way of informing the public. For one, adjudicating false speech claims is likely to take far longer than the election cycle, so a formal decision on the truth or falsity of a campaign claim likely will not happen until it is too late.") (footnote omitted).

[256] *See supra* Part III.A (discussing the BCRA sections that apply to political advertisements). Section 201 will not be analyzed as it applies to unions and corporations.

[257] *See supra* note 190 and accompanying text (listing the provisions of Section 318 of the BCRA).

[258] *See* Jim Rutenberg, *Fine Print Is Given Full Voice in Campaign Ads*, N.Y. TIMES, Nov. 8, 2003, at A1.

rights, the Court did not agree, and correctly found that such a requirement was constitutional.[259] The FEC's classification of the Internet as a public communication requires any paid advertisements posted online to include the endorsement required in Section 318.[260] A possible loophole, however, includes social networking sites that allow you to post videos for free.[261] The key interpretation is whether a person's YouTube page is considered another person's website. If it is, then there must be an endorsement.[262] If it is not, then no such endorsement is needed.[263] With millions of people viewing politicians' videos, there is the possibility of politicians posting endorsement-less ads, but a federal statute regulating false advertisements would not allow a defamatory advertisement without a politician's endorsement to escape scrutiny.[264] Before

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[259] *See supra* Part III.B (discussing the Court's ruling in *McConnell*, which held nearly every challenged section of the BCRA to be constitutional).

[260] *See* Bipartisan Campaign Reform Act of 2002 § 318, Pub. L. No. 107-55 (2002) (codified as amended at 2 U.S.C. § 441d (2006)); Robert D. Lenard & Ellen L. Weintraub, *FEC Internet Rulemaking – Background and FAQ*, http://www.fec.gov/members/weintraub/nprm/statement20060327.pdf ("The new definition of 'public communication' continues to exclude communications over the Internet, except for advertisements placed on another person's website. Paid advertisements are the only Internet activity covered by the new definition.").

[261] A very popular video-sharing website, YouTube.com, allows users who create a profile to post videos for free, though a video that violates community guidelines will be removed by the company. YouTube Community Guidelines, http://www.youtube.com/t/community_guidelines (last visited Jan. 23, 2009).

[262] YouTube Terms of Service, http://www.youtube.com/t/terms (last visited Jan. 23, 2009). On YouTube's terms of use page it states:

> The content on the YouTube Website, except all User Submissions (as defined below), including without limitation, the text, software, scripts, graphics, photos, sounds, music, videos, interactive features and the like ("Content") and the trademarks, service marks and logos contained therein ("Marks"), are owned by or licensed to YouTube, subject to copyright and other intellectual property rights under the law.

Id. Regarding "user submissions," YouTube states: "[Y]ou retain all of your ownership rights in your User Submissions" but "you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website." *Id*.

[263] *See* Lenard & Weintraub, *supra* note 260 (explaining the FEC's rule change regarding the classification of the Internet as a "public communication" and the ramifications on political advertising).

[264] *See supra* note 17 (discussing the number of views each 2008 Presidential candidate had on his YouTube page); *infra* Part V (proposing a federal statute that would regulate false political advertisements, including those on the Internet).

discussing the details of proposed statute, this Comment dismisses alternative treatments of false political advertisements.

c. There are No Better Alternatives in Dealing With False Political Ads

While there has not been a federal statute adopted to deal with false political advertisements, many states have tackled the matter by creating campaign laws or voluntary campaign codes.[265] Most of the state laws use wording similar to the actual malice standard to prohibit publishing false campaign ads, but some use slightly different wording.[266] For example the Wisconsin statute provides for a variety of interpretations as to what a false "representation" means.[267] While it can be interpreted as less stringent as the actual malice standard, it does not offer the politician any recourse other than the satisfaction of his opponent being charged with a misdemeanor.[268] Voluntary campaign codes are not as effective because they do not provide any punishment for politicians who break them.[269]

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[265] *See* ALASKA STAT. §15.56.014 (2008); COLO. REV. STAT. ANN. §1-13-109 (2009); MASS. ANN. LAWS ch. 56, §42 (2008); MINN. STAT. ANN. §211B.06 (2009); MISS. CODE ANN. §23-15-875 (2008); N.C. GEN. STAT. §163-274(8) (2008); N.D. CENT. CODE §16.1-10-04 (2008); OHIO REV. CODE ANN. §3517.21 (2009); OR. REV. STAT. §260.532 (2009); TENN. CODE ANN. §2-19-142 (2008); UTAH CODE ANN. §20A-11-1103 (2008); WASH. REV. CODE ANN. §42.17.530 (2009); WIS. STAT. ANN. §12.05 (2009).

[266] The Ohio statute lists a number of practices a politician must refrain from doing during the campaign, including lying about a voting record and falsely identifying the source of a statement. OHIO REV. CODE ANN. §3517.21 (2009). The Wisconsin code is not as specific, but states: "No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election." WIS. STAT. ANN. §12.05 (2007).

[267] A representation is "a statement or account esp. [sic] made to convey a particular view or impression of something with the intention of influencing opinion or action." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1986).

[268] WIS. STAT. ANN. §12.05 (2008). The statute also allows the politician to be removed from office. *See* Skibinski v. Tadych, 31 Wis. 2d 189 (1966) (Wisconsin Supreme Court affirming lower court decision not to oust election winner because none of his statements were materially false).

[269] Goldman, *supra* 23 at 891. *See also*, May, *supra* note 253, at 206 (proposing a voluntary campaign code for Massachusetts politicians with a list of who signed the code published in a news release).

The most obvious alternative in dealing with false political advertisements is to abandon the actual malice standard altogether[270] and provide a different remedy than damages to a defamed politician.[271] Advocates of abandoning the actual malice standard suggest treating political advertisements like commercial advertisements.[272] Under this theory, an advertisement would be considered false if it probably deceived or misinformed voters.[273] The problem with this standard is it does not protect political speech as the Court intended in *New York Times Co*.[274] Commercial speech promotes a product, but political speech is at the essence of what the First Amendment protects, the right to speak out against the government.[275] Only by retaining the actual malice standard will political speech get the proper protection it deserves.[276]

In sum, the expansion of the Internet has given new meaning to "reckless disregard for the truth" and made it easier for politicians to prove actual malice.[277] Furthermore, using the actual malice standard to regulate false political advertisements, including those on the Internet,

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[270] *See* Goldman, *supra* note 23, at 915-17 (proposing a remedy that uses the "demonstrably false" standard of commercial advertising); Richman, *supra* note 95, at 686-97 (discussing various political scholars' solutions to the dilemma of regulating false campaign advertisements, including the abandonment of the actual malice standard for non-media defendants); Marshall, *supra* note 25, at 321-22 (advocating approaching the false political ad problem from a campaign finance direction).

[271] Kane, *supra* note 38, at 791-93 (proposing a judicial proclamation of truth entered into the public record as the proper remedy for a defamed individual).

[272] *See* Clay Calvert, *When First Amendment Principles Collide*: *Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1539, 1564-66 (1997) ("Negative political ads are not political speech deserving of heightened First Amendment protection. Attack ads are better categorized as *democracy disabling speech*. These ads, which deter participation in the political process, should receive only the intermediate protection afforded commercial speech."); Goldman, *supra* note 23, at 916 (discussing the benefit of evaluating the truth of a political advertisement using the commercial speech standard).

[273] *See* S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 238 (2d Cir. 2001) (defining false for the purposes of evaluating a commercial advertisement).

[274] *See supra* Part II.A.1.c (discussing the risk of chilling political speech).

[275] *See supra* note 54 and accompanying text (illustrating the Court's concern with ensuring robust debate in the political arena without fear of being sued).

[276] *See infra* Part V.A (proposing to retain the actual malice standard in order to ensure political speech is properly protected).

[277] *Id*.

would not violate the rulings of the Court in *Reno* or *McConnell*.[278] Additionally, while many other remedies and standards have been proposed, none protect political speech to the degree the Court requires while providing a public official a meaningful remedy.[279]

IV. PROPOSAL

While voter turnout in presidential elections is on the rise, nearly forty percent of eligible voters do not vote.[280] False campaign advertising, especially of the negative variety, has been shown to effect voters, and although it is not solely responsible for people staying home on Election Day, it is at least partially to blame.[281] The common law regulation of defamation against politicians has protected political speech from being chilled, but has not reduced the number of false advertisements, increased voter turnout, or caused a more issue-oriented campaign.[282] This Part proposes to retain the actual malice standard in a federal statute prohibiting false political advertisements. Furthermore, this Part proposes to penalize politicians who violate the statute with monetary damages and to require them to issue a retraction by the same medium and for an equal amount of time as the original false advertisement. Additionally,

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[278] *See infra* Part V.B (distinguishing potential regulation of Internet from the failed regulation of the CDA and demonstrating the absence of conflict between a potential statute and the BCRA sections held constitutional in *McConnell*).

[279] *See supra* Part IV.C (summarizing other proposals for false campaign ads and discounting them based on the Court's reasoning).

[280] Michael McDonald, *2008 General Election Turnout Rates*, March 12, 2009, http://elections.gmu.edu/Turnout_2008G.html (showing an overall voter turnout of 61.7% in the 2008 Presidential Election).

[281] Robert Roy Britt, *Negative Political Ads Elicit Fear and Anxiety*, LIVESCIENCE, Oct. 16, 2008, http://www.livescience.com/culture/081016-water-cooler-2.html ("[T]hose who saw the negative ad reported being the most anxious, worried and afraid, and those who saw the positive ad were the most hopeful, reassured, and confident. The latter were also more interested in the campaign." (emphasis omitted)). *See also* Seth Borenstein, *This Is Your Brain on Negative Ads*, MSNBC, Nov. 3, 2006, http://www.msnbc.msn.com/id/15549677/ ("Negative ads make supporters of the attacker more likely to vote and followers of the victimized candidate depressed and less likely to vote.").

[282] *See supra* Part I-II.A (discussing the problems false advertising that causes and the Court's commitment to protecting political speech).

this Part proposes a requirement that the candidate, and not the government, initiate the lawsuit. Finally, this Part suggests the statute should include an expedited track to federal court to ensure a timely review.

a. Retain the Actual Malice Standard

The actual malice standard has been part of free speech jurisprudence for over forty years.[283] It safeguards political speech and should continue to do so.[284] Yet, it has new meaning with the increasing use of the Internet by politicians.[285] No longer does it take Sherlock Holmes-like detective work to discover a politician's position on an issue or how he voted on a bill.[286] Perhaps a "reckless disregard for the truth" could now entail a politician spending only twenty minutes researching his opponent's views before making allegations about his opponent's beliefs.[287] With the ease of navigating the Internet, the actual malice standard is no longer an insurmountable mountain.[288]

b. Apply Monetary Damages Only to Candidates and Require a Retraction

The Court, in *New York Times Co.* and its progeny, sought to protect the press from exorbitant monetary damages.[289] Allowing politicians to recover large damages against the press

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[283] *See New York Times, Co.*, 376 U.S. at 256-65 (discussing the factual history of *New York Times Co.*).

[284] *See supra* Part IV.A. (advocating for the continued use of the actual malice standard because of its protections for political speech).

[285] *See supra* Part IV.A. (discussing the new meaning of "reckless disregard for the truth" in light of easier access to information via the Internet).

[286] *See supra* note 242 (describing the *Washington Post's* website that tracks how Congressmen vote on bills and the location of directories for politicians' websites).

[287] *Id*.

[288] *But see* Goldman *supra* note 23, at 906 (discussing how a lack of appropriate remedies, rather than the difficulty of proving actual malice, is really preventing politicians from filing defamation suits).

[289] *See supra* Part II.A.1.b (discussing how the size and nature of the damage award in *New York Times Co.* factored into the Court's decision to create the actual malice standard).

could seriously jeopardize the existence of the press as an institution.[290] Enacting a statute that limits damages to the creator of the false ad would neutralize this threat.[291] The imposition of damages does nothing to halt the damage done by a false ad.[292] In addition to damages, it is necessary for a federal statute to require a politician found guilty of airing a false advertisement about his opponent to publish a retraction on the same medium and for equal time as the advertisement ran.[293] While this will not completely reverse the damage of a false ad, it will have a two-prong effect.[294] First, it will officially vindicate the defamed politician and likely cause voters to, at the very least, reconsider their opinion of the candidate.[295] Second, it will

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[290] *See Gertz*, 418 U.S. at 349.

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship.

Id.

[291] Since this statute is only concerned with the regulation of political advertisements, the risk of a newspaper being sued for $500,000, unlike in *New York Times Co.*, is not present.

[292] *See supra* notes 22-26 and accompanying text (discussing the effect of false campaigns in American politics despite existing liability for defaming public a officials).

[293] This is similar to a judicial declaration of truth, but it requires the offending party to admit its wrong to America. *See generally* Kane, *supra* note 38, at 791-93.

> [T]he candidate would have an official vindication of her reputation that could then be used in the community to rehabilitate her own reputation and, depending on the circumstances under which the falsehood had been published in the first place, undermine the credibility of her electoral opponent.

Id. at 792.

[294] Richard Dunham, *UT Poll Shows McCain, Coryn with Comfortable Margins,* HOUS. CHRON., Oct. 29, 2008, http://www.chron.com/disp/story.mpl/front/6084678.html (noting in Presidential campaign of 2008 a rumor began to spread on talk-radio that Senator Barack Obama was a Muslim, despite his two-decade membership in a Protestant Church and his opponent's attempt to inform his supporters of the truth; in a poll taken one week before the election 23% of Texans still believed Obama was a Muslim).

[295] *See generally* Kane, *supra* note 38, at 792 (discussing the benefits of a judicial proclamation of truth); Borenstein, *supra* note 283 (Concerning false negative political ads, "'[e[veryone says, 'We hate them, they're terrible' . . . [h]owever . . .[t]hey seem to work.' And politicians know it because the latest figures show that by nearly a 10-to-1 ratio, political parties are spending more money on negative ads than positive ones.")

impose further damages on the guilty defendant by forcing him to pay for a retraction and deter politicians from airing advertisements that are false.[296]

c. Make the Candidate Initiate the Lawsuit and Give It Priority to Ensure a Timely Decision

Critics of the actual malice standard have proposed the creation of a governmental agency charged with investigating false advertisements.[297] The federal statute should remove as many political motivations as possible, and granting power to a government agency would call to question the non-partisan nature the statute is supposed to have.[298] Instead, an action under the federal statute should be heard by a district court in the district of the advertisement's origin within two days of its filing.[299] Campaign slander cases present a timeliness challenge that requires them to be decided before the campaign is over.[300] A jury trial could be cumbersome and lengthy, but is required by the 7th Amendment to the Constitution.[301] To solve the timeliness

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[296] *See generally* Mark Preston, *Political Television Advertising to Reach $3 Billion*, CNN, Oct. 15, 2007, http://www.cnn.com/2007/POLITICS/10/15/ad.spending/index.html ("[M]ore than $800 million will be spent on TV ads in the battle for the White House); CNN Election Center, *Election Tracker: Ad Spending*, http://www.cnn.com/ELECTION/2008/map/ad.spending/ (last updated Nov. 4, 2008) (showing a total $450 million was spent on political advertisements between Barack Obama and John McCain).

[297] *See* Goldman, *supra* note 23, at 924-25 (describing the procedural protections afforded to politicians in a federal statute giving the government authority in regulating false campaign advertisements).

[298] *Id*. at 924 (proposing the government initiate a judicial investigation but the case ultimately be decided by a jury). *But see* Kane, *supra* note 38, at 795.

> [W]here a judge could be called upon to rule on matters leading to large damage awards, fines, or criminal penalties, we trust judges to do their duty neutrally, even when the parties before them have antagonistic political affiliations. The oath of office, rules of judicial conduct, and oversight of appellate review suffice in those circumstances to insure trustworthy adjudication on the merits. There is no reason to believe that actions for campaign slander would be any different.

Id.

[299] *See* Kane, *supra* note 38 at 795 ("Because of the breadth of their equitable powers, courts often hear time sensitive cases. Campaign slander actions would present no greater challenge to judicial management then temporary restraining orders, preliminary injunctions, or other time-sensitive actions.").

[300] *Id*.

[301] U.S. CONST. art. VII.

problem the district court judge should make a preliminary finding of the ad's veracity, issue a cease and desist order to prevent further political damage, and then instruct the jury during the trial for damages and a possible retraction that his finding should not influence their verdict.[302]

In sum, a federal statute regulating false political advertisements should retain the actual malice standard of *New York Times Co.*, but provide a timely forum for a potentially defamed politician to be heard. By ensuring a timely decision from a district court judge and requiring a candidate found liable under the statute to pay damages and issue a retraction, the propensity for twisting the truth in political advertisements will diminish.

V. CONCLUSION

The American public has grown weary of political advertisements that manipulate the truth and focus on out of context quotes instead of substantive issues. Politicians continue to use false political ads because they are effective and virtually unregulated. Requiring a politician to endorse his own advertisement no longer deters him from defaming his opponent. While the actual malice standard for defamation of public officials has been a part of free speech jurisprudence for four decades, the lack of a remedy that redeems the victim and deters future assailants has prevented more politicians from filing suit. By providing a remedy that sufficiently punishes the guilty politician while rehabilitating the defamed politician's image, the protection of political speech will be ensured and the political discourse will escape the gutter.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

[302] *See* Goldman, *supra* note 23, at 925 ("[R]equiring a right to a jury trial effectively would preclude pre-election relief.").