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THE DISCOURSES AND PRACTICES OF POLITICAL DECEPTION: FROM CAMPAIGNS TO CABLE TO THE COURTS

By

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ABSTRACT OF THE DISSERTATION

The Discourses and Practices of Political Deception:

From Campaigns to Cable to the Courts

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This project is an examination of the political animal and its ways of communicating, specifically through and about lying and deception. The goal of this project is to develop a discourse analysis of deception in politics. So the key research question is, how do political discourses about deception function? This means looking at how specific political actors create discursive constructions about what is *not true* in American political life and what political actors *know about* that which is not true. The project is not concerned with judging the deceptions themselves but rather how political deception is discussed.

This dissertation is broken into three sections. Section I contains an introductory chapter, a literature review and a discussion of the research questions and method. Section II contains two chapters: a typology of political deception and a discussion of laws addressing the problem. It also analyzes the judicial discourse surrounding political deception. Section III is the analysis of discourses looking at three discursive sites in

three chapters. The first examines the political discourse surrounding the tea party as AstroTurf. The second is an analysis of the discourse of truth and falsity surrounding fact checking organizations and the role of the news media in general. Finally, there is a proposal for a campaign ethics council.

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Chapter 1 - Deception in Politics: A Brief Introduction

I. Introduction

"Credibility gap."[1] Liar. "When Bush lied, people died."[2] Propaganda. "It depends on what the meaning of the word "is" is."[3] Prevaricating. "My heart and my best intentions still tell me that's true. But the facts and the evidence tell me it's not."[4] Rhetoric. Lies. Half-truths. Politics. This project is an examination of the political animal and its ways of communicating, specifically through and about lying and deceit. The central goal of this project is to develop a discourse analysis of deception in politics. So the central research question is, how do political discourses about deception function? This means looking at how specific political actors create discursive constructions about what is *not true* in American political life and what political actors *know about* that which is not true. The project is not concerned with judging the deceptions themselves but rather how political deception is discussed. Some illustrations would be useful here.

On April 8, 2011, during Senate budget negotiations, Sen. John Kyl (R- Ariz.) took the floor of the U.S. Senate to speak out against funding for Planned Parenthood. During the course of his remarks Kyl declared that 90% of the money spent by Planned

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[1] This term was widely used in the 1960s and 1970s by the Kennedy, Johnson, and Nixon administrations to describe "the perceived disparity between" U.S. government claims about American involvement and progress in the Vietnam War and the reality of what was happening (Anderson, 2002, p. 109).

[2] This bumper sticker slogan began circulating as criticism of the Iraq War increased. It was targeted at the Bush Administration's rationale for the war, that Saddam Hussein possessed weapons of mass destruction (Jefferey, 2002, para. 1). It drew an implied contrast between that "lie" and Bill Clinton's false statement that he "did not have sexual relations with that woman" referring to an inappropriate relationship he had with a White House intern named Monica Lewinsky (Bennet, 1998, para. 3).

[3] This quote is from Bill Clinton's grand jury testimony on 17 August 1998 in the Lewinsky scandal (Starr, 1998, p. xvii).

[4] This quote comes from Ronald Reagan's television address on 4 March 1987 to the nation regarding the Iran/Contra scandal (Campbell & Jamieson, 1990, p. 131).

Parenthood, a national organization that provides reproductive health care services for women, was spent on abortion (PolitiFact, 2011a). In the days that followed Kyl was called out by various sources in politics and journalism because his statement was factually inaccurate. A quick examination of Planned Parenthood's budget demonstrated that it did not in fact spend 90% of its money on abortion (PolitiFact, 2011a). One of Kyl's staff members added a little visibility to Kyl's gaffe with the inadvertently hilarious response that the senator's claim was "not intended to be a factual statement" (Benen, 2011, para. 5). This led to the purposefully hilarious derision Kyl received in the form of a Twitter hashtag #notintendedtobeafactualstatement, used most effectively by satirist Stephen Colbert. Kyl later had the statement about Planned Parenthood stricken from the Congressional Record (Smith, 2011a).

Another moment of potential political deception, coincidentally also involving Twitter, is the bizarre case of Anthony Weiner (D-NY). Weiner was once a media-savvy congressman who, although not much of an author or main supporter of significant legislation, had developed a high-profile career appearing on talk shows and receiving abundant attention for one particular outburst on the U.S. House floor during a debate over health care funding for 9/11 first responders.[5] His career came to a sudden end in 2011 when he accidentally tweeted a picture of his genitals to a woman who followed him on Twitter. In the days and weeks that followed Weiner claimed his account had been hacked, he said he didn't know if the picture was of him, and he even hired a private investigator to look into the matter. Of course this charade all came to an end when he

[5] In the incident involving first responders the Republicans in Congress had voted against funding to address health care problems sustained by medical, police, and fire personell in New York City during the attacks on September 11, 2001. Anthony Weiner, who represented many of those first responders in Congress, gave a harsh, critical, and overtly angry speech on the house floor deriding House Republicans for their actions.

finally admitted that the picture was of him, that he had been the one who Tweeted it, and his account had not been hacked (Hernandez, 2011).

On one hand there is Sen. Kyl who made a statement that was clearly false and easily disproven. However, it is entirely possible that Kyl did not at the time know he was making a false statement. He very easily could have sincerely believed what he was saying, he could have received the information from a source he deemed credible, and he could have shared that information in his speech believing it to be true. If that was the case, then he shared misinformation and what he did could be called an act of deception because he deceived anyone who believed his statement to be true. However, his statement could not be called a lie, since a lie by definition, as will be discussed later, involves the speaker knowingly misleading his listener.

Anthony Weiner, on the other hand, more than likely lied to the public. It would be difficult to say that Weiner did not know the picture in question was of him, that he did not know he had been the one who tweeted it, and that he sincerely believed his account had been hacked. Knowing all of the facts of the case the most likely explanation for what happened was that Weiner found himself in trouble, thanks to his own technological ineptitude, and he attempted to lie his way out of it. Roger Simon, a reporter for *Politico*, noted that Weiner would not talk to the FBI and Capitol Hill police because if he had talked them about his false claim about his Twitter account being hacked he would have been committing perjury (Rose, 2011). Hiring a private investigator meant Weiner only had to lie to the public, which is not a violation of the law, just a violation of the public's trust.

What is illustrated by these two examples, standing in contrast to one another, is the difficulty of nailing down precisely what constitutes deception in politics. It is possible that Kyl made a sincere, although false, statement. Weiner, on the other hand, was most likely lying. The "not intended to be a factual statement" response makes it even more difficult say whether Kyl's statement constitutes deception. Perhaps Kyl *felt* like Planned Parenthood was predominantly an abortion provider, therefore his statement was an accurate representation of his feelings. Weiner's actions after his photo surfaced imply the intent to deceive. Both instances present opportunities to discuss how political actors talk about deception. How do they call someone a "liar?" How do they avoid the term but still imply deception? Do political actors talk about deception happening in different ways? In other words is there a typology of deception?

These broader questions will be addressed through the examination of important discursive arenas in American politics, especially electoral politics. These sites of analysis fall under two broad categories. First is the industry of journalism, especially cable news. Cable news is especially important here because it has become a central site for the discourses of deceit. As many have noted, cable news, in particular its opinion programming, is combative (Iskander, 2005; Farhi, 2003; Alterman, 2000; Forgette & Morris, 2006). In addition to the combativeness that makes cable news a prime site for the analysis of discourses of deceit, cable news is useful for this analysis because it continues to figure prominently in the American public's information diet. Citing a Pew Research Center (2004) study, Forgette and Morris (2006) note many Americans were turning to the big three cable news outlets, Fox News, CNN, and MSNBC, "for political

news with more frequency than they tune into traditional network news" (p. 447).[6] That Pew (2004) study found a combination of an increase in cable viewership and a decrease in eyes on the nightly network news and local newspapers made cable the second most common source Americans turned to for campaign information (para. 3). This trend continued in a later Pew (2012a) report that found that while cable declined slightly from 2008 to 2012, it was still the top news source for Americans to learn about candidates (p. 1). Beyond cable, the journalism industry in general is an important site of analysis because of how it describes its role in American politics. The historic and contemporary uses of terms such as "watchdog press" or the "social responsibility" theory of the press,[7] are ingrained in the culture of journalism. These discursive constructions, with their air of high-mindedness, stand in contrast to the "high-conflict" coverage described by Forgette and Morris (2006), which has been cultivated in recent years. This issue will be explored throughout this project but especially in chapter four.

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[6] There are other indicators of the continued importance of cable networks in the American news ecosystem. For example, one Pew Research Center (2010) study showed that the proportion of Americans regularly turning to cable news increased from 33% in 2002 to 39% in 2006 and has remained consistently at nearly four in ten Americans since then (p. 21). As the report says, "cable news continues to play a significant role in peoples' news habits" (p. 6). The Project for Excellence in Journalism found in its 2011 report that revenue increased from 2009 to 2010 for all three major cable news outlets (Holcomb, Mitchell and Rosenstiel, 2011, para. 2). However, over the same period, audiences were in decline, according to this report. It should be noted, though, that there was a steep increase in viewers for cable news from 2007 to 2008 in the midst of the presidential campaign (Pew 2010, p. 21). In the 2012 State of the Media report Pew noted some modest gains for most of cable, and some decline for Fox News (Holcomb, et al., 2012, para. 7). It should also be noted, on the other hand, that while Pew found cable to be the one area of the journalism industry with a solid, and rising, revenue stream it was also noted that emerging forms of media pose a threat to cable and there is some future uncertainty.

[7] The terms "watchdog press" and "social responsibility" have a rich history in journalism. They are synonomous with "fourth estate" and antagonistic press. All of these terms imply a relationship between the press and the government whereby the press acts as another check on power, making the public aware of the potential for corruption and abuse, and holding the government accountable for wrongdoing. For an example of such visions of journalism as a socially responsible institution from a historical perspective, see Peterson (1963); for a more contemporary take, see Kovach and Rosenstiel (2007). For a discussion that places this social responsibility argument in the context of citizen journalism and new media, see Gant (2007). For a discussion of this press/government relationship that takes a more "antagonistic" tone see Stead (1886) which will be discussed in chapter seven.

The second area of analysis is the law. The law itself is a site of discursive practices. This project will look at how the law handles the practice of deception and the stating of misinformation and whether the law allows for these practices as a matter of free speech. For example, in the case of *Minnesota v. Jude* (1996), the Minnesota Court of Appeals declared a "truth in political advertising" law to be "unconstitutionally overbroad" (p. 755) because "the extension of criminal liability to those who have only a 'reason to believe' the campaign material [they are helping to produce] is false" (p. 753) violates the actual malice standard set by the U.S. Supreme Court in *New York Times v. Sullivan* (pp. 754-755).

As part of the legal discussion this dissertation will propose one potential solution for the problem of political deception. The last chapter describes how a campaign ethics council could be created to combat political deception and act as another source of information for the public to judge claims made by candidates. Such a council would not criminalize political deception since multiple courts have already found that to be constitutionally problematic. The goal of the council would be to create a nonpartisan public forum that could judge claims made during a campaign and help the public weed out false statements. This proposal follows the model of press councils.

The purpose of this introductory chapter is to address theoretical and philosophical works and empirical research on political deception and misinformation that will form the foundation for this project. A parallel goal in this chapter will be addressing the concepts of lying, misinformation, and deception in politics. This means defining and making distinctions among those terms, as well as making clear how those definitions and distinctions are important to the project. This chapter will also explain the

importance of the concepts of affect and political myth-making and how they relate to deception.

II. What is political deception?

Deception, misinformation, lying, getting the facts wrong; understanding this behavior is essential to an analysis of politics – especially electoral politics. Misstatement, whether purposeful or accidental, is a political tool as much as it is a problem in public life. So there are a variety of reasons why it is important to study falsity in politics. First and foremost, as Sissela Bok (1999) argues, "no moral choices are more common or more troubling than those which have to do with deception in its many guises" (p. xxxi). Lying has received considerable attention in the realms of philosophy (Mahon, 2007), law (Simon, 1998; Castleman, 2004), politics (Beahrs, 1996; Carmola, 2003; Kellner, 2005; Huang, 2010), international relations (Mearsheimer, 2011), communication (Newman, Pennebaker, Berry, & Richards 2003; Blum, 2005; Stockdale, 2005), and political media (de Vreese, 2005; Brants, de Vreese, Moller, & Van Praag, 2010). What this project contributes to that existing literature is to place the concept of deception in politics into a discourse analysis, to examine the ways in which political actors talk about deception, to examine the "discourses of deceit."

Such an analysis is important because perceptions of the ubiquity of deception in politics can cultivate cynicism and de-politicization. As Bok puts it, it is necessary to have "a minimal degree of trust in communication for language and action to be more than stabs in the dark. This is why some level of truthfulness has always been seen as essential to human society" (p. 18). Cappella and Jamieson (1997) argue similarly "cynicism implies [a public perception] that the self-interest of political actors is their

primary goal and that the common interest is secondary at best or played out only for its political advantage" (p. 142). This is problematic for a political culture because relationships between the public and political actors "are still relationships, even when these relationships are separated in time and space" (p. 142) and, to echo Bok, there must be "a minimal degree of trust in communication" between political leaders and the public in order to maintain public faith in a political system.

For Cappella and Jamieson (1997), cynicism's "closest [definitional] relative is distrust" (p. 142). They describe cynicism as the belief that a politician will put his or her own interests before the public interest (p. 142). So in the simplest terms, cynicism is distrust for politicians and the political process. This is wrapped up in de-politicization in that it creates a desire to remove politics from daily life or other realms of society (i.e. arts and entertainment). De-politicization is then the "development of ideological consensus" (Himmelstrand, 1962, p. 84) to the point where ideological disagreements cease to be meaningful components of a political culture and political discourse becomes a discussion of policies as "administrative *technologies*" (Himmelstrand, 1962, p. 83). On one hand, Himmelstrand describes a de-politicization where the number of people who vote increases as the number of people who are personally involved in politics decreases because those people "are frustrated by not being able to 'express their dreams' in political behavior" (p. 96). So voting rates rise but political engagement does not go beyond voting. On the other hand, de-politicization also can be expressed as pessimism about the effectiveness of political action accompanied by a high level of awareness of the political system. Like Cappella and Jamieson, Eliasoph (1998) found in her political ethnography that those who were most cynical about politics "were incredibly

knowledgeable about politics" (p. 161). She contributes to the definition of cynicism by describing cynics in her study as "frustrated populists [who] talked about politics incessantly, in order to show that they themselves knew that living up to the democratic ideal was impossible within the current political and economic structure" (p. 239).

This cynicism about politics is tied into the political discourse in news media. In *Spiral of Cynicism*, Cappella and Jamieson report that a variety of studies have found "that strategy frames for news activate cynicism" (p. 159). Strategy frames, or strategic reporting, is defined by de Vreese (2005) as reporting that focuses on horse race coverage, political news about who is ahead in the polls and fundraising or candidate style and (the sometimes dishonest) communication strategies that reduce politics to the equivalent of a sports contest rather than reporting on substantive policy debates. Other researchers cite this kind of reporting as being potentially problematic. However, de Vreese argues that it "is not per se cynicism-invoking and may play only a negligible role in citizens' considerations to turn out to vote" (p. 284). Pederson (2012) echoes de Vreese, arguing, "cynicism may not be the best or theoretically most relevant measure" for understanding the impact of media coverage on voter engagement (p. 227). Instead, Pedersen argues, there is a more important connection between the strategy frame and voter perceptions of self-efficacy (p. 234). Despite some skepticism about connections between strategic reporting and cynicism, Patterson (2002) argues, "news media have contributed to declining interest and enthusiasm about politics in the U.S." (p. 283). In addition to Patterson's research, Cappella and Jamieson (1997), Jamieson (1992), and Fallows (1996) all see some validity to the claim that a lack of trust in media, brought on

by inaccurate reporting and strategy frames, can bring about cynicism and de-politicization.

One example of a de-politicizing discourse about media that helps create an intersection between strategy frames and political deception is the common accusation of media bias, which is a very particular way of accusing the press of deceiving. As data in Capella and Jamieson's (1997) research indicate, public cynicism about media "is based on perceptions that the media are inaccurate, imbalanced, and concerned too much with conflict" (p. 225). These findings are true across the political spectrum, whether one finds "conservatives seeing a liberal bias [in the media] or liberals seeing a conservative one" (p. 225). Although it is difficult to make the argument that media critics set out with the intention of cultivating cynicism by accusing the news media of having one bias or another, such accusations are increasingly common.[8] This discourse presents itself in an abundance of political books on bestsellers lists and storefront shelves of Barnes & Noble. It crosses over into the rough-and-tumble shouting discourse of cable news, where authors promote those books as they argue with the authors of other books about political deception.

Schudson (1999) connects strategy reporting described by Cappella and Jamieson (1997) to a journalistic culture that has evolved from healthy skepticism to outright cynicism with reporting that gives the public the impression that "politicians will promise

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[8] The media bias strategy will be addressed in more detail in chapter seven. While President Franklin D. Roosevelt, a Democrat, did throw around claims about Republican bias in the news media of his time the contemporary media bias discourse has a longer history in conservative circles. It can be seen, for a few examples, on Brent Bozell's website the Media Research Center (www.mrc.org) and Accuracy in Media (www.aim.org). There have also been numerous books written from this perspective in which accusations of lying are central rhetorical strategies (Goldberg, 2001; Goldberg, 2009; Coulter, 2003). The media bias discourse is also present on the left, employing accusations of deceit in the form of websites such Media Matters for America (www.mediamatters.org) and in popular and academic press political books (Franken, 2003; Jackson & Jamieson, 2007; Jamieson & Cappella, 2010; Conason, 2004).

anything to get elected, and they neglect to remind people … that politicians with rare exception work hard and often successfully to make good on campaign promises" (p. 999). In short, deceit and cynicism become elements in strategy reporting through the implication that every politician's every utterance should be assumed a lie until proven otherwise. At the very least, the reporting implies that all communication in politics is disingenuous because it is done solely with the politician's career in mind, thus it is somehow dishonest or inauthentic.

With that in mind, there are three ideas that are fundamental to this project. They will be summarized here and discussed in greater detail in the research questions section in chapter three. First, deceit and accusations of deceit are natural parts of the political process. Sometimes the accusations of deceit are themselves deceitful, sometimes they are valid, but they are often a part of the political process. Another way of putting this argument is to say, "propaganda is a natural byproduct of communication that everyone participates in" (Altenhofen, 2010, p. 158). In other words, there is a certain element of manipulation or deception possible at all levels of communication, not just within the realm of politics. It is also important to say that propaganda is not always dishonest, nor is it inherently evil, but it does have an element of deceit in that it focuses the receiver's attention on a perspective that is most advantageous to the propagandist.[9] This leads to

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[9] One way to explore this question of whether propaganda is inherently deceitful is through an examination of Frank Luntz and the so-called "death tax." In the early 1990s Republican politicians were looking for a way to persuade the public to repeal the estate tax, a tax on very large inheritances that, as of 1990, applied to only 1.19% of estates (Tax Policy Center, 2011). Luntz was a Republican pollster who specialized in framing and language who urged Republican politicians to start referring to the estate tax as the "death tax" arguing that this language was more effective for cultivating public support for repealing it (Schaffner & Atkinson, 2009, pp. 123-124). Jackson and Jamieson (2007) argue that this reframing of the estate tax, a tax on a very small number of very large inheritances, as a tax on people when they die, was "misleading, it framed the issue in a way that made people think of the tax unfavorably before they even considered any facts" (p. 47). Luntz, conversely, claimed that he was not lying to people by changing the phrase "estate tax" to "death tax." He said, "that is a clarification; that's not an obfuscation" (Frontline, 2004, para. 20). So

the second idea, that acts of deception are not inherently immoral practices as much as they are the employment of communication strategies that place the sender's perspective in the best possible light. It is the use of, as Altenhofen argues, "hyperbole," or the offering of "a glittery and partial side" of something. Whether that something is a policy position or the conditions in a city, as were discussed in Altenhofen's research, sometimes a message "contains only half-truths and ideals" (p. 159-160). Finally, while it is recognized that deception is part of the political process, and that it is not always an evil act, it is also recognized in this project that it is not enough to throw up our hands in defeat and simply live with it. This project is intended to contribute to doing something about the problem by analyzing the discourse around it and proposing a mechanism for addressing it. So the final assumption is that something can and must by done about deception in contemporary politics, perhaps using a mechanism such as the one proposed in the final chapter of this dissertation.

The thread that connects these three ideas is the intersection of the argument that deception is a natural part of communication with the defense of politicians and politics from Bruno Latour, the French sociologist who studied research practices in *Laboratory Life* (1986) and legal practices in *The Making of Law* (2010). Latour (1988) describes and criticizes public attitudes about the deviance of lying politicians, arguing "It is only politicians who are thought to be dishonest" (p. 210). He counters this public perception of political prevarication arguing, "What we despise as political 'mediocrity' is simply the collection of compromises that we force politicians to make on our behalf" (p. 210).

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on one hand Luntz claimed he was helping people to think about the estate tax more clearly; on the other hand his opponents claim his linguistic change was "spin" intended to persuade the general public to believe the estate tax would affect them when in reality it would only affect the wealthiest members of society.

Barnes (1994) addresses those feelings in a more general sense, arguing, "the greater part of what philosophers have written treats lying as a form of deviance, and not sometimes as an instance of conforming to special norms and expectations" (pp. 4-5).

One example of such expectations is in what linguists call indirect speech. Lee and Pinker (2010) examine this form of communication as being a common part of human relations where a desire is veiled behind choices in language. Using a scene from the film *Schindler's List*, Lee and Pinker discuss how a bribe is given and taken without explicitly stating that the act is a bribe. In the case of a bribe, both parties are fully aware of what is happening; yet they pretend the situation is something other than what it is. Nevertheless, there is an act of deceit, what University of California professor of anthropology F.G. Bailey (1991) calls a basic lie, "which occurs when people collaborate (willingly or otherwise) in pretending that circumstances are other than they know them in fact to be" (p. 16).

Lee and Pinker (2010) also give the example of a veiled sexual advance such as, "Would you like to come upstairs and see my etchings?" (p. 785). Compared to a bribe, the implications of which presumably both parties fully understand, a veiled romantic overture allows both parties to have a higher order of deniability (p. 787). In other words, a woman can decline the romantic advance, without bruising the man's ego, by declining the offer to see the etchings (pp. 796-797). It also allows them both to pretend that no violation of social norms and decency has occurred in the offer itself. This indirect speech "allows plausible deniability of a breach of a relationship type and thus avoids the aversive social and emotional consequences that would be triggered by such a breach" (p. 787). The same practice can happen on a larger scale in political communication. One

example of such indirect political speech is George W. Bush's use of the phrase "a culture of life." During his 2000 and 2004 campaigns for the presidency Bush used this phrase to telegraph the message to supporters that he took certain policy positions, including opposition to abortion and favoring restrictions on stem cell research, without making overt statements about those contentious issues and thus alienating many voters who would be turned off by those positions. So his position, through his choice of words, becomes veiled to some and clearer to others who also use the phrase "culture of life" and understand its meaning to some in a specific political subculture. The similarities between veiled romantic overtures and veiled statements of policy positions serve as support for Latour's (1988) argument that "If we despise politics we should despise ourselves" (p. 210).

Yet, Latour (1988) argues, it "is only politicians who are thought to be dishonest" (p. 210). Despite scapegoating of the politician, Latour goes on to say that it "takes something like courage to admit that we will never do better than a politician (1.2.1.). … Only the politician is limited to a single shot and has to shoot in public. I challenge anyone to do any better than this, to think any more accurately, or to see any further than the most myopic congressman" (p. 210). Thus it is important to understand that it is not realistic to seek to end all deception in politics. A more realistic or preferable goal of research should be to examine the ways in which deception is discussed in our contemporary informational milieu, identify ways in which these discourses can be problematic and, to inject a sense of social conscience into research, theorize potential ways for developing counter-discourses with the aim of undermining cynicism about politics. It could also be useful to develop ways to deter deception in politics through

public means and not just by way of a critical press scrutinizing a politician's words or leaving each citizen to his or her own devices in scrutinizing political debate.

III. The Road Map

The goal of this first, brief chapter was to lay the conceptual groundwork for what it means to deceive in politics. It was also written to establish the parameters of the discussion for this project, explaining that it will not focus on identifying lies but rather on examining how American political culture discusses deception. This is an important conversation to have because deception is a central concern in politics. The importance of our concern about deception is repeated again and again in how we describe our political leaders in our most idealized images of them. School children were once told that the defining characteristic of *the* founding father George Washington, besides his wooden teeth,[10] is the statement, "I cannot tell a lie." Washington was so honest that it was not that he did not *want* to lie, it was that he was literally *unable* to lie – or so the legend goes.

Plato, in *The Republic*, is so concerned about lying as a political problem that he says if any citizen "is found in our state telling lies, 'whether he be craftsman, prophet, physician or shipwright', he will be punished for introducing a practice likely to capsize and wreck the ship of state" (pp. 144-145). On the other hand Plato also concludes that, "It will be for the rulers of our city, then, if anyone, to use falsehood in dealing with citizens or enemy for the good of the State; no one else must do so" (p. 144). For Plato a

[10] George Washington's wooden teeth serve as another reminder of how enduring falsehood can be. According to the Mount Vernon website this longstanding belief about Washington is actually a myth the origin of which is open to speculation. According to William Etter (n.d.), who wrote a brief essay for the Mount Vernon Ladies' Association, Washington had dentures made of ivory, gold, and lead but never wood (para. 1). Etter says one possible explanation of the origin of the myth is that Washington did not take very good care of his dentures and the stains caused observers to think they were made of wood (para. 3).

top-down lie, from government to citizen, is a necessary good for managing the state; a bottom-up lie, from citizen to government, will certainly kill us all. This presents an important problem surrounding political deception, a problem that is especially addressed in chapter eight.

For some of the judicial discourse discussed in this project deception, especially lying, contributes nothing of value to the political process but it must be protected for the sake of protecting true speech. This is the chilling effect argument that protects deception. If deception is punished someone may be inclined to not speak at all for fear that, even if they believe their speech to be true it may turn out to be false, and they will be punished for deceiving. While there may be a good in protecting individual free speech, and some may see it as worthwhile to protect lies in order to do so, this position along with the one expressed by Plato above, does a greater harm to individual rights. It protects the ability of government to lie to citizens and, while Plato may see this is good for the state, it is not necessarily good for the citizens on the receiving end of those lies.

So deception can happen in a top-down manner (i.e. government to citizens), and it can happen in a bottom-up way (i.e. citizens to government); as the old Quaker saying cited by Martin Jay (2010) goes, citizens sometimes "speak lies to power" (p. 135). Deception can also be discussed as more of a horizontal communication practice or, if there is a hierarchical nature to the relationship between the liar and his target, it is a non-governmental relationship (i.e. citizen to citizen with no government involvement). These are the problems that this project will address. How do we define deception? How do we talk about it? How is it discussed in relation to electoral campaigns? How does the press address deception? How is deception problematized, or *not problematized*, by the law?

This dissertation is broken into three sections. Section I contains, in addition to this introduction, a literature review and a discussion of the research questions and method. Section II contains two chapters: a typology of political deception and a discussion of laws addressing the problem. It also analyzes the judicial discourse surrounding political deception. Section III is the analysis of discourses looking at three discursive sites.

Continuing this introductory section, Chapter two, the literature review, outlines the existing research on lying, deception, and especially deception in politics. The third chapter presents an explanation of the method of discourse analysis, its usefulness in media studies, and how it will be applied to this project. The final section of chapter three will discuss the discursive sites to which the discourse analysis will be applied. These first three chapters set up the analyses in chapters four through eight.

Section II consists of chapters four and five. Chapter four provides a typology of political deceptions, breaking it into six categories. Chapter five examines the legal discourse of political deception. It looks at and categorizes state-level statutes designed to regulate political deception. It then examines the judicial discourse around challenges to these statutes. Chapter five pays particular attention to *U.S. v. Alvarez* (2012), a case that explicitly gives First Amendment protection to unambiguous lies from politicians, a protection that is problematic according to Justice Samuel Alito[11] of the U.S. Supreme

[11] As argued in his dissent in the U.S. Supreme Court's decision in *U.S. v. Alvarez*.

Court, Judge Jay Bybee[12] of the Ninth Circuit Court of Appeals, and Justice Phil Talmadge[13] of the Washington Supreme Court.

Section III, chapters six and seven, delves into the political process, how political actors engage one another with the discourses of deceit. Chapter six looks at how a political organization describes itself as it campaigns for a cause, how that representation can be an exercise in creating an air of authenticity, and how political opponents of that organization combat that authenticity construction through a discourse of deceit. This is done through the lens of examining Rachel Maddow's coverage of the tea party organization FreedomWorks. Chapter seven looks at fact checking organizations and the various discourses of deceit surrounding what they do.

Finally, chapter eight proposes a mechanism for combatting political deception, a campaign ethics council. Relying on arguments made in the case *Pestrak v. Ohio* (1991) the chapter describes how a campaign ethics council could be created and funded, who would serve on it, and what its responsibilities would be. This is not the only solution to the problem of political deception but one of the key arguments to this dissertation is that a solution should be proposed. University of Virginia professor of law Frederick Schauer (2010) argues, "the seemingly increased pervasiveness of falsity in public discussion is a phenomenon that may possibly be a consequence of a strong free speech culture" and that "the widespread existence of public falsity is a topic about which the [free speech] tradition has essentially nothing to say" (pp. 911-912). The last chapter of this dissertation is part of an argument that it is not enough to simply describe the problem of

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[12] As argued in his dissent in the Ninth Circuit's *Alvarez* decision.

[13] As argued in his dissent in the Washington State Supreme Court's decision in *Washington v. 119 Vote No! Committee*.

political deception. Though the problem will never be fully eradicated the political culture must attempt to combat it rather than simply throwing our hands up in defeat and accepting it or continuing with the illusion that the marketplace will simply work itself out.

Chapter 2 – Literature review

If one is seeking the seminal works written on the topic of deception and lying in general, or in politics in specific, there are two good starting points. For a general, not merely political, treatment of the subjects Sissela Bok's (1999) *Lying* is essential reading that has been cited thousands[1] of times. Bok's critique of deception draws on Kant and Aristotle giving "an initial negative weight to lies" (p. 30) and argues, "in any situation where a lie is a possible choice, one must first seek truthful alternatives" (p. 31). This is the position of what Stanford Law professor William Simon (1998)[2] refers to as "Quasi-Categorical Moralism" (p. 435).[3] Portland State English professor, and author of *The Habit of Lying*, John Vignaux Smyth characterizes Bok's position on lying similarly. Smyth (2002) refers to Bok as a "saner" (p. 18) philosopher than Kant on the question of deception while noting that she "shares with Kant the positing of a supposedly general or fundamental rule against mendacity" (p. 19).

Bok, Smyth notes, self-characterizes her position on lying as "moderate" and aligned with Aristotle (p. 20). On this point Bok argues "we must at the very least accept as an initial premise Aristotle's view that lying is 'mean and culpable' and that truthful

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[1] According to Google Scholar, as of a search on 26 September 2014, Bok's *Lying* had been cited 2,412 times.

[2] The reader may note that Bok's book is cited as being published in 1999 while Simon's work citing it was published in 1998. This is because Bok's work was originally published in 1978 while the edition cited in this dissertation was published in 1999.

[3] The definition above is a brief one and Simon notes that "quasi-categorical moralism" is actually "not easy to define" (p. 435). It requires being defined in relation to two other positions, categorical moralism and contextual ethics. The former holds, "some kinds of activities, including lying, are always wrong" (p. 435) while the latter is the belief that "there are often moral costs to lying and [one] should lie only when these costs are exceeded by the morally relevant benefits" (p. 436). Simon defines Bok's position as having "three principle elements" (p. 436). The first is that "moral judgments about lying are subject to powerful cognitive biases" that will generally lead one to always find the moral justification for his or her own lies. The second is Bok's "nostalgia" for categorical moralism that is only slightly tempered by reluctant qualifications. Finally, there is Bok's argument that lying should be a "last resort," which Simon argues is only slightly different from his own contextual ethical position.

statements are preferable to lies in the absence of special considerations" (p. 30). Such special considerations would include Simon's reference to the "famous hypothetical about whether it is morally permissible to lie to the murderer about the whereabouts of his intended victim" (p. 435). This is a widely cited argument from Kant that it is morally impermissible to lie to the murderer (Singer, 1994; Varden, 2010), a position characterized by Simon as "a sanity test flunked by Kant" (p. 435).

Bok's position is that lying is basically immoral and that one should not lie unless it is absolutely necessary. She argues:

> If lies and truthful statements appear to achieve the same result or appear to be as desirable to the person contemplating lying the lies should be ruled out. And only where a lie is a *last resort* can one even begin to consider whether or not it is morally justified. (p. 31). (emphasis in original)

Bok does not say absolutely that lying is always wrong, just that decisions to lie always begin with a "negative weight given to them" (p. 31). She argues that people do not like being lied to and that the consequences for someone who is deceived can range from personal disappointment about the situation, to a loss of faith in others, to a loss of faith in what she calls "information of a conventional nature" with the deceived individual turning to "the stars or to throws of the dice or to soothsayers" (p. 21-22).

Bok's ideas are applicable to political lies in two important ways. First is in that loss of faith in others. The stability of a political system is essential. Without faith in the system, and trust between citizens, and between constituents and their representatives, a political system cannot maintain itself. If the constituents have no faith in the political

process the process at worst will break down and at best becomes a sustained sham. The latter of the two is the basis of Bok's second applicable idea.

Bok argues that deception "can be coercive. When it succeeds, it can give power to the deceiver" (p. 22). Bok fears the loss of autonomy for the deceived. When one is deceived their choices are no longer truly their own. This is especially problematic in the political process. For example, when the voter takes information into the voting booth that information should be accurate. When the voter has been deceived, given information by a candidate or other political actor that is false, they end up exercising their right to vote on a false basis and will perhaps exercise it with consequences they would have not intended had their information been accurate. Judge Milton Shadur lamented in his opinion in *Tomei v. Finley* (1981) that those who deceive in politics are not working to ensure that the stream of ideas "'flows both freely and cleanly.' Instead they are seeking to poison the stream, to deprive voters of a free choice by diverting the intended exercise of the franchise to an unintended result" (p. 698).

This argument directs the discussion toward the second essential reading, Hannah Arendt's *Lying in Politics*. Arendt begins her analysis, which focuses on the Pentagon Papers and U.S. government deception and malfeasance in handling the Vietnam War,[4] with a rather depressing thought. She argues that deception has always been a part of politics; that "deception, the deliberate falsehood, and the outright lie used as legitimate means to achieve political ends, have been with us since the beginning of recorded

[4] The Pentagon Papers were documents stolen from the Pentagon by a military analyst named Daniel Ellsberg. Ellsberg released those documents to the *New York Times* and the *Washington Post*. Both newspapers published portions of the documents, which outlined United States foreign policy mistakes particularly those related to the war in Vietnam. The Nixon Administration sued to stop the papers from publishing the documents; the *Post* complied while the *Times* refused, which resulted in the Supreme Court case *New York Times v. United States* (1971). The Court decided in favor of the *Times* allowing the newspaper to continue reporting on the contents of the Pentagon Papers. An account of these events can be found in the Court's decision and in Ellsberg's book about it (Ellsberg, 2003).

history" (p. 4). That being said Arendt, just as Bok does, notes surprise at "how little attention has been paid, in our tradition of philosophical and political thought, to their significance" (p. 5).

In analyzing the problem of lying Arendt argues that it is a problem that, "no factual statement can ever be beyond doubt … It is this fragility that makes deception so very easy *up to a point*, and so tempting" (p. 6). She says "the historian, as well as the politician, deals with human affairs that owe their existence to man's capacity for action, and that means to man's relative freedom from things as they are" (p. 11) In other words, inherent within politics is the capacity for deception; so the politician's "freedom from things as they are" is what makes it possible for the politician to lie, deceive, dissemble, and manipulate. This is combined with Arendt's lament about the similarities between the processes of selling soap and getting people to "'buy' political opinions and ideas" (p. 8), along with the ease of lying, to create a dangerous political environment.

The notion of self-deception among political elites is also important to Arendt's analysis of the Pentagon Papers and Vietnam. Although she does not use these exact words Arendt's description of Washington is similar to Jamieson and Cappella's (2010) use of the phrase "echo chamber," where a combination of government bureaucrats and university and think tank scholars convinced of their own greatness felt that "defeat was less feared than admitting defeat" (p. 36). Arendt paints a fairly damning portrait of lying in government, one that was exposed by Daniel Ellsberg who leaked the Pentagon Papers to the *New York Times* resulting in one of the most significant U.S. Supreme Court free speech cases, *New York Times* v. *United States* (1971).

The important point in this instance, a point that will come up again and again in this dissertation, is that political deception is rarely as simple as being a situation where a politician knows that X is true and yet tells the public not-X is true. Evert Vedung (1987), a Swedish scholar of political science, argues, "lying is a *relatively* uncommon infringement of the rules of rational political argumentation. The risks to the liar are too great. Other types of deception are less risky and, apparently as a consequence of that, more widespread" (p. 356). Arendt lists these other forms of political deception, including secrecy, deliberate falsehoods, outright lies (p. 4) and very importantly there is Arendt's repeated reference to self-deception on the parts of the decision makers that was part of the U.S. government's handling of the Vietnam War.

Bok and Arendt represent historical resources on deception in politics. The most prolific contemporary writing on deception and politics comes from the team of Kathleen Hall Jamieson and Brooks Jackson. Jamieson and Jackson, however, take a different approach in their analysis of deception. Bok explores strictly philosophical questions about lying and Arendt explores philosophical questions arising from an analysis of a specific incident in political deception. Jamieson, a Professor at the Annenberg School for Communication at the University of Pennsylvania and director of the Annenberg Public Policy Center, has written numerous books and articles on politics and the press and is a contributor to FactCheck.org. Jackson, her coauthor on the book *unSpun: Finding facts in a world of disinformation*, is also Director Emeritus of FactCheck.org and has a long history of working in journalism covering politics.[5] Jamieson and Jackson take a journalistic and analytical approach to specific instances of political deception in

[5] More biographical information about Jamieson and Jackson can be found at the FactCheck.org "about us" page at http://www.factcheck.org/our-staff/.

their research. They are searching for empirical evidence, in a systematic way, for the veracity of claims made by politicians and other political actors.

They have contributed, in addition to multiple books on the topic, research correcting political misinformation, spin, and lies through their organization FactCheck.org. They describe their organization as "a nonpartisan, nonprofit 'consumer advocate' for voters that aims to reduce the level of deception and confusion in U.S. politics" (FactCheck.org, n.d., para. 1). The organization does a wide range of political analysis by doing everything from a broad report fact checking one issue such as gun control (Farley, Robertson, & Kiely, 2012) to examining a specific claim made by one politician such as their examination of Sen. Rand Paul's claim that the CIA recruited and funded Osama Bin Laden to fight in Afghanistan against the Soviet Union in the 1980s (Farley, 2013). FactCheck.org also analyzes claims made over the course of an entire single election as they did with the 2013 Virginia gubernatorial campaign (Robertson & Jackson, 2013) and they fact check claims made by presidents during state of the union speeches (Kiely, Jackson, Robertson, & Farley, 2012).

The work done by FactCheck.org stands in contrast to more partisan attempts at fact checking claims that often come across as political rhetoric more than actual attempts to critique the factual basis of a claim. There is a cottage industry for partisan books claiming their opponents are all liars and dissemblers. A sub-industry is devoted to accusations against specific presidents. Entire books have been devoted to calling Bill Clinton (Becht, 1997; Coulter, 2011; Hitchens, 2013), George W. Bush (Conason, 2003; Waldman, 2004), and Barack Obama (Klein, 2010; Pavlich, 2012) liars. There are also books accusing everyone falling in one part of the political spectrum of being liars

(Coulter, 2003; Franken 2004). All of these books are characterized by partisan hyperbole that undermines any value they may have for helping the reader actually understand what political deception is, how it works, and if it is actually happening in any of the instances discussed within those books.

This cottage industry of books has a secondary branch in the form of partisan media watchdog websites. These sites are becoming important parts of the political media ecology. Although their research is not academic, peer-reviewed work, it is important to discuss what they do because it is a force that drives one aspect of the discourse of deceit – the bias discourse. Deception is part of this storyline for political partisans in the way these sites describe the work they do and how they talk about the media industry. These forms of research generally do not see the problem of political deception as being one of boldface lies but rather deception that involves misinformation, disinformation, and omission or ignorance.

For example, on the conservative side the Media Research Center (MRC) describes their work as "neutralizing left-wing bias in the news media and popular culture [that] has influenced how millions of Americans perceive so-called objective reporting" (n.d., para. 2). They go on to say that they "educate" their readers "about left-wing bias in the media" (para. 3). Similarly, the liberal organization Media Matters for America (MMA) define themselves as a "progressive research and information center dedicated to comprehensively monitoring, analyzing, and correcting conservative misinformation in the U.S. media" (n.d., para. 1). Neither group uses the terms "lies" or "liars" to define the information or people they critique. This is an interesting contrast with the more hyperbolic titles of the books mentioned above. It is important to note that the work done

by groups like MCR and MMA is overtly partisan and that there is good, non-partisan research on the ways in which reporters cover politics.

Stanton Wortham and Michael Locher, researchers who have published multiple works on language and reporting, examine in an article for the journal *Language & Communication* how journalists use embedded metapragmatics. This is when a "speaker reports what one speaker says about another's language use" (Wortham and Locher, 1999, p. 109). Wortham and Locher argue that reporters covering politics use this discursive strategy in order to "express allegations against politicians without themselves taking responsibility for those allegations" (p. 110). They argue that there are two conflicting forces influencing journalism; reporters are expected to write stories that are somehow both objective and sensational (p. 124). Thus reporters are inclined to use phrases such as "Bush claimed that Clinton lied" because it allows them to present claims that are sensational and involve conflict while distancing themselves from the act of making those claims thus maintaining at least the illusion of objectivity.

Wortham and Locher's research is useful here because it demonstrates how discursive strategies will vary across realms of political communication such as campaigns, journalism, and the law. For instance, two politicians on the campaign trail are in a communication context that is very different from a reporter communicating with or about a candidate, which is a different context from a reporter communicating with or about an elected official. The norms of behavior in each context are going to vary, what can be said and how it can be said is going to depend upon the situation. A candidate may be hesitant to use the word "lie" to describe an opponent's communication. A reporter may also be reluctant to use the word "lie" but willing to report when a candidate uses it.

University of Missouri-Columbia communication professor William Benoit's examination of the 2000 presidential campaign between Republican George W. Bush and Democrat Al Gore showcases some examples of how the approach to accusations of deception depends upon the context. In addition to the difference between candidates making accusations about lies, as opposed to a reporter accusing a candidate of lying, there are also different ways in which campaigns can make such accusations about one another. In the 2000 election, Benoit (2003) says, the Bush campaign and the Republican National Committee put a great deal of focus on questions about Gore's character by making accusations that Gore was a serial exaggerator and generally dishonest (p. 173).

Wortham and Locher argue that reporters are hesitant to make overt accusations of dishonesty on the part of politicians for fear of appearing partisan so they embed those statements in their reports by using someone else's words. Similarly, campaigns are hesitant to allow the candidate to make such overt accusations for fear of creating the public perception of ugliness on the candidate's part, so such accusations like the ones Bush made of Gore, will come in the form of press releases or statements from campaign surrogates. A surrogate is an individual who is not a member of the campaign staff but is a public supporter of the campaign; for example, a senator or governor who has endorsed a presidential candidate may act as a surrogate who makes negative statements about an opponent.

When a candidate, such as Bush during the 2000 election, has to question the honesty of his opponent it must be done in softer terms. A good example of this is when, during the first presidential debate of the 2000 election on October 3, Bush accused Gore of being "guilty of 'fuzzy math'' and trying to 'scare' the people with inaccurate

depictions of [Bush's] proposals" (Berke, 2000, para. 14). The communicative strategy for Bush in this case was to convey the message that Gore was lying without explicitly calling Gore a liar. Bush said that Gore was "trying to 'scare' the people," meaning that Bush is arguing that Gore *knows* he is using "fuzzy math" (that is, manipulating numbers) and he is *intentionally* making false statements for the purpose of misleading people. By softening the language Bush is able to call Gore a liar without saying "he is a liar" and thus avoids the consequences of being accused of "going negative."

Whether a person is willing to use the word "lie" to describe a statement draws attention to the fact that much of the work done on deception is devoted to defining what it means to deceive or to lie. The problem is in part a political one. To call someone a "liar" is a harsh statement and could result in a public backlash against the accuser for "going negative" just as much as it could go against the supposed liar for telling the lie. The problem is also a definitional one. It is difficult to define what it means to tell a lie and to make a distinction between lying as opposed to other forms of deception. So politicians and their surrogates have to be careful with the word "lie" because it can be difficult to prove definitively that a statement is in fact a lie.

There is of course Bok's definition of "an intentionally deceptive message in the form of a statement" (p. 15). Adler (1997) defines lying in the simplest terms as "asserting what one believes false" (p. 435). Varat (2006) defines a lie as "an intentional affirmative assertion designed to produce a belief in the listener that the speaker knows, or at least believes, to be false" (p. 1109). The definitions of lying can vary based upon the perspective and purpose of the person doing the defining. For Ekman (2009), a psychologist who studies body language and deception, a lie is "a deliberate choice to

mislead a target without giving any notification of the intent to do so" (p. 41). The philosopher Arnold Isenberg defines a lie, as "a statement made by one who does not believe it with the intention that someone else shall be led to believe it" (p. 466). U.S. Supreme Court Justice Stephen Breyer defines lies in the case of *U.S. v. Alvarez* as "false factual statements made with knowledge of their falsity and with the intent that they be taken as true" (p. 2553).

Chishollm and Feehan (1977), who wrote a widely cited article on intention and deception in *The Journal of Philosophy*, make an important and very specific distinction in how lying is defined. They argue that to say, "A lie is a statement made by one who does not believe it with the intention that someone else shall be led to believe it" (p. 148) is inadequate. A better definition, they propose, would be to say, "A lie is a statement made by one who believes it to be false who has the intention that someone else shall be led to believe it" (p. 148-149). The distinction here is subtle but important. In the first instance the purported liar "does not" hold a belief. For example a congresswoman may have no idea whether a certain policy will increase taxes but she will say that it will because it may be politically advantageous if she opposes that policy. By the latter definition of lying said representative may firmly believe that said policy will in fact *not* cause taxes to increase but she says that it will do so because it is politically useful for killing said policy. So in the former a politician who "does not believe" something and the latter the politician "believes [something] to be false." One who does not believe a policy will have a certain effect can include a politician who is simply uncertain about it. This is one way to distinguish between lying and deceiving. If a politician knows

something to be false but says it anyway he has lied; if he is uncertain about something but feigns certainty he has deceived.

Jorg Meibauer, a professor of linguistics at Johannes Gutenberg University in Germany, presents two other distinctions between lying and deceiving. The first is that lying is strictly verbal. As Bok (1999) says, to lie is to make "an intentionally deceptive message in the form of a statement" (p. 15). Meibauer (2005) makes the lying/deception distinction with Kant's example of the man who packs his bag to give the impression that he is leaving some place when in fact he is not. He has not lied because he has not made a statement but he has deceived because he purposefully gave a false impression through his actions.

The second distinction is that when a deception is verbal it is "not bound to assertions" (Meibauer, 2005, p. 1383). In other words, according to Meibauer, a lie is to assert something one knows to be false with the intention of leading another to believe that false assertion to be true. Meibauer uses the example of someone asking, "Where has Peter gone?" The person asking knows Peter was never present but is attempting to give others the false impression that he was and has since left; this is an act of deception. If the person had said, "Peter was here a few minutes ago but he left. I wonder where he went," he would be lying because he asserted that Peter was present when he in fact was not.

The problem with using assertion as the basis for the distinction is that it creates a fine, and easily negotiated, line between lying and deceiving. If a politician is looking to create a false impression but does not want to be called a liar the solution becomes as simple as rephrasing the false statement as a question. If politician X wants to give the false impression that taxes have increased in recent years when in fact they have not he

might say, “taxes have gone up quite a bit the last few years.” This would be a lie. On the other hand, he could ask, “why are taxes so high lately?” If he in fact knows taxes have gone down, in the latter hypothetical, he has not told a lie. He perhaps deceived but he has not lied. The transformation from lie to deception is as simple as a transformation from statement to question.

In the legal realm a big part of the debate about political deception that will be explored in this dissertation is the debate around whether political deception should be regulated. There are good arguments for and against the curbing of false campaign speech through some form of government regulation. While Gerald Ashdown (2012) says the “arguments on both sides of the issue of regulating false campaign speech are compelling” (p. 1095), he also says legal solutions to the problems of false and negative campaign speech may be out of the question due to American courts’ decisions in recent years. For example, Ashdown cites the decision in *Citizens United v. F.E.C.* (2010) as being especially problematic arguing that if the corporate expenditures aspect of that decision is applicable to campaign deception then even defamation lawsuits under the *New York Times* actual malice standard may be impermissible (p. 1108). Lieffring (2013) makes a similar argument about the even more recent decision in *U.S. v. Alvarez* (2012) saying this decision would indicate the Court would knock down any attempt to regulate “false, non-defamatory campaign speech” (p. 1061).

Legal research on the matter supports Ashdown’s assertion about the compelling nature of both sides of the argument. There are some, such as May (1992), Richman (1998), Kane (1999), Kruse (2001), Williams (2007), Goldman (2008), White (2009), Schauer (2010), and Lieffring (2013), who argue in favor of some form of regulation of

false and misleading campaign speech; however, even some who are in favor of such restrictions, Ashdown for example, are admittedly pessimistic about the constitutionality of such statutes. The are others, such as Conn (1994), Varat (2006), Rodell (2008), and Norton (2011), who argue strong cases against such restrictions. Marshall (2004) is a good example of an analyst who takes the "catch-22" position on the matter, seeing problems with both regulatory schemes and political deception left unchecked. Ferguson (1997) does not take a clear position on the value of such regulations but instead presents a useful discussion of how states have attempted to restrict campaign falsity, an analysis he wrote as an intern for the Florida House of Representative's Committee on Ethics & Elections and then later published as an article in the *Florida State University Law Review*.

Marshall's catch-22 on campaign speech regulation is that on one hand "unchecked excesses in campaign speech can threaten the legitimacy and credibility of the political system" but on the other hand there are "serious dangers and risks" to allowing the government to intervene in, and restrict, campaign debates, not least of which is a First Amendment concern (p. 286). Marshall argues that because the Court upheld the restriction on corporate campaign expenditures in *McConnell v. F.E.C.* (2003) that the same logic should be applied to false campaign speech, thus allowing some restriction on political deception. The problem for Marshall's article is that it was published in 2004, in a pre-*Citizens United* world. In the *Citizens United* decision the Court held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" (p. 909).

Even in 1997, years before *Citizens United*, Ferguson recognized "State legislatures that truly desire to curb negative campaigning must operate within a narrow regulatory environment" (p. 500). Such restrictions, Ferguson told the Florida legislature in his report, would have to withstand strict scrutiny. While noting the obstacles faced by such restrictions Ferguson still argues that false and negative campaign advertising distort the political process and "diminish the voters' ability to assess candidates and their views" (p. 486). May (1992) points out that false and negative political speech not only hurt the public's ability to elect the better candidate from the choices before them but also limits those choices. Dishonest political attacks harm the public and the political process by "diminishing substantive discussion of important campaign issues, and by discouraging qualified candidates from seeking public office" (p. 179). When a decent, honest, and qualified person looks at what they might have to go through in order to get elected they may be likely to say, "I am not going to put myself, and my family, through the wringer to get elected. It is just not worth enduring those false attacks." This will be especially so if potential candidates know there is little to no legal recourse for protecting one's reputation when entering the political arena.

Kane makes an appealing argument for addressing this problem using the court system as a mechanism for addressing false political attacks. One key issue for Kane is addressing the *New York Times* actual malice standard. The actual malice standard comes from the case *New York Times v. Sullivan*, a case in which an elected official in Alabama sued the *New York Times* for defamation for printing an ad that contained what he claimed were false and defamatory statements related to his conduct in the service of his position. In this case the U.S. Supreme court found that in order to win a defamation

lawsuit an elected official must meet the actual malice standard meaning the official must demonstrate the allegedly defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times v. Sullivan*, 1964, p. 280). Kane (1999) argues that, despite some interpretations, this actual malice standard does not preclude "the judicial vindication of truth in the context of campaigns" (p. 760).

It is Kane's contention that "negative campaigning undermines many core democratic values" (p. 760). With this in mind Kane calls for the courts to become venues for the protection of reputations not through punitive damages from lawsuits but instead through judicial decrees of the truthfulness of statements made in campaigns. He cites Justice White's argument from *Dun & Bradstreet v. Greenmoss Builders* (1985):

> I can therefore discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false — a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published. (p. 768)

This is an argument that will be explored in chapter eight of this dissertation. In an instance like this one the court would not be violating the First Amendment rights of any political actor or restricting speech. It would merely be adding one more voice to the exchange of ideas in a campaign. As the Ohio court held in *Pestrak v. Ohio* (1991) a court declaration such as this one is similar to a government agency doing research and issuing a report on that research. This is also the argument made by Norton (2011), that the First Amendment interests at the basis of American ideals about public debate are enhanced when the government contributes information on a given issue.

Kane argues that such a solution has two major advantages for the victim of a false campaign attack. First, a candidate could use "official vindication of her reputation … to rehabilitate her own reputation" within the community. This would have the coinciding benefit of "undermin[ing] the credibility of her electoral opponent" (p. 792). Along with this the second benefit of such an official declaration is that it would act as a "a de facto preclusive effect against further use of that claim" (p. 792). Kane's proposal is also useful because it addresses the problem of false attacks in a narrow manner and it would be difficult to argue that such a court declaration would have a chilling effect on the First Amendment protected right to political participation.

Another aspect of Kane's proposal is how it might address some of the arguments against such regulations, arguments that are exemplified by the Washington Supreme Court's decision in *Washington v. 119 Vote No! Committee* (1998). In this case the court knocked down a truth in political advertising statute arguing, "the State's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic" (p. 698). So on one hand there is this argument against regulation, that the voters are able to figure things out on their own without needing help from the state. This argument runs parallel to Varat's (2006) argument against such restrictions on the basis that "policing deception would tend to undermine the enlightenment function of free expression" (p. 1109).

Despite these arguments one has to address University of Virginia Law Professor Frederick Schauer's (2010) concern about First Amendment theory's absence of a response to the problem of falsity (p. 912) and some compelling social science evidence that corrections in the marketplace often fail to address the problem (Nyhan & Reifler,

2010; Nyhan, 2010). For example, Dartmouth political scientist Brendan Nyhan (2010) found that despite frequent corrections from fact checkers, organizations that would be perfect examples of voices in the marketplace, opponents of the Affordable Care Act, which was being debated in 2009, repeatedly made the claim that the bill contained "death panels" that would coerce elderly people to prematurely end their lives. Clearly there was an element of "market failure" in the repetition of this myth even as it was repeatedly corrected. Future research might usefully examine whether Kane's proposal for an official court decree of the falsity of a statement would be a more effective counterbalance to such false statements than the press or political opponents.

This example raises another set of issues; who is the speaker to which such a statute would be applied; who (or what) is the target of the speech; what is the subject of the speech? The inability to correct and stop the "death panels" claim is one thing but it becomes a different problem when one group of political actors are claiming that "politician X" wants to "kill your grandma." Making such a claim about a politician's policy position may not be defamatory but it may do reputational harm. Having a court decree of the falsity of the claim could be useful in protecting that politician's reputation in his or her community. The handling of such speech is altered by the changing context within which the speech is made, for example, by changing who is making the claim.

For example, lawyer Evan Richman (1998) makes the case for the actual malice standard only applying to media defendants (p. 669). What Richman is getting at with this argument is that news media covering a campaign, reporting on the words and actions of the candidates, require a greater level of protection from defamation suits from one of those candidates than the level of protection afforded to a candidate talking about

his or her opponent. The news media that cover a campaign require greater breathing room for their speech than the candidates. This is especially so as it applies to an incumbent running for reelection. Goldman (2008), for example, argues that false campaign speech is so problematic because falsity in campaign communication leads not only to voters choosing something that may not have chosen if they had the correct information but that it also reduces the accountability of elected leaders. So a false statement from a candidate is qualitatively different from a false statement in a newspaper article.

There are a number of concerns about falsity in political debates raised in legal research. William Williams (2007), a writer for the *South Dakota Law Review*, worries that "anyone can say anything about a ballot measure – no matter how demonstrably false or egregiously misleading – and nothing can be done stop or prevent it" (p. 327). Ashdown also fears that "calculated campaign lies are beyond state sanctions" (p. 1104). For Kruse (2001) this raises questions about the integrity of "electoral processes and the general public debate" (p. 133).

On the other hand it is important to note the concerns of critics of such regulations. Conn (1994) argues that laws against false campaign speech "fail on both constitutional and practical grounds" (p. 508) and that when faced with such falsities we should find a way to "resolve the dilemma in favor of less government intervention in the political process" (p. 510). Varat (2006) makes a chilling effect argument in pointing to a threat to the First Amendment protected right to express opinion. He employs this common argument that one might state what one believes to be true, which could later turn out to be false, and thus be transformed into "an actionable lie" (p. 1111). Knowing

that what one believes to be true could potentially later turn out to be false, and thus transformed into an actionable lie, might result in one choosing to not speak at all, which could potentially result in the loss of true statements that could be useful to advancing a debate. This chilling effect argument is found in court cases such as *Minnesota v. Jude* (1996).[6]

While all of the works cited here are from the late Twentieth and early Twenty-First centuries, legal questions about this issue are not new. The *Harvard Law Review* was asking questions about this issue in 1957. This fact combines with the first line of Goldman's abstract to produce an overwhelming sense of pessimism about the whole situation: "Much of campaign advertising is false" (p. 889). Goldman might be just a bit hyperbolic in that statement but it cannot be denied that the effect of political actors being able to disseminate false campaign speech with little to no consequence is a "potential harm [that] cannot be overstated" (Williams, 2007, p. 328). On the other hand one cannot ignore Rodell's argument, in his analysis of the *Rickert* case, that Washington State's "insertion of a truth-finding government agency into the middle of a political campaign conflicts with the fundamental thrust of the First Amendment" (p. 958).

Robert Sokolowski (2007) addresses this conflict between truth and freedom in a slightly different manner. The argument goes, as he says, that truth "seems to exclude freedom. If something shows up as true, we seem to have no further choice about the matter" (p. 39). In other words, if something is declared "truth" we lose the freedom to act against it. Instead of having two equally acceptable alternatives we have truth and

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[6] In this case a congressional candidate made a statement that, after the election was over, was found to have been false and thus a violation of a Minnesota truth in political advertising law. The candidate, Thaddeus Victor Jude, and his campaign manager were found guilty but they appealed the verdict. The Minnesota Court of Appeals overturned it and found the law unconstitutional. This case will be explored in greater depth in chapter five.

non-truth and the latter has been deemed unacceptable; it ceases to even be a choice. Sokolowski argues that the way to bridge this gap between truth and freedom is through the idea of responsibility.

For Sokolowski the discovery of truth creates freedom. As noted in the introductory chapter to this project and in the typology in chapter four, there are a variety of definitions of lying. The most important element of those definitions is the idea a lie is *not* an accidentally false statement. As discussed earlier in this chapter there are a variety of definitions for what it means to tell a lie. Bok (1999) calls a lie "an intentionally deceptive message in the form of a statement" (p. 15). Adler (1997) defines lying as "asserting what one believes false" (p. 435). Martin Jay (2010) argues lying "requires the acquired skill to speak improperly" (p. 39). In all three instances *intent* is a necessary ingredient. By definition, as Sokolowski argues, "we can choose to tell the truth or to tell a lie only after we have acquired the truth in some manner" (p. 40). It is a sense of responsibility, whether it is to the community, one's honor, or the concept of truth itself, which compels one to tell the truth. Where a regulatory regime comes into the equation is in how much power it is given to define, and compel one to tell, the truth.

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

members of the public, from defamatory and/or false attacks. There is also the collective responsibility to protect the integrity of the electoral process.

Standing in stark contrast to all of this debate about whether it is constitutionally acceptable to regulate lies, and the partisan discussions about how one's opponents are just terrible, no good, dirty, rotten liars, and the philosophers who debate just what it means to lie, there is political philosopher Glen Newey who actually writes in defense of political deception. Newey (1997) argues, "It is not merely that political lies sometimes fail to violate autonomy. Sometimes they are *required* by it" (p. 108). What Newey is getting at is the idea that at times political leaders are faced with a series of bad choices, each one worse than the one before it, where in the list of options they have there is no "good" option. In these cases the political leader is forced to make a "bad" choice, one that will cause harm and that, "no government advocating the policy, and truthful about its costs, would win popular support" (p. 108). Newey proceeds to argue that the citizens may actually authorize disinformation "in order to make, in such circumstances, the policy politically acceptable" (p. 108).

Taken to its ultimate conclusion Newey makes a sort of "evil genius of the object" argument that echoes Baudrillard. This is Baudrillard's (2000) idea that "people are always supposed to be willing partners in the game of truth" (p. 103). In Baudrillard's analysis the public are the object, the subject is the leader ruling the masses or the pollster studying them. As the leader engages the public they disappear, "the subject is absolutely alienated in its sovereignty" (p. 104). In other words, Baudrillard argues, "The deepest desire is perhaps to give the responsibility for one's desire to someone else" (p. 105). The masses turn responsibility for their desires over to political leaders.

There is a scene in the conclusion of Sydney Pollack's 1970s classic political thriller *Three Days of the Condor* (Schneider, 1975) in which Robert Redford is threatening a CIA agent with the possibility that he will leak secrets about agency operations in the Middle East to the media.[7] The agent, played by actor Cliff Robertson, scoffs at Redford. Robertson tells Redford the public will not want the government to ask for consensus if there comes a time when food or oil are running out. "They'll just want us to get it for 'em," he tells Redford. This is the evil genius of the object; it is a public complicit in evil deeds, while avoiding confrontation with that complicity through self-deception. The subject perhaps deceives the public but only because the public is a willing participant in accepting the deception. Newey similarly argues that the public "might explicitly condone the government's use of dissimulation from time to time where this secured … public benefits such as national security or economic stability" (p. 108).

This is the pessimistic view of political deception; the government does evil and immoral things and lies to the public about them but not because those officials want to personally profit from and then get away with their evil deeds or simply because of some self-deception on the part of those officials, as in Arendt's analysis; the deception is there because of the "evil genius of the object," the public is a willing participant in the evil and wants to be deceived about it so as to enable a self-deception that makes it possible to avoid confronting moral culpability for the governmental misdeeds done in the name of the public. Gustav Le Bon describes an only slightly less pessimistic characterization of political deception in his discussion of political leaders manipulating the masses into doing what is best for them.

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[7] The scene described here is from the closing minutes of the film. Readers interested in seeing the scene can find it at this URL: http://youtu.be/9w3E3eFMsLg.

For example Le Bon's (1896) argument for an unjust tax being imposed upon masses who don't understand that the tax "may be the best for the masses" (p. xiv) because understanding this requires "an amount of foresight of which the masses are incapable" (p. xv). Even in Le Bon's example "manipulation" and "deception" are foggy concepts. Le Bon argues the masses are more likely to accept without complaint a tax that is levied little by little over time rather than in one lump sum. The act and the results are the same, although the application is altered. There is a manipulation of things felt by the masses, an altering of perceptions through an altering of policy application, but no lies are told.

Where Le Bon has political elites manipulating the public the legendary political journalist Walter Lippmann reminds his readers that elites are subject to intellectual shortcomings and intra-class manipulation – elites manipulating elites. Lippmann describes one scenario where in 1919 a rumor was floating around that a British admiral had ordered American naval forces into battle. Before waiting for confirmation of the rumor, Republicans took to the floor of the U.S. Senate to decry this as evidence for the rightness of their opposition to the establishment of the League of Nations. This kind of thing would be happening all the time, they argued, should that organization be allowed to form. Democrats took to the Senate floor to argue just the opposite, if there were a League of Nations this kind of thing would be prevented by clearer international rules. Lippmann describes the senators saying, "Being lawyers they still remember some of the forms of evidence. But as red-blooded men they already experience all the indignation which is appropriate" to the situation (p. 12). In other words while Le Bon fears the crowd Lippmann calls out the politicians for being just as easily swayed away from

reason and toward emotion, that people at every level of the social/political hierarchy are subject to political self-deception.

This dissertation contributes to the existing literature discussed in this chapter in a few ways. First, it looks at political deception through discourse analysis. This will be explored in greater depth in the next chapter on the research method but, briefly put, this dissertation will examine how political actors discuss deception and use accusations of deception as a political tool. The works cited in this literature review generally do one of two important things: (1) they do the work of defining what deception is, in particular what a lie is, or (2) they actually make accusations about deception. The research for this dissertation does look at what it means to deceive but only insofar as it is necessary for looking at how political actors talk about deception; it makes no accusations of deception.

This dissertation also builds on the research cited here in the types of discourse it examines. First there is the discourse of politics and campaigns. Chapter six, which looks at the tea party and its critics, especially Rachel Maddow, takes on the partisanship of discourses of deceit. It looks at deception as a tool in political debate and political campaigns. Chapter seven, which examines the discourse surrounding fact checkers, looks at how the discourses of deceit are part of descriptions of the role of the news media in American politics. Finally, there are the issues that come out of the debate about the role of the law in political deception discussed in chapter eight.

These three chapters make up the third section of this dissertation. The remainder of this first section, chapter three, will explain the research method and the research questions. It defines discourse analysis and explains how it will be applied to political deception. This will be followed by section two which is made up of two chapters.

Chapter four is a typology of political deception and chapter five is an exploration of the law and the courts, a typology of legal responses to the problem of political deception.

Chapter 3 – Research Questions and Method

I. Introduction

Social anthropologist J.A. Barnes (1994), in his book *A Pack of Lies*, argues that the "political arena is second only to warfare as a domain where lies are expected, do in fact occur, and are to a substantial extent tolerated" (p. 30). Just as in war, it is accepted that there will be deception in politics; it is even an expected practice to engage in various forms of political deception, for example when the language of warfare becomes mixed into the process of campaigning it becomes understandable how there would be deception there. This essentialization of deception raises important questions about how political actors talk about, think about it, and thus enact deception in their practice of politics.

Former Speaker of the House Newt Gingrich, who in late 2011 was campaigning for the 2012 Republican nomination for president, told reporters on his campaign bus that "Politics has become a really nasty, vicious, negative business and I think it's disgusting and I think it's dishonest" (Karl, 2011, para. 2). There are a few things happening in Gingrich's statement that require some discussion. First is Gingrich's apparent tying together of negativity and dishonesty, as if something cannot be both honest *and* negative, or perhaps even dishonest and positive.[1] Second is his use of the words "has become," as though there were a time in which American political campaigns were genteel affairs, ignoring the fact that political campaigns have never been for the faint of

[1] Perhaps it seems a silly premise that something would be dishonest and positive but such a thing is in fact possible. In privacy law there are cases known as positive false light cases. The best example of such a case is *Warren Spahn v. Julian Messner* (1967). Spahn was a well-known pitcher in Major League Baseball about whom Julian Messner published an unauthorized biography. Messner's biography contained details about Spahn's "childhood, his relationship with his father, the courtship of his wife, important events during their marriage, and his military experience" (p. 127). All of the details in the biography, including the claim that Spahn had won the Bronze Star in his service during World War II, placed Spahn in a very positive light but were completely fabricated. The court ruled in favor of Spahn in this lawsuit and ordered Messner to discontinue publication of the book.

heart. One need only look to the campaign between John Adams and Thomas Jefferson in 1800 to see that American political campaigns have not *become* nasty, vicious, and negative, but rather *have always been* nasty, vicious, and negative.

Barnes and Gingrich represent just two examples of the many discourses of deceit. These discourses reflect conventional wisdom, assumptions about political deception reflected in the ways in which political actors talk about it. Some see emerging media as improving the effectiveness of and speed at which deception is disseminated (Perloff, 2010). Others acknowledge that deception has always been present in American politics (Lerche, 1948). This constant presence of deception in campaigns has raised some legal debate about the topic that Judge Jay Bybee, in his dissent in the Ninth Circuit's *U.S. v. Alvarez* decision, notes has produced contradictory Supreme Court decisions on the acceptability of legal restrictions of deception (*U.S. v. Alvarez*, 2010). One side of the debate Bybee describes is more prominent, the side that argues that deception is a natural part of political discourse and is best addressed by counter speech as opposed to government restriction or punishment for the deceivers. Another discourse of deceit is in the absence of language, the ways in which candidates and surrogates accuse opponents of deception without using the words "lie" or "liar" (Spicer, 2012).

This chapter will explain the research questions and method that will be used to examine these discourses of deceit. Section II will discuss the research questions and how they will be examined. This will be followed by section III, which will explain discourse analysis as a research method and explain how it is being used in this project. Finally, section IV will define the sites of discursive analysis that are being examined in this project: (1) campaigns, specifically the campaign that started the tea party and *The*

Rachel Maddow Show's coverage of that campaign *qua* astroturf,[2] (2) journalism, especially the relatively new creation of fact checking organizations in the news media, and (3) the law, examining court cases and statutes dealing with political deception.

II. Research Questions

The first two research questions address the ways in which political actors discuss deception.

> **RQ 1:** What are the political and philosophical arguments that are common across discourses about deception in politics?
>
> **RQ 2:** How do participants in various political discourses describe deception in politics?

Because there is so much talk about the pervasiveness of deception the first research question is a starting point for addressing issues like why there is a public perception that politicians do not keep their promises, despite evidence to the contrary (Sulkin, 2010). Breaking promises is just one form of political deception but such discussion is a perfect example of how political actors discuss deception. To accuse one's opponent of failing to fulfill promises is a euphemism for accusing the opponent of deceiving the public. This research will look at other ways in which political actors talk about deception.

This requires looking at various discursive sites for common threads about lying. The second research question opens up the possibilities of analysis, thinking about those sites of political discourse. This includes a wide range of venues for political

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[2] A commonly used term in politics and public relations, "astroturf" is used pejoratively to question the authenticity of the political activism of one's opponents. Edward Walker, professor of sociology at UCLA, defines astroturf as comprising three characteristics. It is "highly incentivized," for example activists may be paid money in exchange for their activism. It involves some form of deception, either deceiving the activists about the nature of the protest or deceiving political leaders about the nature of public opinion (i.e. giving a false impression of the authenticity and enthusiasm of public sentiment). Finally, astroturf organizing conceals "the disproportionate resources provided to a mass mobilization effort by an elite patron or group of patrons" (p. 46).

communication such as news reports in various media, political advocacy documents instructing advocates on how to manage a campaign, press releases, political speeches, and court decisions just to name a few.

The third research question expands upon the second by placing the forms of discourse under examination into three categories.

RQ 3: How is political deception discussed in the three separate realms of political campaigns, journalism, and the law?

Wortham and Locher's (1999) research, discussed in the literature review, offers one example of how discursive norms are part of how political deception is discussed, demonstrating how journalists can use accusations of deception rather than making the accusations themselves. These norms of veiled accusations, by contrast, certainly do not apply to political books where even the titles contain overt accusations about deception. For example, Joe Conason (2004) talks about *Big Lies* in his book about the Bush Administration, and Ann Coulter (2003) talks about *Slander* in her book about liberal discourse about conservatism. Research question three can be elucidated by an example such as that of then-NBC White House correspondent David Gregory and his 2006 apology to the Bush Administration for his behavior during a press briefing.

On February 13, 2006, it was reported that then-Vice President Dick Cheney had accidentally shot a hunting companion (Bash, 2006). This incident resulted in some conflict between members of the press and the Bush White House, with some, such as Gregory, questioning whether the White House had disclosed all the details of the incident or if some information was being withheld. During an exchange with then-White House Press Secretary Scott McClellan, Gregory said, "I'm sorry, but I'm not getting

answers here, Scott, and I'm trying to be forthright with you, but don't tell me that you're giving us complete answers when you're not actually answering the question. Because everybody knows what is an answer and what is not an answer" (MSNBC, 2006, para. 86). This was followed by an off-camera exchange between Gregory and McClellan, which was described by Tim Russert, one of the top political reporters in America at the time and host of the preeminent Sunday morning talk show *Meet the Press*, as containing a moment when Gregory called McClellan a "jerk" (para. 91). When later asked by Russert for his reflections on the events Gregory responded with an apology.

> I think I made a mistake. I think it was inappropriate for me to lose my cool with the press secretary representing the president. I don't think it was professional of me. I was frustrated, I said what I said, but I think that you should never speak that way, as my wife reminded me, number one. And number two, I think it created a diversion from some of the serious questions in the story, so I regret that. I was wrong, and I apologize. (para. 93)

There are two things that are interesting about this example that make it relevant to the third research question. First is the fact that a reporter made a public apology for his conduct in being confrontational with a White House official. So the context of that relationship, reporter to White House, demands a certain decorum that was apparently violated by Gregory. The specific reason Gregory gives for that apology is that he was disrespectful of "the press secretary [who is] representing the president." In other words, the press secretary is an extension of the president; to disrespect the press secretary is to

disrespect the office of the presidency. In this context, to accuse the press secretary of hiding something and then call him a jerk is equivalent to, or at least almost equivalent to, saying such things directly to the president.

The second reason for interest in this example is the way Gregory constructs the meaning behind the whole incident. In his apology Gregory says that the incident "created a diversion from some of the serious questions in the story." In other words, he is still able to argue that there were questions left unanswered by the White House, implying, as he did during the press conference, that there were things the public still did not know about what happened on Cheney's hunting trip and that the White House, and McClellan in particular, were hiding something, thus a deception of omission. In this context and in this manner a reporter questioning the honesty of the White House becomes socially acceptable.

In the David Gregory example deception, and the discourse surrounding it, is a fairly straightforward matter of whether a political actor (the press secretary) is giving the press complete and accurate information or misleading the press in some way. Deception could also be connected to structures of feeling, something less tangible, where political discourse is not about verifiable facts (i.e. Did the vice president shoot someone in the face? Was he intoxicated when it happened?). Instead it is about whether something *feels* right and the ways in which something can *feel right* but not necessarily be true. Another way to describe this is as political myth making, which Altenhofen (2010) says needs to tap into something that a public is "ready" to believe. Discourses can *create* political waves only over long periods of time, building them up over years through repeatedly arguing in support of the beliefs that make up those waves. In other words, the influence

of political ideas in the creation of a movement is not like a hypodermic needle injecting ideas and immediately creating feelings, it is more like waves washing over a shore slowly altering the shape of that shore.

Political theorists see deception as part of this myth making process. This can be a matter of elites deceiving masses, or elite self-deception, or the collective self-deception of a large group.

RQ 4: How do the discourses of deceit describe affective political strategies in the process of myth making?

This question will be explored most prominently in chapter six in the examination of the tea party and Rachel Maddow. However, it will also be part of the ways in which the law and journalism draw on structures of feeling about the way the American political system works and is supposed to work.

Communication theorist Jennifer Slack (2006) argues that communication theory should "explore the workings of a complex world, figure out how it works, and propose changes to make it better" (p. 223). This is the inspiration for the final research question. There is an established political culture in which accusations of deception are common. The accusations of deception, and their prevalence, are just as, perhaps more, problematic than the deception itself. This is a cynical political culture that devalues political discourse and depoliticizes, discouraging public participation in politics. How do the discourses of deceit play a part in the broader political culture? How can a positive counter-discourse be developed? Is it even possible to develop? If so, what would it look like?

> **RQ 5:** Is there a way to address deception in politics that deters deception while also respecting, and not creating a chilling effect upon, political actors' First Amendment rights?

Chapter eight will address this question by outlining a proposal for a campaign ethics council. The idea behind the council is to create a solution to the problem of political campaign lies, not general misstatements but knowingly false statements, in a way that is community oriented. This is part of an attempt to develop a counter-discourse to the cynicism described above, to invoke "notions of community, civic virtue and active participation" (Torfing, 1999, p. 262).

This final research question is inspired by Slack's call, proposing changes as an attempt to improve political discourse and practices. Research into these questions requires both critique of actual political actions and theory about political communication, a mixture of theoretical discussion and the actual workings of political discourse. A campaign ethics council could meet just such a goal. Chapter eight imagines a real-world process where members of the community can come together to suss out the veracity of statements, but it does so in a way that addresses complex problems of legal theory, how the judicial discourse of the marketplace of ideas might impede such a goal, and how to create a council structure that respects free speech rights while also acknowledging how free speech can infringe upon the rights of the electorate to cast votes on the basis of accurate information, to protect the right to vote from being infringed upon by deceptive practices that misdirect those votes. The next section will discuss this project's use of discourse analysis as a method to address these research questions.

III. Research Method: Discourse Analysis

In her analysis of teenage motherhood the Canadian professor of Social Work Iara Lessa (2006) notes that, "current theorists propose different approaches to discourse analysis" but they have a common, underlying assumption that "language, the medium of interaction, creation and dissemination of discourses, is deeply implicated in the creation of regimes of truth" (pp. 285-286). That is the starting point for the analysis of this dissertation; it is a search for the ways in which political discourse about deception creates "regimes of truth" about how deception works in politics and how to respond to it. Before proceeding with a discussion of discourse analysis and how it will be applied in this search it is essential to define what the term discourse means because discourse is about more than simply the words chosen to describe something.

This dissertation uses Foucault's (2010) definition of the concept of discourse as "practices that systematically form the objects of which they speak" (p. 49). Lessa, citing Foucault's *Archaeology of Knowledge*, defines Foucault's concept of discourse as "systems of thoughts composed of ideas, attitudes, courses of actions, beliefs and practices that systematically construct the subjects and the worlds of which they speak" (p. 285). So a Foucaultian discourse analysis of politics could look at how words are enacted in concrete practices such as the management of political campaigns, the choices made by reporters in covering those campaigns, the actions of elected officials once the campaign is won, and how legislatures enact laws related to political practices, and then how the judicial system interprets those laws. The discourse analysis of this dissertation will look at how politicians and constituencies, and their political speech, are

"systematically constructed" as subjects vis-à-vis political deception in the three contexts of campaigns, the news, and the law.

To further explore the concept of discourse it will be helpful to discuss Foucault's chapter on discursive formations in *The Archaeology of Knowledge*. Foucault proposes four hypotheses for how statements form a unity and thus create a discursive formation. For the purposes of this dissertation these four hypotheses, taken together, serve as a good starting point for defining discourse, discourse analysis, and how those concepts will be used in this project.

In his first hypothesis Foucault (2010) argues, "statements different in form, and dispersed in time, form a group if they refer to one and the same object" (p. 32). Foucault uses the concept of madness as his example for explaining this hypothesis. He argues that the term refers to different conditions at different times, so it might appear that there is not actually a unity in this discourse. There is no inherent connection between melanocholia and neurosis, Foucault says, yet they are tied together under a medical discourse about madness. The goal of a discourse analysis then, according to Foucault, is "knowing whether the unity of a discourse is based not so much on the permanence and uniqueness of an object as on the space in which various objects emerge and are continuously transformed" (p. 32). For political deception this would entail looking at the way in which deception emerges in the case of *New York Times v. Sullivan*, where it includes false information about the actions of police in Montgomery, Alabama, and the way it emerges in the case of *U.S. v. Alvarez*, where it includes statements from a politician that are explicit lies. The messages in question in these two cases are very

different kinds of deception yet the legal discourse about freedom of speech and the marketplace for ideas is deployed in similar ways in these two instances.

Foucault's second hypothesis is about how statements form groups through "their form and type of connexion" (p. 33). A discourse, in Foucault's example the discourse of 19th century medical science, is "characterized not so much by its objects or concepts as by a certain *style*, a certain constant manner of statement" (p. 33). To put this into a specific example, in April 2013 the *Houston Chronicle* website featured a headline that read, "20 conspiracy theories you should know" (Chron.com staff, 2013). Jack Bratich (2013) responded to the headline arguing, "Nothing holds these twenty beliefs together except that someone at some point has ridiculed them" (para. 3). In other words, the discourse that makes conspiracy theories problematic takes a variety of claims that have little to nothing in common and places them in a single category for the sake of convincing people that they represent a problematic phenomenon.

For his third hypothesis, Foucault asks if it would be possible "to establish groups of statements, by determining the system of permanent and coherent concepts involved" (p. 34). What Focuault is posing here is the possibility that every unity of statements is only an illusory unity. He asks if grammar "only appears to form a coherent figure" and if it is actually "no more than a false unity" (p. 35). Acknowledging this possibility Foucault proposes that in analysis "One would no longer seek an architecture of concepts sufficiently general and abstract to embrace all others and to introduce them in the same deductive structure; one would try to analyse the interplay of their appearance and dispersion" (p. 35). In the discourses of deceit this might mean looking for how, in some cases, deception is just part of a self-correcting marketplace (i.e. *U.S. v. Avlarez*), while

in other instances a court has found that an act of deception has violated the proper functioning of the marketplace (i.e. *Tomei v. Finley*). By drawing out a case like *Tomei*, an example of an inconsistency in the discursive system, one is able to see the false unity of the marketplace of ideas argument as the courts apply it to deception and thus begin to question that discourse itself.

For his fourth hypothesis Foucault proposes that in order to "regroup the statements" that create a unity one should "describe their interconnexion and account for the unitary forms under which they are presented" (p. 35). He argues this is "the identity and persistence of themes" and that "a certain thematic is capable of linking, and animating a group of discourses, like an organism with its own needs, its own internal force, and its own capacity" (p. 35). This is a fascinating characteristic to discourse from a Foucaultian perspective, the idea that a discourse might, in a way, be a living thing. It is easy to see this in legal discourse about speech, the ways in which, for example, the discourse of freedom of speech has evolved over years and years of legal precedent, the ways in which those precedents are critiqued by legal scholars and communication theorists, and how legislators enact laws with those precedents in mind.

For just one example there is the legal concept of actual malice emanating from *New York Times v. Sullivan* (1964). In a defamation suit when a plaintiff is required to demonstrate actual malice on the part of someone who has made a false and defamatory statement about the plaintiff it means they must show the plaintiff made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280). Part of this legal discourse is that the actual malice standard only applies to public officials and public figures, not private figures. These ideas about defamation

reverberate beyond the *Sullivan* case to cases such as *Gertz v. Welch* (1974), *Time v. Hill* (1967), and *Hustler v. Falwell* (1988). The arguments made in *Sullivan* are played out over and over for decades to follow, not just in court cases, but in legal scholarship analyzing those arguments with some questioning the wisdom of *Sullivan* (Kane, 1999) and others arguing for the correctness of the precedent (Lewis, 1992).

Sullivan and its progeny also create a lens through which to view Foucault's third and fourth hypotheses. There is the "false unity" and "permanent and coherent concepts" created across this line of cases and there are the ways in which one can describe the "interconnexions" created by them. In some instances these cases tie together distinct and disparate forms of speech. For example, *Sullivan* was about civil rights activists criticizing official racism; even if in their case the criticism was rooted in false accusations criticism of such racist policies at any level of government must be protected from the abuses of the court system by racist officials attempting to silence critics.[3] The *Hustler* case on the other hand was about a pornographic magazine satirically describing a public figure's fictionalized incestuous encounter with his mother.[4]

In the texts of the Supreme Court and Fourth Circuit decisions in the *Hustler* decision the courts make distinctions between different types of political discourse and

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[3] In his book *Make No Law*, Anthony Lewis describes the Alabama court in which the lawsuit first took place as a bit of a kangaroo court. The Lawyer for the *New York Times*, worried about unnecessarily bringing his client under Alabama jurisdiction by simply appearing in court, followed procedure to avoid that problem as outlined in a book written by the judge presiding over the Sullivan case. Unfortunately for the *Times* the judge "overruled his own book" (Lewis, 1992, p. 26). Lewis describes how the court system in Alabama was used as a way to silence critics of racial segregation including rumors that the judge presiding over the Sullivan case had actually helped plan the lawsuit (p. 26). For these reasons it is important that critics of government actions be protected by the First Amendment even in cases where false statements are made in good faith.

[4] Jerry Falwell was a politically outspoken televangelist. He sued *Hustler* magazine, a pornographic publication, for creating a satirical ad for Campari liquor that contained fictional quotes attributed to Falwell describing the encounter with his mother. The bottom of the ad contained text designating the ad as satirical. The Supreme Court sided with *Hustler* saying that the First Amendment protected the ad as political speech criticizing a public figure.

interpret how the *Sullivan* actual malice standard should be applied. For example, the Fourth Circuit says the actual malice standard must be applied if the court is to consider *Hustler's* speech under the category of defamation; in other words, if the question is whether the magazine defamed Mr. Falwell that question must be answered within the actual malice framework. If the question is whether the magazine *intentionally* attempted to cause Mr. Falwell emotional distress then actual malice and *Sullivan* are moot points, thus Falwell was awarded damages by the jury and they were upheld by the Fourth Circuit.

Here the lower court attempts to separate *Hustler's* speech into two distinct categories drawing attention to a false unity in any attempt to simply call it "political speech" (*Falwell*, 1986, p. 1274). The Supreme Court would reconnect that unity but in the process remind the reader that it is only a fragile unity at best. The Court briefly recounts the history of political cartoons critical of even historically vaunted figures such as George Washington and Abraham Lincoln but derides the *Hustler* ad as

> at best a distant cousin of [those] political cartoons … and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard … (*Hustler*, 1988, p. 55)

So cartoons making fun of Lincoln's "gangling posture" are lumped into a single category with a fake liquor ad describing a fictional sexual encounter between a minister and his mother. The "permanent and coherent concept" here is the First Amendment right to free speech, the concept of public figures, and the notion that they will be subject to

greater public scrutiny and its subsequent emotional distress and that they will simply have to live with this as part of their duties.

It is perhaps easy to be lured into a mindset where all of this is thought of as just words on pages. “So the courts and scholars talk about ‘the actual malice standard’ and defamation is treated differently as it applies to public versus private figures. These are just words and ideas? What does it matter?” The Falwell example should serve as a reminder that, as Julian Henriques (1984) argues, “Every discourse is part of a discursive complex; it is locked in an intricate web of practices, bearing in mind that every practice is by definition both discursive and material” (p. 105-106). In this case it would be the practices of politics; campaigning and all the little things that go along with it that are too numerous to list, the journalistic practices and norms of covering the campaign, Non-journalistic media portrayals of political actors, and attitudes about when and how negative attacks are appropriate or inappropriate. The legal discourse on the pages of court decisions and law journals have consequences for these material practices of politics, the ways in which a candidate engages with the electorate, the things he or she may say, and how much they might stretch the truth when saying them are impacted by the things said in court.

The British sociologist Michele Barrett (1991) says the most important thing to understand about Foucault’s concept of discourse is that “it enables us to understand how *what* is said fits into a network that has its own history and conditions of existence” (p. 126). A discourse analysis is an analysis of a practice that “is vitally important to the workings of power” and reflects the user of those words as a situated being (Fairclough, 2000, p. 308). Discourse is treated by Foucault (2010) “sometimes as the general domain

of all statements, sometimes as individual groups of statements, and sometimes as a regulated practice that accounts for a certain number of statements" (p. 80). The analysis of discourse asks, as Foucault says, "How is it that one particular statement appeared rather than another?" (p. 27).

A discourse analysis then, according to Fairclough, is "the analysis of relationships between … *text*, *discourse practice*, and *sociocultural practice*" (p. 311). A text can be of any medium. For example, in this project one key type of text is a court opinion. A discourse practice is "text production and text consumption" (p. 311). For this Fairclough points to "institutional practices" (p. 312), which could include how a court makes a decision, the way in which an opinion is written, the arguments the court chooses to emphasize and the questions it chooses to answer (or ignore) in a case, and the tools it uses to do so (*i.e.* precedents emphasized and precedents ignored or obscured). Finally, the sociocultural practices are the "social and cultural goings-on which the communicative event is a part of" (p. 311). For example, in the case of the analysis of Rachel Maddow and the tea party in chapter six, there are the historical expectations about acceptable practices in political debate, leftist political feelings about corporations, and rightist political feelings about government power, all giving rise to the political discourse of the tea party and Rachel Maddow's critique of it, each as separate sociocultural practices but also part of a larger sociocultural practice of American politics. Fairclough says, "the sociocultural practice dimension of a communicative event may be at different levels of abstraction from the particular event" (p. 315).

Carpentier and De Cleen (2007) employ their own variation on discourse analysis, Discourse Theoretical Analysis (DTA), which is a useful contribution to discourse

analysis. Although this dissertation does not follow DTA as described by Carpentier and De Cleen, some of their ideas and insights about discourse as a concept will be helpful here in understanding what discourse analysis does. DTA, Carpentier and DeCleen say, is a method of critical analysis that employs and examines theory "as a proper methodological toolkit to tackle empirical data" (Carpentier & De Cleen, 2007, p. 280) aimed at "revealing the contingent nature of the social through analysis of the political, social and historical constructedness of discourse" (p. 276). DTA is a product of discourse theory (DT), which is itself "the proposition that all social phenomena and objects obtain their meaning(s) through discourse" (Carpentier, 2010, p. 252).

Howarth and Stavrakakis (2000) characterize DT as "investigat[ing] the way in which social practices articulate and contest the discourses that constitute social reality" (p. 3). The analysis of DT, they write, "refers to the practices of analysing empirical raw materials and information as discursive forms" (p. 4). The objects of analysis for discourse analysts include "a wide range of linguistic and non-linguistic data … as 'texts' or 'writing'" and "empirical data [that] are viewed as sets of signifying practices that constitute a 'discourse' and its 'reality'" (p. 4). So a discourse analysis of political discourse about deception could include everything from cable news segments, to popular press political books, radio shows, blogs, and TV ads.

This is in part why discourse theory and discourse analysis are so useful. As Howarth and Stavrakakis argue, "a political project will attempt to weave together different strands of discourse in an effort to dominate or organize a field of meaning so as to fix the identities of objects and practices in a particular way" (p. 3). Put another way,

Carpentier and De Cleen (2007), argue, "all social phenomena and objects obtain their meaning(s) through discourse" (p. 267). This means that a discourse analysis

> must grasp the statement [under analysis] in the exact specificity of its occurrence; determine its conditions of existence, fix at least its limits, establish its correlations with other statements that may be connected with it, and show what other forms of statement it excludes. (Foucault, 2010, p. 28)

When one looks at a political text it should be examined within the context of the time or political era when it is happening, the medium through which it is distributed, the assumptions of the text and the political movement or philosophy that gives birth to it.

An example of some political discourse might be helpful here. One could take Bill O'Reilly's use of the phrase "No Spin Zone" as an object of analysis of the discourses of deceit. Set aside the fact that such a phrase could be seen as an act of spin in and of itself – presenting the speaker of the phrase in a positive light – and its use places certain practices outside of the realm of legitimacy and credibility. Through the phrase, O'Reilly implies his own honesty not by simply stating it. He *could* just say, "Welcome to the honesty zone," which would also imply there is some zone of dishonesty from which O'Reilly's show is a refuge, although it would do so in a slightly less confrontational manner. It also probably creates greater credibility to proclaim the rest of the world to be dishonest as opposed to holding one's self out to be a pinnacle of honesty. At the very least the "I am so honest" proclamation will lead the audience to question how humble the proclaimer is. Instead, he implies his own honesty and the accuracy of his own communication by more overtly and confrontationally attributing deceit to others. There

is a difference between the statements "I am honest" and "I am not dishonest." The former points the receiver of the message toward the speaker and the idea of honesty; the latter directs the listener to think about dishonesty and what the speaker *is not*. He is not, like some other individuals, dishonest. This is similar to Foucault's (2010) argument about the two statements: "No one heard" and "It is true that no one heard." Foucault says these two statements, "are indistinguishable from a logical point of view and cannot be regarded as two different propositions. But in so many statements, these two formations are not equivalent or interchangeable" (p. 81).

This not only sets up a discourse where dishonesty is a norm to be expected in other realms of media (O'Reilly would not need to say "no spin zone" were there not so much spin in the world), but also one of confrontation. So in cable news there is an expectation of "verbal violence." O'Reilly essentially gets to say "if you're not an honest person don't bother showing up here in the 'no spin zone.' But if you do try to come in, you better be ready to take on *The O'Reilly Factor*!" It is a discursive strategy that does three things. First, it draws on the aforementioned "media bias" discourse, in which members of O'Reilly's audience are given the feeling that they are beset by lies throughout the rest of the media industry. Second, it implies its own honesty through the questioning of the honesty of others. Finally, it sets the tone for a discourse that is confrontational recalling the strategy coverage discussed by Cappella and Jamieson where the debate is turned into politics *qua* wrestling match.

The next question to ask in exploring a discourse analysis is how to "weave together different strands of discourse" (Howarth & Stavrakakis, 2000, p. 1) and why. This goes beyond just one cable news show. Here, the method allows for multiple

directions. One might look at O'Reilly's show as a site in the broader construction of conservative discourse. There is also the possibility of seeing the show not simply as a site of conservative ideology, but instead as part of the culture of confrontation in cable news, a quality found in most cable news programming irrespective of the ideology of the show being examined. As Howarth and Stavrakakis argue, "Discourses and the identities produced through them are inherently political entities that involve the construction of antagonisms and the exercise of power" (p. 9). Those constructions can happen in many ways and come from many directions. They can be rooted in political philosophy, the format in which the discourse happens (i.e. network news, cable talk shows, etc.) and the medium through which the programming is presented.

So there is openness to the method, as is indicated by Hofstadter's (2008) analysis of Barry Goldwater and "pseudo-conservatism." Hofstadter created that analysis by "spread[ing] his net widely, gathering in everything," including newspaper articles, campaign bulletins, press reports, book club lists, and Goldwater's public statements (Wilentz, 2008, p. xxii). However, as Howarth and Stavrakakis (2000) point out, this does not mean "an anything goes approach to the generation and evaluation of empirical evidence," but rather, a discourse analysis should aim at "understanding and explaining the emergence and logic of discourses, and the socially constructed identities they confer upon social agents" (p. 7). This means looking at the logic of the discourses of deceit, which means making connections between different sites within a discourse and arguments to support those connections. In other words, in order to properly employ this method, one must make a clear line of connection between one piece of media content and another. This means making an argument and presenting evidence to support the

decision to look at O'Reilly's show as part of the larger conservative movement or as part of cable news culture.

One must acknowledge the different questions at play in those two directions and note that when "spreading your net widely" it should not be done haphazardly. However, in both approaches in this example ultimately the questions are the same. What realities do these discourses help political movements and media institutions to construct? What "identities do they confer" (Howarth and Stavrakakis, 2000, p. 7)? How are those identities conferred? How do the different sites within discourse connect to one another to enact these processes?

Torfing (1999) presents three potential ways to anchor this method and apply it to the field of media studies. First, there is "the political and/or theoretical *discourse about mass media*"; second, there are the "*discourses of mass media*"; and, third, an analysis can "focus on *mass media as discourse*" (pp. 212-213, emphasis in original). Torfing goes on to draw a connection across the three areas of analysis:

> What is important is that the analysis at all three levels is concerned with discursive terrains, i.e. socio-political terrains composed of discursively constructed meanings, rules, norms, procedures, values, knowledge forms, etc. That is to say, the signifying chains articulated in the text are shaped by the rules of formation, which are defined by the hegemonic forms of discourse. (p. 213)

In other words, within each of those three discursive sites there are rules of conduct that are constructed and agreed upon. A discursive analysis can be effectively used to look for

the ways in which such rules are applied in discourses about deception in political media and how those rules appear in all three levels described by Torfing.

Torfing continues his connection between discourse analysis and media studies by taking on the "sociological perspective [where] communication is conceived as merely a question of message exchange" (p. 217). This is problematic for Torfing because there is a "layer of PR workers [who play] an increasingly important role as agenda setters and opinion leaders" and are using the "free flow of information and messages [that] is often depicted as the essential telos of the process of mass communication" (p. 218). This free flow of information happens across media platforms and makes Torfing's conception of this method useful for this project, especially as Torfing is acknowledging the role of the public relations industry that is central to political media.

The next question is, how will each of Torfing's three levels be applied in this project? First, the *discourses about mass media* examined in this dissertation will be the legal discourses that address political speech and deception. Court cases about political communication and the use of media for its distribution make up a legal discourse about the regulation of the use of media in politics. This will be addressed in chapters five and eight. The analysis of *discourses of mass media* will be the focus of chapter six, the chapter on campaigns. That chapter will look at how Rachel Maddow presents the organization FreedomWorks as political astrotuf, defined as an instance when large groups of people are organized toward political action in a top-down manner while that organization is falsely presented as a bottom-up movement, occurring naturally. Finally, the analysis of *mass media as discourse* will come in chapter seven on news media. That chapter will look at the discourse created by and about fact checking organizations

placing it in the larger context of the history of journalism's role in American political life.

Howarth and Stavrakakis (2000) argue that discourse theory sees that "all ideological elements in a discursive field are contingent" (p. 6). While there is a contingency, it is important to note, "that partial fixations of meaning are both possible and necessary" (p. 7). Similarly, Carpentier and De Cleen (2007) argue, "discourses have to be partially fixed, since the abundance of meaning would make any meaning impossible" (p. 268); however, "a discourse is never safe from elements alien to that discourse" (p. 268). So, in discourse theory there are partial fixations of meaning, but these fixations are contingent upon and open to the creation of new constructions; additionally, in these contingent and disputed positions, the "social relations [that] are formed by political struggle … eventually lose their contested political nature and become sedimented in social norms" (Carpentier, 2010, p. 257). This project looks at the elements of the discourses of deceit that are contingent and the ways in which some of them become sedimented.

IV. Sites of Discursive Analysis

This project looks at political deception in general, but one of the central concepts is the campaign. Solomon and Cardillo (1985), citing Stein (1970) and Rogers (1973), present two potential ways a campaign can be defined:

> A campaign can be defined, generically, as "any systematic course of aggressive activities for some special purpose" (Stein, 1990, p. 214). From a more specific communication point of view, a campaign is defined as "a pre-planned set of communication activities designed by change agents to

> achieve certain changes in receiver behavior in a specified time period" (Rogers 1973 p. 277). (p. 60)

Solomon and Cardillo note the difference between the two definitions is the use of time period as necessary to the second, while the common element is that both make "purpose" part of the conceptualization of what a campaign is. They go on to review existing research on defining campaigns, noting a few common elements that appear across this body of work. These common elements are (1) setting realistic and explicit middle-range goals, (2) having a short run, and (3) using some evaluation to measure the success of the campaign (Solomon & Cardillo, p. 61).

In politics, one might think of a campaign as the clearly demarcated time period from when a politician announces his or her candidacy for office to the moment when the concession and victory speeches are given. An important argument for this project is that a campaign can also be defined in more ambiguous terms with unclear or adjustable temporal demarcations. Jarol Manheim (2011) defines an information and influence campaign (IIC), a category that is not limited to campaigns for elected office, as "an effort by one party, through some combination of communication and action, to change the behavior of another party to its advantage" (p. 3). Manheim's definition makes no mention of temporal markers. In other words, a campaign can be a hegemonic process or, drawing on one definition of hegemony, "a process of continuous creation which, given its massive scale, is bound to be uneven in the degree of legitimacy it commands and to leave some room for antagonistic cultural expressions to develop" (Walter Adamson, quoted in Lears, 1985, p. 571). So this project defines the term "campaign" broadly to include three conceptualizations. First, there are campaigns for election to office. Second,

there are short-term campaigns for achieving a specific policy goal (i.e. when a president or interest group is waging an opinion campaign to urge the public to support, and politicians to pass, a specific piece of legislation, but not necessarily during an election campaign). Finally, there are long-term campaigns waged to sway public opinion and hegemonize (i.e. the conservative movement's creation of policy institutes and media outlets to build public and government support for free market economics as described by Kim Phillips-Fein (2009)).

For the purposes of this project, another defining characteristic of political campaigns is that they are made of a collection of political texts, authored by a person or definable group, and bound together by sharing a common and specific persuasive goal. Thus this analysis will include a variety of political items, such as news stories about campaigns, statements from various political entities, legal decisions, and writings on political theory. So political campaigns are more ambiguous things than they might seem, a bit more difficult to define. This dissertation, following Solomon and Cardillo, defines a campaign as a systematic communicative process, happening within an ambiguous and adjustable timeframe, involving a wide variety of texts across multiple media platforms, created by one person or group in order to persuade another person or group. In the simplest terms, this project is about the various ways in which political actors "*get it wrong*" in such political campaigns and, more important, how political actors talk about how other political actors "*get it wrong*." The project looks at this issue in a variety of discursive sites across the remaining chapters.

Chapter one started the analysis with its brief discussion of theoretical and philosophical questions surrounding deception in politics. This laid the groundwork for

the chapters to follow, which will examine the "discourses of deceit," the ways in which we talk about deception in politics. Chapter two is a literature review looking at how political deception has been discussed in previous research. This chapter explained the research method and questions to be explored in this dissertation.

Chapter four offers a typology of political deception and explains how each type is addressed in this project. Chapter five takes the law as its discursive site, examining statutes from around the country that regulate various forms of political deception. This is followed by a discussion of the judicial discourse surrounding political deception, drawing on state and federal court cases, especially, *U.S. v Alvarez* (2012), *281 CARE Committee v. Arneson* (2013), and *Susan B. Anthony List v. Driehaus* (2013).

Chapter six looks at campaigns as discursive sites through a discussion of Rachel Maddow's coverage of the political organization Freedom Works and how she framed the tea party movement. This chapter will take this recent and important moment in political media and examine its implications for how political deception is discussed. Chapter seven looks at the news media as a discursive site. Given the decisions in *U.S. v. Alvarez*, *Minnesota v. Jude*, and similar cases discussed in Chapter five, and the dominance of a political philosophy that opposes almost any government regulation, how does the American political system deal with the problem of deception in politics? This chapter looks at one answer, what I call the "privatization of deception detection." Chapter seven will examine how political discourses about the press have given rise to fact checking organizations, such as PolitiFact, and the implications and consequences of such organizations on political deception.

Finally, chapter eight proposes a solution to political deception in the form of a campaign ethics council. This is where the idea of a counter-discourse comes into play in this dissertation. There is a persistent notion of a self-correcting marketplace for political speech in American legal discourse. Alongside this discourse is the judicial discourse about the dangers of giving First Amendment protection to deception. This project, and especially chapter eight, is an attempt to begin building a positive counter-discourse that recognizes the shortcomings of First Amendment theory on the question of political deception

Chapter 4 – A Typology in the Discourses of Deceit

I. Introduction

It is difficult to find research that typologizes deception in general, and political deception specifically, where the typology is the central goal of the work. That is the purpose of this chapter, to create an original standalone typology that breaks political deception down into its various forms and analyzes those forms. Some researchers have created simple typologies of deception but only for the purposes of advancing some other research agenda on the subject. For example Evert Vedung does not explicitly label his book chapter on political deception a typology but he presents a basic one as a single page of discussion in a larger analysis of political deception. Vedung (1987) categorizes political deception as (1) a leader misleading his or her public (i.e. an Austrian presidential candidate made demonstrably false statements about his war record that he in fact had to have known were false, p. 354), and (2) lies about foreign policy, the main purpose of which is to "mislead and manipulate the enemy" but also unavoidably ends up misleading a domestic political audience (p. 355).

Mearsheimer (2011) creates a more complex typology of international political lies that would work as a subcategory to Vedung's second class of deceptions. What he calls his "inventory" of international lies includes (1) fearmongering, (2) strategic cover-ups, (3) nationalist mythmaking, (4) liberal lies or hiding "illiberal actions [behind] idealistic rhetoric," (5) social imperialism or lies meant to divert public attention away from domestic problems and toward imagined foreign threats, and (6) ignoble cover-ups or "when leaders lie about their blunders … for self-serving reasons" (p. 23). This

typology bases categories of deception upon their purpose and functionality. It is useful as a model because of its scope but it limits its focus to only international politics.

Mark Spottswood (2008), a law clerk for the United States District Court for the Northern District of Illinois, argues for a much simpler typology of three forms of false statement. His categories are "false speech (speech which does not accurately describe the world), insincere speech (speech which misrepresents a speaker's belief), and misleading speech (speech which may be literally true but which carries false or insincere implications)" (p. 1205). The characteristic that creates the categorical boundaries in Spottswood's typology is intent, a concept that, as discussed in the first chapter, is quite tricky. How does one prove that someone acted with the *intent* to deceive another?

Australian professor of social science Brian Martin presents two brief typological schemes. First Martin (2011) classifies political lying based upon "motivation, credibility, consequences, and mode of delivery" (p. 3). Second he describes political lying as happening in three situations. There are lies in office; these are the lies of politicians who are serving in office that are somehow connected with their job performance. A second category, which coincides with the first, is breaking campaign promises. This can be a tricky category because politicians can make sincere promises on the campaign trail and fail to accomplish what was promised; this does not necessarily constitute a lie or deception. Martin cites George H.W. Bush's 1988 campaign promise – "Read my lips. No new taxes." It is entirely possible that Bush sincerely intended to not raise taxes; perhaps he knew full well that tax increases would be inevitable and yet still made the promise he knew he could not keep. It is difficult to know for sure which of these two hypotheticals is reality so one cannot say whether Bush lied. Politicized private

lies are those about a politician's private life that become part of public debate. A perfect example of this third category, cited by Martin, would be President Bill Clinton's extramarital affair with intern Monica Lewinsky, a private situation that became very public with Clinton lying about his physical involvement with the young woman.

There are other typologies dealing with forms of deception describing the phenomenon in varying levels of complexity. Paul Ekman spent more than three decades as a full professor at the University of California doing research on emotion, expression, and lying with his work becoming the basis for the television program *Lie to Me*.[1] Ekman (2009) creates a simpler typology arguing, "There are two major forms of lying: concealment, leaving out true information; and falsification, or presenting false information as if it were true" (p. 41). In an article from *Communication Quarterly* Dirk Gibson (1985) creates a typology of information control. His typology is not strictly about deception but includes a particular kind of deception: omission of information. Gibson's second category from his six-part typology is the cover-up, which is "characterized by intentional lying, destruction of physical evidence, and similar reluctance to tell the truth" (p. 128). Robert Goodin (1980), a lecturer in government at the University of Essex, argues for a four-part typology of political deceptions. His list includes lies, secrecy, propaganda, and information overload (p. 39).

Ekman, Gibson, and Goodin's typologies highlight the fact that deception can be both active and passive or, in the terms designated by Chisholm and Feehan, it can be a positive or negative act. In their widely cited typology of lies, published by *The Journal of Philosophy*, Chisholm and Feehan (1977) employ the same dual categorization used by

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[1] Ekman's website contains an explanation of his involvement on that Fox television program that ran for three seasons before being canceled. It can be found here: http://www.paulekman.com/lie-to-me/.

Ekman: deception by commission and deception by omission, positive deception (actively attempting to deceive) and negative deception (deceiving by withholding information) (p. 143). These two categories are then split into four subcategories creating an eight-part typology of deception.

Of the typologies discussed here Chisholm and Feehan's is the only one created with the explicit and sole purpose of typologizing deception. They begin with the hypothetical that *L* is a person who might deceive *D*, another person, "with respect to a proposition *p*" where *p* is a false statement (p. 143). They present four cases of positive deception and four cases of negative deception. They are as follows: (a) "*L* contributes causally toward *D's acquiring* the belief in *P*." (b) "*L* contributes causally toward *D's continuing* in the belief in *P*." (c) "*L* contributes causally toward *D's ceasing* to believe in not-*P*." (d) "*L* contributes causally toward *preventing D* from *acquiring* the belief in not-*P*." (e) "*L* allows *D* to acquire the belief in *P*." (f) "*L* allows *D* to continue in the belief in *P*." (g) "*L* allows *D* to cease to have the belief in not-*P*." (h) "*L* allows *D* to continue without the belief in not-*P*." (p. 144-145). While Chisholm and Feehan are proposing a typology of deception in general their structure could easily be placed in a political context. For example, hypothetical congressman Pitts (L) contributes causally toward his constituents' (D) belief that a bill will cause a tax increase when it actually will not (P).

Finally, Nathaniel Klemp, Assistant Professor of Political Science at Pepperdine University, argues for a three-part typology of political deception. Klemp's (2011) forms of political deception include lying, concealment, and distraction (p. 64). Lying is defined as when politicians "affect the choices of others by intentionally disseminating information they know to be false" (p. 64). Concealment is when politicians

"intentionally withhold relevant information from other agents" (p. 65). Finally, manipulation takes on two forms for Klemp. The first is "informational distraction," when politicians flood "the information space with so much information that listeners become confused and overwhelmed" (p. 66). The second is "emotional distraction," when political rhetoric is employed, both overtly and subtly, to direct public attention toward issues that will elicit emotional responses rather than rational analysis (p. 66-67). Klemp points to the Willie Horton ads from the 1988 presidential campaign where George H.W. Bush's campaign used racially charged imagery to prompt emotional responses rooted in racial fears attempting to persuade voters to support Bush over his opponent Massachusetts Gov. Michael Dukakis.

All of the above typologies produce useful frameworks for thinking about deception in general and political deception in specific. However, none of them is a typology with the sole purpose of typologizing political deception; the typology is a sort of afterthought or an ancillary element or, in the case of Chisholm and Feehan, is a typology of deception in general not political deception specifically. It will be useful to create a typology not as a sub-section of a chapter but as a chapter in its own right. This chapter will do just that, breaking political deception down to more specific categories rather than just dyads or triads as discussed above. It will also allow for a greater depth of analysis of each of those categories rather than giving the typology a passing treatment on the way to some other analytical goal.

So there is a three-part rationale behind the creation of this typology. First, it will demonstrate that political deception is a complex practice and that there are variations on that practice. It is not enough to simply say, "politicians lie" and move on. In fact an

important argument for this project as a whole is to move beyond this simple cynicism. To assert that all politicians are liars is as counterproductive and problematic as naively accepting everything a politician says as truth. To create a typology is to search for a more subtle understanding of deceptive practices, their problems, and even where political deception may have some value. Second, the typology has a descriptive function. To begin to outline these different forms of deception is to clarify what deception is and, very importantly, to recognize the distinction between deception and lying. Finally, this typology will make clear where and how each of the deceptive practices will be addressed in this dissertation.

The typology is broken into six sections. Each section defines and gives examples of the categories that make up the discourses of deceit. The first section is the lie, knowingly false statements made with the intent of misleading the listener. The second section is myth making. This category draws on Plato's noble lie; these are ideas that have elements of truth and falsity that are used to organize a political system. The third category, spin, is how political communication is described as taking on characteristics of public relations used to manipulate the public. Category four is a variation on spin, true statements that allow/lead to false conclusions. This is the description of political communication in which statements are made or evidence is presented to the public that is truthful, but is done so in a way that purposefully gives a false impression or allows the public to draw a false conclusion. The fifth category is secrecy. This is explored by splitting it into two subcategories, hard and soft secrecy. Finally, there is pandering, when a political actor is described as saying what needs to be said in order to win a political battle with a disregard for truth.

II. Lies

One might think that lying would be the most easily explained concept in the discourses of deceit. Appropriately enough the concept is deceptive in its simplicity although the "clear-cut" lie, to use Bok's term, is often defined in simple terms. The lie is a statement that is not only demonstrably *not true*, it is also a statement the sender makes knowing that it is false, with the intention of misleading the receiver of the message. Bok (1999) defines a lie in the simplest way possible as "an intentionally deceptive message in the form of a statement" (p. 15). University of California anthropologist F.G. Bailey (1991) critiques Bok's simplicity noting a few examples of what could be an infinite list of permutations where what might seem like a lie is not (pp. 7-9). For her part Bok notes that not all deceptive messages are lies and that there can be self-deception involved in false statements. If a politician is deceiving himself in his own false statement then, while he may be misleading his listeners, he is not lying to them.

For Mahon (2008) the distinction between lying and deceiving is the distinction between success and failure. To deceive is to successfully mislead the listener. If a politician makes a false statement, which she knows to be untrue, with the goal of leading her audience to believe (a) that she is sincere in her statement and (b) that the statement is true then she has deceived. The subtle difference between lying and deceiving is that even as said politician tells her lie her audience may listen with incredulity. They walk away from the speech thinking, "Well that was a bunch of baloney." Our hypothetical politician has lied, presented "an intentionally deceptive message in the form of a statement," but she has not deceived because the audience did not buy what she was peddling.

The challenge for critiquing a political lie is that it can only be understood as a lie if one has the benefit of hindsight and even then there is still uncertainty as to whether the politician in question was in fact lying. To prove a political lie requires either irrefutable evidence or an admission of guilt. Sometimes even if a politician admits to the wrongdoing of which he was accused, and about which he made false statements, he still has not committed what could be called a lie. In his counterargument to Bok, Bailey imagines a hypothetical alcoholic claiming to not have a drinking problem. Even if he is found "flat in the gutter outside a pub" he still has not necessarily lied because he may only be guilty of "self-misdiagnosis" (Bailey, p. 8).

Here it is useful to turn to Michigan State University Professor of Philosophy Arnold Isenberg. Isenberg (1964) defines lying, as "a statement made by one who does not believe it with the intention that someone else shall be led to believe it" (p. 466). Once again the simplicity is deceptive. There is falsity, there is communication between a sender and a receiver, and there is the intent on the part of the sender that the receiver be misled into believing that which the sender knows to be false. If it is assumed that lying is wrong, and that Isenberg's proposed definition of lying is an acceptable one, then the conclusion must be that it is wrong to lie to Kant's hypothetical murderer. Thus the simplicity of the definition creates a moral quandary. The problem, Isenberg argues, is "Any short definition will leave some queer possibilities open" (p. 466). In other words, using Isenberg's example, a speaker may believe it is nine o'clock when it is actually ten o'clock and tell someone it is ten o'clock (the correct time) while thinking he is lying to the other person. In his mind he is lying but in reality he is telling the truth.

Villanova University philosopher Joseph Betz examines the differences of opinion on the definition of a lie by placing Kant and St. Augustine in contrast to Constant and Grotius. Kant (1976) defines a lie as "an intentional untruthful declaration to another person" (p. 347). Betz (1985) argues, "Constant and Grotius agree that it should be redefined as an intentional untruthful declaration to another person *who has the right to the truth*" (p. 217). This definitional debate is centered on the hypothetical question of lying to a murderer about the whereabouts of his potential victim. Kant, as discussed earlier, rejects this "right to truth" or "potential harm" aspect to the definition arguing essentially that a lie is a lie and the potential harm it brings to another is not essential to defining the concept.

So what does it mean to "lie" and what is it that distinguishes a lie from other forms of deception? As the preceding discussion demonstrates these are difficult questions. For example, in 1998 President Bill Clinton famously, and emphatically, said, "I did not have sexual relations with that woman, Ms. Lewisnky." Clinton did in fact have an inappropriate physical relationship with Lewinsky but apparently never had intercourse with her. In this scenario it appears Clinton defined "sexual relations" as "intercourse" and thus his statement was technically true. The problem with the definition of a lie is involving the intent to mislead. One has to conclude that Clinton was hoping the public would think of the phrase "sexual relations" as referring to a broader category of actions beyond just intercourse. The ambiguity of language here is both Clinton's ally in deception and the greatest hurdle to a satisfactory definition of lying.

Clinton made an accurate statement but a less than truthful one. There had to be some possibility that he knew his statement, while accurate, would be misunderstood and

would thus mislead people. Yet, even by Kant's definition, Clinton was not lying. This is why the typology of deceptions is necessary. Clinton deceived but by the strict definition of lying he did not lie with the aforementioned statement. Martin Jay notes the perception that lying is ubiquitous in politics (pp. 14-16). This is a problematic perception not just because cynicism is problematic but also because it misses the subtlety of the forms political deception can take, forms that will be explored in the remainder of this chapter.

III. Myth Making

Myth making is perhaps the most important discourse of deceit under examination in this study, a connective theme across the chapters and objects of examination. The concept of political myth making is defined as a general worldview, containing elements of truth and falsehood, which is collectively rationalized and accepted to varying degrees by members of a society at every level of the political hierarchy including elites and citizens alike. There are subspeciations that have been used by philosophers to describe this category. Some uses modify the concept, creating variations on the theme, but the basic premises remain the same. In Plato's (1987) *Republic* Socrates referred to a "noble lie" (p. 177). Walter Lippmann described a "pseudoenvironment." Raymond Williams (1978) uses the term "structures of feeling."

In *The Republic* Plato (1987) argued that tales, myths, and lies might be "in general, fiction, though they contain some truth" (p. 131). Former Middlebury College Associate Professor of Political Science Kateri Carmola (2003) argues, "these true things are the unspoken wishes of those who tell them or those who ask to hear them" (p. 58). The eminent political philosopher Leo Strauss also saw it in Plato. In his book *The City*

and Man Strauss, like Carmola, uses the term "myth" rather than "noble lie" to describe this concept. Strauss (1964) writes:

> However evidently reasonable a law may be, its reasonableness becomes obscured through the passions it restrains. Those passions support maxims or opinions incompatible with the law. Those passion-bred opinions in their turn must be counteracted by passion-bred and passion-breeding opposite opinions which are not necessarily identical with the reasons of the law. The law, the most important instrument for the moral education of 'the many,' must then be supported by ancestral opinions, by myths--for instance, by myths which speak of the gods as if they were human beings--or by a 'civil theology.' (p. 22)

In other words, there is a sort of collusion on the part of political leaders and masses to collectively agree upon believing even those things that are false. It is at this point where the concept becomes complicated by the imprecise use of the word "lie" to describe the political process that is happening.

Sir Desmond Lee, a Cambridge scholar of classical philosophy (Thorn, 1993), in his translation of *The Republic* (Plato, 1987), argues that the use of the word "lie" is a mistranslation and an incorrect interpretation of Plato's "foundation myth" (p. 177). Philosopher Catalin Partenie (2011), writing for the Stanford Encyclopedia of Philosophy, defines the foundation myth as "a true story, a story that unveils the origin of the world and human beings" (para. 1). Partenie notes that while the term myth carries implications of falsity in its contemporary meaning for Plato it meant a true story. Lee similarly argues that the foundation myth has been misconstrued to imply Plato

"countenances manipulation by propaganda" (p. 177). However, Lee says, the foundation myth is not a top-down manipulation of the masses by political elites it is "accepted by all three classes," the rulers, auxiliaries, and workers[2] (p. 177). This creates a problem for the discourse using the word "lie," as in "noble lie," because, as has been established, a lie is defined as when the sender of the message is fully aware that they are making a false statement with the intention of misleading the receiver. Lee argues that the rulers and auxiliaries, the senders in this situation, are just as unaware of any falsity in the myth as the masses, the receivers of the message.

Another way to describe what is happening here is that the myth is a concept "meant to replace the national traditions which any community has, which are intended to express the kind of community it is, or wishes to be, its ideals rather than its matters of fact" (Lee, p. 177). Partenie adds to this that Plato "uses myth to inculcate in his less philosophical readers noble beliefs and/or teach them various philosophical matters that may be too difficult for them to follow if expounded in a blunt, philosophical discourse" (para. 2). In Lee and Partenie's explanations of the foundation myth one begins to see the influence of Plato's concept on Lippmann and his pseudoenvironment. This is the way in which individuals manufacture "maps" of reality to help them navigate a complex world and integrate into their established perceptions the events and changes occurring in that world. These are the "fictions and symbols" that are "important part[s] of the machinery of human communication" (Lippmann, p. 8). Lippmann's pseudoenvironment is a tool, helping individuals navigate political waters because, Lippmann argues, "the real environment is altogether too big, too complex, and too fleeting for direct acquaintance.

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[2] In Desmond Lee's translation of Plato's *Republic* the Rulers, "exercise supreme authority in the state and are selected by exacting tests" (p. 177). The Auxiliaries are those who "discharge Military, Police, and Executive duties under the orders of the Rulers" (p. 177).

We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations" (p. 11).

What kinds of things might fulfill such a definition? What national myths permeate politics in the United States? Chief among the potential answers to this question would be the notion of American exceptionalism, a concept that encompasses a variety of ideas, defined differently by various political commentators, that essentially boils down to the notion that there is something unique about the United States, its role in the world, and its place in human history. The simplest explanation is in Hofstadter's (1962) oft-quoted comment, "It has been our fate as a nation to not have ideologies but to be one" (p. 43). In other words America was not subject to the ideological divisions that plagued Europe but instead was based upon the notion that "hard work and common sense, were better and more practical than commitments to broad and divisive abstractions" (p. 43). The American political sociologist Seymour Martin Lipset (1996) defined the ideology of America in five words: "liberty, egalitarianism, individualism, populism, and laissez-faire" (p. 31). It does not matter if it is "true" that America is somehow exceptional or special in the bigger picture of human history; the idea is not even something that can be called "true" or "false" because it is a political-philosophical concept used as an organizing principle and basis of American political culture. To espouse a belief in American exceptionalism is more of a political statement, perhaps even a quasi-religious one, than a statement about anything that could even remotely be described as a fact.[3]

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[3] One can see this political myth making in action in controversies about the term during the Obama Presidency. President Obama, in a press conference, responding to a question about American exceptionalism said he basically believed in it in the same way in which most other people believe in the exceptionalism of their own nations (Tumulty, 2013, para. 6-7). This was just one moment resulting in criticism from conservative critics about Obama's failure to embrace the notion of America as having a special role in the world and in history, which is an important part of the conservative politic ethos.

American exceptionalism is a broad, all encompassing myth about the image of the nation within which is contained other myths about the character of its political culture. These are summed up by Lipset's five-word definition. Together these five words point especially to the ideals of individualism, as Lipset describes an anti-statist position, the ability to live free of state intervention in personal decisions (pp. 31-32), and self-reliance, the ability of one to stand on their own without needing help from the state. These notions stand in contrast to collectivism and state-controlled economics. There is the high ideal of freedom of speech and the legal discourse that draws on free market (laissez-faire) economics to frame that concept of speech creating a marketplace for ideas. There is the notion of an objective press that acts as a "fourth estate"[4] and a check on government power. Each of these "myths" is part of the discourses that will be examined in the other chapters of this project. They all contain at least a ring of truth, if not actual truth.

Nevertheless, there is an element of deception in the concept of the myth and each individual myth, even if a given myth contains some truth and is collectively co-accepted by the leaders and masses of a society. In Lee's translation, Plato uses the term "witchcraft" to describe the "involuntary" loss of belief in what is right. In other words, Lee argues in a footnote, what is being discussed here could loosely translate to propaganda (p. 179).[5] Plato's hypothetical Republic would produce what in contemporary terms might be characterized as war propaganda by altering perceptions of the after-life

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[4] The idea of the "fourth estate" is that there are three branches of government creating checks and balances on power and the press acts as a fourth branch shining light on corruption in the government.

[5] Lee argues that "propaganda would be a somewhat free translation" but that the "means of operation" of advertising and mass-media are "not a bad modern parallel" to Plato's concept of "goéteuo" or "to bewitch" (p. 179). It is not that propaganda is itself "myth." Propaganda is the means by which myths are disseminated through many small deceptions, and truths, designed to reinforce the myth.

in order to "produce a fighting spirit" (p. 140). In World War II era America it was not so much feelings about the after life but rather feelings of patriotism that "produced a fighting spirit" through the images of Uncle Sam saying, "I want you" or Rosie the Riveter saying, "We can do it." The myth as part of propaganda is not about the specific acts being propagandized (i.e. enlisting in the military or working in a factory to help the war effort) it is about the underlying feelings about American greatness and the individual citizen's dedication to that greatness.

Where conflict between leaders and masses becomes a problem is when the myth stands too starkly in contrast with the reality in front of the masses'/public's eyes. Again, this does not necessarily mean that political leaders cease to believe the myth or they are purposefully lying to the masses. Political leaders can either continue to fully cling to a belief in the face of all evidence to the contrary or they may break with the myth. This happened with former Federal Reserve Chairman Alan Greenspan after the banking crisis at the beginning of the 21st century when he told the House Committee on Oversight and Government Reform (*Financial Crisis*, 2008) that he had found a "flaw" in his ideology (p. 46).[6] In other words, his experience with his myth of market economics proved to be "the murder of a Beautiful Theory by a Gang of Brutal Facts" (Lippmann, p. 10).

A most useful way for concluding and clarifying this discussion is in Shadia Drury's discussion of the noble lie and her argument for a distinction between deliberate

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[6] A *New York Times* article on Greenspan's testimony explains that the then former chairman of the Fed was called to testify about the financial crisis in part because some blamed the crisis on his policy of "keeping interest rates too low for too long" (Andrews, 2008, para. 5). Some believed the low interest rates resulted in a bubble in the housing market where prices for houses were artificially high resulting in a housing market crisis that rippled out to the broader economy. Greenspan spent his career espousing a belief in the self-correcting power of markets. Rep. Henry Waxman (D-CA) asked Greenspan, "Do you feel that your ideology pushed you to make decisions that you wish you had not made?" (para. 6). To this Greenspan replied, "Yes, I've found a flaw. I don't know how significant or permanent it is. But I've been very distressed by that fact" (para. 7).

lies and ideals. Drury (1996), Canada Research Chair in Social Justice at Regina University, argues "there is always a discrepancy between the ideal and the actual because no society can live up to its own ideals" (p. 1229). This can still be politically workable however. Peter Bachrach, a Temple University political scientist who "advocated a dialectical approach to democracy" (Fischer, 2008, para. 3), argues even if a political ideal is not possible in practice it should still not be discarded because it can be useful for critiquing a political system. Bachrach (1980) says, "an unrealizable doctrine, political or religious, can lead to cynicism, but on the other hand it may be a valuable guide and a spur to a more humane society" (p. 86). Drury (1996) is slightly more pessimistic about the concept arguing that, "Problems arise when the discrepancy between the ideal and the actual becomes so great that it is intolerable" (p. 1228).

For Drury (1996) it is important to distinguish between what she characterizes as Strauss's interpretation of Plato's noble lie and its actual meaning. She argues for a thinking of the noble lie that sees it as "a fanciful account of the truth" (p. 1229). This is distinct from what she sees as Strauss's view of "a set of lies intended to dupe the multitude and secure the power of a corrupt and decadent elite" (p. 1229). This political elite, Strauss's philosopher-prophet, Drury (1999) elsewhere argues, "falls prey to his own bodyguard of lies; he begins to believe that he is in truth the humanly perfect manifestation of the divine mind" (p. 58). So, as in Lippmann's perspective, Drury notes that political elites are capable of falling victim to their own myths or deceptions, their own pseudoenvironments, their own noble lies; those elites may turn the myths from allegories for guiding humanity into truths to which they themselves fall prey.

Finally, there is Raymond Williams's "structures of feeling," a concept that also in some ways gives theoretical roots for contemporary uses of affect theory and some insight into how these tactics might play out in political discourse today. While affect theory draws on structures of feeling, Ngai (2005) argues that Williams is not exactly describing affect, but rather something broader. She argues,

> His term represents a 'cultural hypothesis' derived from efforts to understand 'a social experience which is still *in process*' (132), and thus has 'many of the characteristics of pre-formation' … a social experience which is *not* fully semanticized, yet *does not require* this semanticization in order to exert palpable pressures and generate concrete effects. (p. 360)

As Ngai describes it, Williams presents the theoretical bridge for this point in the typology that assists in connecting the big picture of political philosophy to the day-to-day operations of politics. If the noble lie is a sort of political "being" then structures of feeling are political "becomings." This political "becoming" in the discourses of deceit is best defined as "spin."

IV. Spin

You can put your best foot forward. You can offer "a glittery and partial side" (Altenhofen, p. 160) of an issue. You can alter the perspective from which an issue is viewed. This is what it means to "spin" something. Spin is the use of, sometimes manipulative, communication tactics to alter the way the receiver of a message thinks about an incident or issue in order to advance the immediate political goals of the sender of the message. In his doctoral dissertation for Murdoch University Dale Hynd (2007) defines spin as "a collection of information control behaviours and techniques designed

to lead the receiver away from the real intention of the communicator's message" (p. 77). It is when the communicator takes a problem and repositions it in relation to the audience or when the politician will "meticulously *massage* the facts, then *filter* them through letters, speeches, and *front groups* until even he could not say for sure what was truth and what was spin" (emphasis added, Tye, p. 75).

This is the definition of spin from Larry Tye's biography of Edward Bernays in his discussion of what Bernays would do for his clients. Many public relations practitioners consider Bernays to be the Godfather of PR. He was an early 20th century PR man who defined the craft as it is practiced today; his influence on the industry is still felt many years after his death. Bernays also had a direct impact on American politics early in his career and that impact is still seen in how spin is employed in American politics in the early 21st century.

There is some overlap between myth and spin in their methods. Both spin and myth may contain elements of truth and elements of falsity. There is also within both spin and myth, at times, an inability to distinguish between what is true and what is false, as noted in the above description of Edward Bernays. However, the falsity is rendered moot or meaningless in the face of the cleverness of spin or the power of the myth. Whether something is true becomes secondary to its value to a political agenda. The value of a statement in spin is not whether it is true; it's almost silly to suggest that truth would even be a concern with spin. What matters is the value for advancing the political agenda.

One form of spin is the use of "front groups," a common deceptive tactic in public relations and politics. Front groups are used to create a "calculated simulation of enthusiasm" referred to more informally as "Astro Turf Organizing" (Ewen, 1996, p. 29).

Media historian Stuart Ewen quotes a *New York Times* article from 1993 that discusses organizations such as Bonner & Associates that are responsible for organizing "grassroots" support for corporations and trade organizations (p. 29). He goes on to discuss the spin that is often employed by such groups, for example, turning the public's attention away from the question of the value of a particular government regulation to questions of individual liberty. Citing the distribution of an "'educational brochure' from the Dow Chemical Corporation" (p. 30), Ewen describes the arguments against the regulation of hazardous materials that avoid mentioning environmental danger, instead focusing on an "emotional rhetoric of 'individual' choice and the rights of 'our children'" (p. 31).

Similarly, Manheim (2011) discusses the concept of campaign "surrogates," individuals who are either overtly or covertly connected to a cause and advocate on its behalf. In political campaigns a surrogate can be someone who is as open as a governor who has endorsed a presidential candidate and then campaigns in favor of that candidate. However, there are also more covert uses of surrogates, as Manheim describes with Thomas Edison's campaign to associate his competitor Westinghouse's alternating current (AC) with the death penalty, thus creating the public impression that it was dangerous (pp. 9-10). Edison wanted to convince the public that his direct current (DC) system was preferable to AC. Because AC required fewer generating stations making it "far more economical" (Maheim, p. 8) than DC. Edison made his case on emotional grounds through his own statements and by using a surrogate named Harold Brown.

Instead of saying to the public, "my system is better than Westinghouse's" and presenting an argument based upon the comparative merits of each system Edison

launched a campaign that would give the public the impression that AC was dangerous. The campaign played on fear through public statements from Edison extolling the virtues of Westinghouse's system for a more efficient implementation of the death penalty. Harold Brown, Edison's surrogate, performed experiments in which he would kill animals using electricity delivered via Westinghouse's AC (Manheim, p. 9). Brown served as a front man while giving the appearance of being independent of Edison, when in reality he was explicitly hired by him to make statements in the media, write articles, and make public appearances that would advance Edison's interests without the public being aware of the ties between the two men. The method that Manheim says Edison employed helped to maintain the public perception that Brown was independent and thus more credible. This credibility is maintained by concealing the sender's motivation.

The Edison and Dow Chemicals examples demonstrate spin at work in how it focuses the public's attention on some aspect of an issue or frames the debate. Dow did not want the public to think about dangerous chemicals. They wanted the public to think about freedom and government intrusion into business practices. Edison did not want the public to think about the efficiency of the two competing electricity systems. He wanted the public to think about the potential danger of his competitor's system. In both cases the "sculpture" was adjusted to show the viewer one side and have the other side facing the wall and out of view. In both cases there is truth but there is also a deceptive practice in that public attention is being diverted away from an important aspect of a topic and toward the aspect the sender finds more desirable.

V. True Statements that Allow/Lead to False Conclusions

In his exploration of the definition of lying Loyola University professor of philosophy Thomas Carson (2006) discusses how to use a true statement to mislead. He uses the example of a car salesman being asked if a car overheats. The salesman responds, "I drove this car across the Mojave desert [sic] on a very hot day and had no problems" (p. 285). The salesman has made a true statement, and thus by definition has not lied to the buyer, yet he has also presumably deceived the buyer. He has made a true statement that would allow for or lead to a false conclusion.

This issue of true but misleading communication can be examined beyond just a political context. For example, in a law journal article written as a J.D. candidate at Notre Dame Law School R. John Kuehn III (2000) made an argument for lawyers to think about this issue through a moral lens. He examined whether lawyers are morally responsible for a client making a true but misleading statement under oath. He concludes that lawyers "can be morally accountable for advising a client to make legally true but misleading statements under oath" (p. 592). There is an important qualifier in this argument; the statement is *legally* true. While the client may be on legally solid ground she is still misleading a judge and jury.

Political leaders can employ this tactic to attempt to encourage or allow the public to come to a false conclusion. Put another way, one might describe it as *giving the receiver license or at least the potential* to take away a false impression. This takes some, but not all, of the agency away from the sender of the message and places it in part on the receiver. This does not take away intent on the part of the sender, the salesman still intends for the buyer to have a false impression, it just allows for the fact that meaning is

in the decoding as much as, maybe more than, in the encoding of a message. It also acknowledges the idea that the onus is at least in part on the receiver to think more critically about the message rather than accepting it at face value, to say, "wait, that salesman did not *really* answer my question."

This blurring of the lines of agency is epitomized by a television ad run by the Montana Democratic Party against Republican candidate Mike Taylor during the 2002 U.S. Senate race between Taylor and incumbent senator Max Baucus (D, MT). The ad featured images from an early 1980s TV program in which Taylor talked about hair care and beauty products for men, promoting his beauty school business. These are images of Taylor, decked out in a three-piece leisure suit with the top buttons opened exposing his chest hair and accompanied by gold necklaces, applying beauty products to another man's hair and face.[7] In this case Taylor's campaign was dealt what he himself perceived to be a devastating and terminal attack that resulted in Taylor dropping out of the race in early October (Gransberry, 2002), only to re-enter the race two weeks later to, as he said, "[get] the slander out of Montana politics" (Associated Press, 2002, p. B4). In his re-entrance Taylor essentially conceded that he had no possibility of winning, but said that his honor and the integrity of the political process were at stake, and he was going to continue to campaign only to take a principled stand on those two issues.

The ad in question received some minor national media attention, including an entry on the website The Smoking Gun (2002), and sparked some debate about gay rights

[7] Still shots from the ad can be seen here: http://www.thesmokinggun.com/file/senate-hopeful-quits-citing-gay-baiting-tv-ad and here: http://www.thesmokinggun.com/file/senate-hopeful-quits-citing-gay-baiting-tv-ad?page=1 and the ad itself can be found on YouTube here: http://youtu.be/6sXdFEyEIlQ. Like all other sources in this dissertation it is also included on the list found at https://delicious.com/rob.spcr/dissertation.

and homophobic attacks in political campaign ads,[8] particularly because it came from a state Democratic Party committee and the Democrats were typically seen as stronger supporters of the gay rights movement than Republicans. The reason Taylor perceived this ad to be so damaging to his campaign as to lead him to drop out is that it carried what he and others argued was a not-so-subtle implication of homo-eroticism in the fact that he was touching another man's face, coupled with the perceived femininity or at least non-masculinity of beauty products, presenting an image that might leave the viewer to assume that Taylor was "a gay hairdresser" (Gransberry, para. 2).

Both Democrats and Republicans criticized the ad, attacking the Montana State Democratic Party for running it and Baucus for not condemning it. Taylor described the ad as an act of "character assassination" (Gransberry, 2002, para. 12) and state Sen. Ken Toole, a Democrat and gay rights activist, characterized the ad as "an overt and obvious appeal to the homophobic (voter) that is playing to that stereotypic imagery" (para. 16). A Montana Republican consultant said the ad was as subtle as "a 2x4 across the forehead. The video was clearly designed to send a subliminal message about Mike Taylor's sexuality" (para. 21).

Yet, there must be some discussion about how the roles of interpretation and intention are described in such discussions, the ways in which an appeal is described as overt or covert. There has to be some interrogation of the line of intention, that point where someone has used an image or said something in a certain way so as to (mis)lead the receiver to believe something that is not true. The State Democratic Party claimed,

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[8] Even more than a decade after that Montana campaign Baucus was still criticized for it. Jim Messina, one of President Obama's campaign managers, was criticized in 2012 by journalist David Sirota for producing the ad, which Sirota (2012) referred to as "one of the most homophobic ads in American history" (para. 1). In a PBS (2002) article on the race Taylor's campaign manager was quoted as saying that the ad "very clearly implied in the pictures that Mike is homosexual. Mike thinks it's a moral outrage" (para. 12).

"the image [in the ad] was not intended to imply that Taylor was gay" (Gransberry, 2002, para. 18). Conversely, Toole argued that the ad's image was "obvious and [the ad] ought to be pulled [from television]" (para. 19). Perhaps to some there was an obvious allusion to homosexuality used in the ad. However, the ad's overt content was about a student loan money scam at Taylor's business and so the images of Taylor's beauty products show were relevant to that business and that scandal. Moreover, most campaign managers would consider making hay about a business scandal from an opponent's past to be a valid course of attack in a campaign. In an article discussing the stories about sexual harassment accusations against presidential candidate Herman Cain during the 2012 Republican primary, Democratic Party campaign consultant Paul Begala (2011) wrote what he referred to as Begala's law: "If an attack is factual and about the public record, it's not dirty" (para. 8).

In the Taylor "hair dresser" ad it is easy to see how some might interpret an air of homoeroticism in its imagery.[9] However, this interpretation must be placed, at least in part, on the shoulders of the "readers" of the ad. It is still possible that the makers of the Taylor ad used these images because they were connected to a business scandal and had no intention of playing on feelings of homophobia. Or, they knew full well that the images would be damaging, but thought the damage would be in showing their opponent wearing such ridiculous out-of-style clothing, not thinking about the potential

[9] One image that stands out in particular from the ad is in the last few frames. Taylor is standing next to another man sitting in a chair. Taylor reaches down but the viewer of the ad never sees why he is reaching down because the ad ends and the last image is seen from an angle that gives the appearance that Taylor is reaching for the man's genitals. This is accompanied by the tagline, "Mike Taylor. Not the way we do business here in Montana." It is difficult to not conclude that "Taylor is gay" is in the subtext of that imagery and language. When the announcer says, "not the way we do business" the implication is "funny business" or Gary Hart's "monkey business." In this context the sexual implications of the image combined with "business" takes on a sexual connotation and it becomes easy to understand why critics saw it that way.

homophobic implications. There was nothing contained in the ad that was factually inaccurate, yet the discourse surrounding the ad carries terms that imply the unambiguous language of dishonesty. The ad is referred to as “slander” and “character assassination,” although there is no statement made about Taylor’s sexuality, just the subjective interpretation of an image that may or may not leave the viewer with a false impression.

There are also two constructions about the tactic of the ad in the language describing it. On one hand Toole, the Montana Democrat, referred to the ad as having “an overt and obvious appeal to the homophobic (voter)” while, on the other hand, a Montana Republican consultant referred to the ad as being both “as subtle as ‘a 2x4 across the forehead’” and having “a subliminal message about Mike Taylor's sexuality.” In these responses the ad is presented as being simultaneously overt and covert. The respondent must characterize the tactic as being somehow obvious to any reasonably intelligent observer while also being sneaky and deceitful. There are contradictory impulses here. A message cannot simultaneously be “overt and obvious” and “subliminal.” Yet, this is what critics of the ad in this discourse attempt to show in order to characterize the message as deceitful. These contradictory impulses are what make this category of political deception so complex and interesting.

Another way to describe the talk surrounding this type of deceit would be as “context discourse.” It is a common refrain when a political actor says something controversial that has landed him or her in hot water to respond by saying, “I was taken out of context.” It is quite easy to cherry pick one statement from a politician, remove it from the context of the larger speech, and present it on its own. This would be a “true” representation in the sense that the politician did in fact say what she or he is quoted as

saying but it gives a false impression because it is removed from its context; the lack of context alters the meaning and gives the public a false impression.

In his analysis of legal moralism and false or misleading statements Louisiana State University Associate Professor of Law Stuart Green points to President Bill Clinton's testimony around his inappropriate relationship with White House intern Monica Lewinsky in 1998. Clinton gave a videotaped testimony to a grand jury about the relationship during which Green says Clinton made "a handful of literally false statements under oath" but "most of his testimony consisted of statements that, though misleading, were literally true" (p. 210). Green (2001) describes Clinton's testimony as being "legalistic" (p. 210) in that he took advantage of legal wordplay. This allowed Clinton to (a) accurately answer questions about his wrongdoing while, (b) avoiding admitting to the wrongdoing, and (c) avoiding a perjury charge. For example, Green points to the "falsity rule," the idea that "ambiguous questions cannot produce perjurious answers" (p. 180). At one point during his testimony Clinton was asked a two-part question to which he replied "yes, that's true" (p. 207). This was not perjury because, Green contends, it is unclear to which part of the question Clinton was replying. An ambiguous answer to a poorly worded question cannot be perjurious. That being said, while it may have been a true statement it was also not exactly honest, it was deceptive.

On two occasions out-of-context quotes played a part in the 2012 presidential campaign. In both instances the questions surrounded the candidacy of a Republican candidate, former Massachusetts Gov. Mitt Romney. In the first case, Romney's campaign produced an ad containing a quote from incumbent President Barack Obama in which Obama says, "If we keep talking about the economy, we're going to lose."

Romney's campaign was criticized for using the quote "out of context" because in its original use Obama was quoting a McCain campaign staffer talking about McCain's 2008 campaign strategy. Romney's use of the quote gave the appearance that Obama was saying this about his own campaign in 2012, which was deemed by critics to be misleading (Politifact, 2011; Shear, 2011).

In the second instance Romney became the target of this tactic. In early 2012 in a speech to the Nashua Chamber of Commerce in New Hampshire, Romney said, "I like being able to fire people." While this statement sounded bad on its face, when placed into the context of the entire speech, the statement shows that Romney was not revealing himself to be a heartless employer who gets pleasure from firing his employees. In context it is clear that Romney was talking about consumers purchasing health insurance and being able to drop their coverage and move to another provider if they are unhappy with the service they are receiving.[10]

Where this creates a problem in the political process, for both the public and political figures, is when the out-of-context quote reinforces an established perception. If there is already a feeling about a politician in the public mind, a quote like Romney or Obama's, even if it was not actually said in the way the de-contextualization implies, can be believed and, even if it is corrected, can still have an impact. Brad Phillips (2012), president of the Phillips Media Relations firm, wrote about the incident on his blog, saying that mistakes like Romney's, quotes like that one, "that reinforce an existing

[10] The full quote from Romney was: "I want individuals to have their own insurance that means the insurance company will have an incentive to keep you healthy. It also means if you don t like what they do you can fire them. I like being able to fire people who provide services to me. ... You know if someone doesn't give me a good service that I need, I want to say I'm going to go get someone else to provide that service to me." One interesting point about this is Romney's speech immediately after saying "I like being able to fire people." He begins to stammer a little and it is easy to conclude that he might be thinking that he has just said something that will be used out of context to attack him. A video clip of the quote can be found in the CNN archives at this link: http://imagesource.cnn.com/content/clip/370017_672.do

narrative about a candidate are almost always the most harmful ones" (para. 5). In other words, there was already bubbling in the public mind a perception of Mitt Romney as a heartless corporate raider. Even in context, that phrase "I like being able to fire people" reinforces and possibly strengthens such negative perceptions.

In a similar scenario, during the 1992 presidential election, incumbent President George H.W. Bush inadvertently created a similar problem for himself when he expressed amazement at seeing a grocery store scanner. In a 1995 C-Span interview, Bush's former press secretary Marlin Fitzwater described a campaign stop in which President Bush, being polite to someone demonstrating a new grocery store scanner his company was selling, said "that's amazing." This was later written up in a news article portraying Bush as truly amazed by a grocery store scanner, as if he had never seen one before, which Fitzwater argued reinforced a narrative that the president was so "out of touch" with the economic pains of average Americans that he had never been in a grocery store. The problem for the Bush campaign, Fitzwater said in the interview, is that this "touched on a truth … we were out of touch on the economy. We really didn't know where the American people were hurting and how they were reacting to economic problems at that time" (Wiggins, 2000, para. 145-146).

Finally, this discourse is not only part of how campaigns volley criticisms back-and-forth. It is also part of how the press and political fact-checking initiatives critique political actors. For example, in 2010 an advocacy organization called The 60 Plus Association claimed that the Affordable Care Act would cut Medicare spending. Politifact (2010) declared this claim mostly false, saying that what the bill actually did was "slow the program's future growth," not cut it (para. 9). Jackson and Jamieson

(2007) called a similar strategy by the 1996 Clinton campaign (and many other Democrats) the "baseline bluff" (p. 57). This is when politician A proposes an increase in spending that is smaller than politician B's proposed increase and politician B refers to politician A's increase as a cut. Compared to politician B's proposal it is a cut, but it is only a cut compared to that particular baseline, hence the name "baseline bluff." Politifact (2010) criticized 60 Plus's claim as being "mostly false" saying it "leaves critical facts out of its description in a way that gives a misleading impression" (para. 26).

In these two instances there is a statement that is true in one context but false in another. It is a true statement that misleads because of its lack of context. It is kind of problematic that Politifact would deem 60 Plus's statement as "mostly false" because slowing the growth of a program is technically a cut. Clinton's 1996 "baseline bluff" against his Sen. Bob Dole, his Republican opponent in that campaign, is a true statement when comparing Dole's MediCare proposal to Clinton's but a false statement when comparing Dole's proposal to what was the present spending level on MediCare.

The essential point is that context matters in political speech. Even when context is clear, choosing the wrong words can end a campaign by reinforcing an established negative perception or creating a new one. What is even more problematic for political actors is how underlying truths can be reinforced in and out of context through the wrong choice of words, or perhaps, unfortunately, through the right choice of words. That is, sometimes the truth itself, the "right" words, can be used in deceptive ways, becoming political weapons.

VI. Secrecy

Edward Shils, a renowned sociologist from the University of Chicago, begins his book *The Torment of Secrecy* with what might seem a fairly self-evident argument. Shils (1956) argues, "A free society can only exist when public spirit is balanced by an equal inclination of men to mind their own business" (p. 21). In other words, freedom requires that citizens be both publically engaged with one another but also respectful of one another's privacy. Shils goes on to contrast the differences between the privacy of those citizens with the "privacy" (or secrecy) of the government. He recounts the historic evolution from monarchy, which made governing a private process for a ruler and his advisors, to the development of "the modern liberal democratic movement" that considered "publicity regarding political and administrative affairs" to be one of its "fundamental aim[s]" (p. 23).

This means that government "privacy" is better described as secrecy. Shils presents a most effective and succinct definition of secrecy as "the compulsory withholding of knowledge, reinforced by the prospect of sanctions for disclosure" (p. 26). So in order for the government to maintain some level of secrecy it must have both the power to withhold information from the public and the power to punish those who would disseminate that information which has been deemed necessary to be kept secret. While the Shils definition is useful secrecy is actually subtler than that. Political secrecy is more nuanced, taking on different qualities in different contexts. Although this project does not focus on secrecy it is important to explore it here as part of the typology and explain the ways in which secrecy can be a tool for political deception.

The word "deemed," as used above, points to where secrecy can be a tool of political deception and where secrecy as deception is most potentially problematic. President Richard Nixon represents perfectly the problematic contrasts in the handling of government secrecy, the importance of balancing secrecy and transparency, and the problem of whether it is valid to deem something worthy of protection from public scrutiny. In June of 1972 Nixon signed Executive Order 11652.[11] In a March 1972 statement on this executive order Nixon said:

> Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and---eventually incapable of determining their own destinies. (Nixon, 1972, para. 6)

The statement takes on a strange character when considering the fact that the Nixon tapes, recordings that were made of discussions between the president and his advisors in the Oval Office, show a very different attitude about secrecy and government actions.

President Nixon would go on to resign in disgrace after a group of political operatives known as "the plumbers" broke into Democratic Party headquarters, the party of Nixon's opposition, at the Watergate Hotel at the behest of Nixon. White House recordings show that on at least three occasions Nixon and his advisors discussed stifling the investigation into the Watergate break-in by claiming that the investigation would

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[11] Executive Order No. 11652 (1972) is titled Classification and Declassification of National Security Information and Material. It was an order from President Nixon changing the way in which material related to national security would be classified and declassified and creating a system to oversee the process. The full text of the executive order can be found on the website for the American Presidency Project at http://www.presidency.ucsb.edu/ws/index.php?pid=482&st=&st1=.

reveal sensitive information related to national security.[12] The protection of national security is a widely accepted rationale for protecting government secrecy. The evidence, in Nixon's own voice, indicates that he was willing to at least mislead about the national security implications of the Watergate investigation in order to protect himself from scrutiny for political misdeeds, in this case his knowledge of and leadership in the Watergate break-in.

While Nixon demonstrates the problem of secrecy and its adverse effects on the rights of the public to be informed about government deeds and, more important, misdeeds, a report from a commission on government secrecy chaired by Sen. Daniel Patrick Moynihan (D-NY) points to a greater complexity on the topic. Moynihan (1997) writes in the commission report, "some secrecy is vital to save lives, bring miscreants to justice, protect national security, and engage in effective diplomacy" (p. XXI). Eva Horn, professor of German Literature and cultural studies at the University of Vienna, makes a similar point about the subtlety of the concept. Horn (2011) argues that secrecy cannot simply be contrasted with transparency as if the two were equal and opposite concepts. Instead secrecy and transparency should be thought of as complementary concepts, where secrecy paradoxically protects a democracy (i.e. as a necessary tool of national security) while also threatening democracy (i.e. through the potential for abuse and consolidation of power free from public scrutiny that might prevent it).

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[12] Nixon's predecessors wired the White House for secret recordings before he arrived in the Oval Office (Doyle, 1999). Other presidents, including both John F. Kennedy and Lyndon Baines Johnson recorded conversations (Widmer, 2012; Caro, 2012). Recordings and transcripts of the Nixon White House tape conversations can be found at the website for the Nixon library at this URL: http://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/trial/transcripts.php. The transcripts in question in which Nixon discusses using national security as an excuse for not allowing an investigation into the Watergate break-in are from one conversation that took place on June 23, 1972 and two conversations that took place on April 16, 1973. Direct links to the transcripts and recordings can be found at my Delicious page https://delicious.com/rob.spcr/dissertation.

Nixon, as a political figure, embodies this paradox. His March 1972 statement on his executive order acknowledges the importance of understanding government secrecy as a threat to individual liberty yet his own recordings reveal a man willing to use a false sense of threat to national security as a tool to protect the secrecy of his own misdeeds. This one example illustrates the importance of secrecy to national security; this argument is widely acknowledged.[13] From a political analysis standpoint one can conclude that Nixon would not have proposed it as a tool for protecting secrecy were it not such a widely accepted rationale.

Alongside the paradox of secrecy as both a necessary protection of and threat to democracy is the subtlety of the concept itself. This subtlety is best described by Horn in her argument that, "the secret is not so much a piece of withheld knowledge as a 'secrecy effect' that structures social and political relations between those who 'are supposed to know' and those excluded from this knowledge" (p. 105). This political and social structure that Horn describes will be explored in the chapter about Rachel Maddow and the tea party and the way Maddow describes "astroturf" in political organizing; the blurred line between organic and spontaneous political action as opposed to top-down organized action funded by "shadowy" organizations protecting the sources of their funding. In the Maddow/tea party example there is a discourse of deceit where secrecy,

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[13] The importance of secrecy to national security is widely accepted. The ACLU, an organization that works to protect civil liberties and fight government secrecy, argues that laws should be written, "to ensure information is withheld from the public only when truly necessary to protect national security" (German, 2010, p. 7). So they argue for transparency while acknowledging the need for *some* secrecy. In the same report, however, the ACLU argues that, as of 2010 when their report was written, there was a problematic and unnecessary over-classification of government documents. The aforementioned Moynihan report on government secrecy notes this as a problem, arguing, "when everything is secret, nothing is secret" (p. xxi). In other words, the Moynihan report says, "Secrets can be protected more effectively if secrecy is reduced overall" (p. xxi). So when the government over-classifies information it ends up harming national security by making it more difficult to manage and protect classified information thus making it more difficult to protect the public from harm.

the obscuring of the sources of funding for political action, gives a false impression of the meaning of those actions. It also creates a distinction between who is "supposed to know" where the money comes from (i.e. donor and organizer) and who is "excluded" from that knowledge (i.e. the general public).

Once again the ghost of Nixon returns to assist in this discussion. During the Watergate investigation Bob Woodward and Carl Bernstein (1974), the reporters who rose to journalism stardom through their investigation for the *Washington Post* of the Watergate break-in, reported on Nixon's "secret slush fund" (p. 56).[14] That "secret slush fund" looks quite quaint and tame in comparison to the machinations of today's movement of funds across political campaigns and organizations. This distinction between Nixon and contemporary political money could be termed as "hard" and "soft" secrecy. The Rachel Maddow chapter, the portion of this project that deals with secrecy, addresses soft secrecy in political deception.

The difference between hard and soft secrecy is defined by the fact that soft secrecy involves practices that are not wholly secret. Bratich (2004) argues, "Whereas truth is often attached to notions of exposure and the elimination of secrecy, we see in the current conjuncture that secrecy, if anything, has become more *visible*" (pp. 237-238). The way in which this is seen that is most relevant to this project is in the flow of money into campaigns. As the once powerful California politician Jesse Unruh[15] said, "money is

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[14] The "secret slush fund" refers to money given to Nixon's political operations to be used for "political sabotage" (Woodward and Bernstein, p. 184). The money was intended to be untraceable.

[15] Unruh was the speaker of the California Assembly who butted heads with then Governor (and future President) Ronald Reagan. In his book *Ronnie and Jesse*, Lou Cannon (1969) attributes the cliché about money and politics is attributed to Unruh, although some say California businessman Howard Ahmanson coined it. Cannon says the phrase reflected Unruh's attitude toward money, "which he saw from beginning to end as the means to power rather than as a political end" (p. 99).

the mother's milk of politics" (Cannon, 1969, p. 99). It is the lifeblood that keeps campaigns going.

Where Nixon had his "secret slush fund" the politicians in the early 21st century political environment have 527 and 501(c) groups creating and paying for their attack ads for them. Because of the U.S. Supreme Court's decision in *Citizens United* (2010), a secret slush fund is unnecessary because private independent groups can spend large sums of money freely. On top of that, those groups, sometimes called Super PACs, have managed to circumvent disclosure laws, keeping their donor lists away from public scrutiny (Flaherty, 2001; Liptak, 2011; Sandler, 2011). In addition to the subversion of disclosure laws, there has also been a pattern of avoiding restrictions against the coordination of efforts between independent groups and candidates' campaigns, even to the point where, during the 2011 run-up to the 2012 Republican presidential primary, some seemed to ignore those regulations altogether when producing campaign ads.[16]

It is appropriate that a major website that tracks campaign donations is called OpenSecrets.org. Echoing Bratich's discussion of the typical notion of truth, The Center

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[16] McCain/Feingold (BCRA) prohibited third-party organizations from coordinating efforts with campaigns in terms of things such as message management. Some campaigns in 2011 engaged in practices that were close to violating that aspect of the law. Texas Governor Rick Perry's campaign was accused of coordinating efforts with so-called Super PACs that supported his presidential campaign (Smith, 2011a). Questions were raised about whether Former U.S. Ambassador to China Jon Huntsman Jr.'s father had donated funds to a Super PAC that had run ads on behalf of the younger Huntsman's presidential campaign (Sink, 2011). Huntsman Jr. claimed to not know if his father had funded the ad saying, "He's my dad, he's my best friend, he can do whatever he wants to do. We don't talk about those things, we can't" (para. 2).

Coverage of the ad demonstrates secrecy at work in Super PACS, noting that Huntsman Sr. was "widely suspected to be the primary financier of the Our Destiny PAC" (para. 4) the political action committee that was responsible for the ad. Even before the 2012 Republican presidential primary questions were raised about coordination during the 2006 Pennsylvania U.S. Senate race. Then incumbent Sen. Rick Santorum's campaign was accused of coordinating the creation of TV ads by using the same actors in his TV ads that were used in an ad supporting him that was paid for by the group Americans for Job Security (Associated Press, 2005). On the other side of the same campaign, the *Scranton Times-Tribune* ran ads for their newspaper featuring an image of their paper that came dangerously close to promoting Santorum's challenger then state auditor-general Robert P. Casey Jr. with the newspaper headline "Casey to Run for Senate." This prompted a complaint of coordination from the Santorum campaign and the filing of a FECA claim with the FEC by the PA Republican Committee (Budoff, 2005).

for Responsive Politics (CRP) (n.d.), which runs the Open Secrets website, describes its mission as "aim[ing] to create a more educated voter, an involved citizenry and a more transparent and responsive government" (para. 1). The CRP makes the assumption, a common assumption and another common cliché in politics, that "sunlight makes the best disinfectant." In other words, openness in government shines a light on and, more important, thus prevents corruption and protects the purity of the democratic process.

The problem here is that *attempts* to educate voters do not guarantee *success* in educating voters (i.e. some people simply are not interested) and if the group does succeed in educating voters it does not necessarily lead to having more active voters. This way of talking about secrecy imagines information as an activating agent, something that, once it is released, will lead the public to a more generally active posture, improve responsiveness of government, and have a democratizing effect on society. This is not always the case. In fact soft secrecy can actually have an adverse effect on the body politic, creating cynicism and thus be a deactivating agent.

Put another way, by placing the practices of secrecy right out in the open, the deceiver neutralizes the critics' attempts to stoke public outrage or even, in some cases, raise public awareness. For example, campaign finance disclosure laws become part of the spectacle of politics. The Open Secrets website has an entire section devoted to examining lobbying practices and 527 and 501(c) organizations.[17] It becomes common knowledge that money has an influence on the political process, an influence that is not

[17] The 527 organizations are independent expenditure groups such as Citizens United that were created by what is known as the McCain/Feingold campaign finance reform bill (Bipartisan Campaign Reform Act of 2002), also known as the BCRA or by the title of the U.S. House version of the bill, Shays-Meehan. Open Secrets highlights the very basic and important difference between these groups and a political campaign. Whereas campaigns have limits on how much money they can accept from any one individual or group 527 and 501(c) groups are able to "raise unlimited funds from individuals, corporations, and labor unions" (Open Secrets, n.d.a., para. 2). In addition to raising unlimited funds 501(c) organizations can protect the anonymity of their donors (Open Secrets, n.d.b., para. 7).

limited to donations to a politician's reelection campaign but extends to how outside groups communicate with and about government and how that influence is hidden in plain sight. These organizations are able to keep their donors secret, everyone knows they have these secret donors but the public has no idea who those donors are. Thus the public sees the donors purchasing influence, the public sees the purchase happen but is left with uncertainty about who is doing the purchasing. This is a soft secrecy. The public response to it, more than becoming activated, is to become lethargic. "Money has a corrupting influence on politics. What else is new?"

A discussion of secrecy is more complex than simply contrasting it with transparency. Too much secrecy can have an adverse effect on individual rights giving governments, and non-governmental political actors, too much power to hide malfeasance. Too little secrecy makes it difficult for government to manage national security by opening sensitive intelligence to those who might do harm. Too much secrecy can also do harm by making it difficult to manage secrets and thus also national security as the Moynihan report notes (p. xxi). Secrecy plays a "limited but necessary role" (Moynihan, p. xxi) in governance; the most important word there being "limited." When it runs rampant it allows for public deception that is most especially problematic in how political messages are funded.

VII. Pandering

One of the most famous campaign promises in modern political history came from then Vice President George H.W. Bush during his speech at the 1988 Republican National Convention, the convention at which he officially became the Republican nominee for President of the United States. It was there where he uttered his now famous

statement, "Read my lips. No new taxes." Four years later this statement would come back to bite him when, during the third presidential debate of the 1992 campaign, then-Arkansas Gov. Bill Clinton said, "The mistake that [Bush] made was making the 'read my lips' promise in the first place, just to get elected, knowing what the size of the deficit was" (Commission on Presidential Debates, 1992, para. 234).[18] The implication of Clinton's statement there was that Bush knew full well he would need to raise taxes but told the electorate that he would not do so just to get their votes.

For its part, the 1992 Bush campaign featured a TV ad called "Gray Dot" that displayed two candidates side-by-side, both with their faces covered by a gray dot. The announcer went down a list of contradictory positions from the candidate on the left and the candidate on the right with the commercial ending with the gray dots disappearing to reveal that the two candidates were actually the same person – Gov. Clinton (November Company, 1992). The obvious implication of the ad was that Clinton changes positions with the political winds.

The Clinton and Bush campaigns were accusing one another of pandering. Princeton Professor of Politics Brandice Canes-Wrone (2004), in her analysis of presidents and public policy, defines policy pandering as when "presidents follow public opinion when they believe citizens are misinformed about their interests" (p. 104). She raises some important descriptive questions in a footnote citing other definitions of the term. For example, Canes-Wrone cites Jacobs and Shapiro (2000) who expand the definition of pandering to include not only situations where constituents are ill informed but also those times when constituents are well-informed. Lawrence Jacobs is a professor

[18] The transcript of this debate can be found here: http://www.debates.org/index.php?page=october-19-1992-debate-transcript

of Political Studies at the Humphrey School Public Affairs. Robert Shapiro is a professor of political science at Columbia University. Their analysis of pandering poses the argument that, despite popular perception, politicians actually do not pander to public opinion. Jacobs and Shapiro (2000) argue that the "irony of contemporary politics" at least in the year 2000 was "that politicians both slavishly track[ed] public opinion and … studiously avoid[ed] simply conforming policy to what the public want[ed]" (pp. 7-8).

Canes-Wrone and Jacobs and Shapiro define pandering only on the basis of the correlation between the policy preference of the public, how informed that public is, and the policy actions of the politician. Carnes Lord, a Naval War College Professor of Strategic Leadership, points toward a slightly darker way of thinking about pandering. Lord (2004) equates pandering with demagoguery, which he points out actually has its etymological origins in the "Classical Greek term meaning simply 'leader of the people'" (p. 13). Lord argues that pandering is "as old as democracy itself" and that there is a long history of worry, stretching back to the fourth and fifth centuries, that democracy would be "vulnerable to unscrupulous politicians who played on the hopes and fears of the people to advance their own careers" (p. 13).

Pandering might simply be defined as those times when a politician tells constituents what they want to hear but *only because* of the fact that they want to hear it. In other words a pandering politician does not necessarily believe what she is saying but she is saying it because it is electorally advantageous to do so due to her constituents' beliefs. So pandering's deceptive qualities are in its insincerity. It can also be deceptive because in some cases the politician is tapping into constituents' beliefs in order to manipulate the constituency. Lord notes that fears about such manipulation have been

expressed in response to leaders from Hitler to Franklin Delano Roosevelt (pp. 13-14). So defining pandering requires a bit of a breakdown of differing situations. The situations are as follows:

(a) The politician believes X while a certain constituency believes Y. The politician advocates Y.

(b) The politician believes X while a certain constituency believes Y. The politician advocates X.

(c) The politician believes X while a certain constituency also believes X. The politician advocates X.

(d) The politician feels ambiguous about an issue and a certain constituency believes X. The politician advocates X.

Each of these scenarios requires a little more discussion to define precisely how they do or do not constitute pandering.

For example, the meaning of scenario A can be altered by whether the constituency in question is well informed or poorly informed about X and Y. If the constituency is misinformed, the politician knows they are misinformed, the politician knows that X is a better policy than Y, and the politician, knowing all of this, still chooses to follow the desires of the constituency and advocates Y. This can be considered pandering. The politician in this scenario has chosen against her better judgment to advocate a policy she knows to be bad because a certain constituency desires that policy. This is one way pandering takes on a deceptive character. The politician is hiding her true feelings on an issue because those feelings are not popular and thus it is electorally advantageous to conceal them.

On the other hand, in scenario A if the public is well informed and simply desires a policy that differs from the policy desired by the politician there are two possible ways to read the situation. In the first reading the politician can be said to be taking an ideological position about the role of the representative. A representative's job is to *represent* her constituents. This means doing what they would have her do even if that goes against her judgment and conscience. This is not necessarily pandering but merely a politician making a judgment about the definition of her job as a representative.

Scenarios B and C pose situations in which it is more difficult to see pandering in action; although there are ways in which they can be seen as pandering. In some ways scenario B is the very antithesis of pandering. To pander is to follow public opinion and scenario B goes against public opinion. The notion of pandering depends upon who the constituency in question is. For example, the politician is a congressman, the certain constituency is an unpopular group, the politician goes against that unpopular group, and he is thus pandering to another constituency. Scenario C also seems on its face to not be an example of pandering. However, if the issue X is one about which the politician does not feel very strongly, and he chooses to place a strong emphasis on it, focusing political and legislative energy only because a certain constituency feels strongly about it, he can be said to be pandering. The same can be said about scenario D. A politician who does not have much of an opinion about something, who then takes a public stance on it because of public opinion can be described as a panderer.

This breakdown of scenarios demonstrates that a problem that arises for defining pandering, and accusing a politician of it, is similar to the problem that arises from the definition of a lie. How can one possibly know the internal thought process of the

politician, which is a necessary component here, in order to know for certain that the politician is pandering? As was pointed out in the discussion of the definition of lying it is impossible to know the internal thought process of any other individual. So one cannot know for sure if a politician sincerely believes what she is saying. In judging whether a statement is a pander the constituents and the press have only the politician's public statements to go on.

The problem is that the accusation of pandering is effective and useful in a political campaign. Interestingly, Jacobs and Shapiro argue that, not only do politicians not pander, but that "since the 1970s" politicians "have become less responsive to the substantive policy preferences of the average American" (p. 4). Nevertheless the accusation of pandering as a political tool has been part of the process for centuries. While it has been around for a long time it took on a particularly high profile role in the presidential campaign of 2004. Its potency in this campaign is exemplified by the repeated use of the term "flip-flopper" to describe the Democratic Party nominee Sen. John Kerry. Here the idea of pandering is not only about a politician taking a position because it is a popular one. It is about the fact that the politician is *changing* positions because of popular opinion. This is the height of pandering.

The pandering discourse is effective because it is not only about deception, but deception to the point of being a character flaw, something that is wrong with the politician at his or her core. As Stahl (2008) argues, the use of the term in the 2004 campaign "implied that Kerry could not even measure up to a fork-tongued, Janus-faced opportunist … 'Flip-flopper' meant that in his equivocation, Kerry did not even know what he himself believed" (p. 80). Not only was the accusation politically effective, it

was also politically *affective*. It connected to a feeling about Kerry and tied *weakness* and vacillation to public awareness about his wealth and a perception of effete liberalism on the part of Kerry. This perception that was created around Kerry stood in contrast to the image of Bush as "resolute" and "certain," as someone who knew exactly what he believed and was not afraid to let the American people know.

In other words, Bush would tell the American public that, unlike John Kerry, he *did not need* to equivocate. This idea is best exemplified by Bush's acceptance speech at the Republican Party's national convention in New York. With public opinion polls showing his positions to be unpopular, Bush (2004) said to the American people, "Even when we don't agree, at least you know what I believe and where I stand" (para. 158). This single line opens up an analysis of a few points. First, there are the implications about what are good reasons to vote for a candidate in general. In this case Bush is saying ideology or beliefs about policy and culture are less important than a perception that the candidate possesses the courage of his convictions. There is also the implication of deceit on the part of his opposition. By saying "at least you know what I believe," he implies that the American public did not know at the time what Kerry believed, or perhaps as Stahl argues, Bush may have been implying Kerry did not even know what Kerry believed. This leads the discourse from a general statement about the reasons for voting for a candidate to the specific contrasts of the two candidates in question in the 2004 election. It was one of the most effective and affective arguments made against Kerry, that the public did not know where he stood either because he "waffled" or was not open (read: deceptive) about his positions, or because Kerry himself did not know.

The pandering discourse about Kerry, and its accompanying "non-pandering" discourse about Bush, demonstrates the use of two rhetorical strategies. First, the Bush campaign played on affect and feelings about honesty connected to strength and masculinity. The Bush campaign commonly used terms like "resolute," "backbone" and "strong" to describe its candidate, which contrasted with terms it used to describe Kerry, like "waffle" and "flip-flop," which implied weakness. Conversely Kerry supporters argued that the Bush campaign's flip-flop accusations were less a reflection of Kerry's uncertainty and more a reflection that Bush was "stubborn" or unable to change his mind even in the face of evidence of the wrongness of his position. Kerry supporters attempted to use the "wrong track" question to criticize Bush campaign *strategy* as much as they criticized Bush himself. The "wrong track" argument was essentially that polls were showing a majority of Americans believed the nation was in trouble. In other words, they argued Bush's policies were not working, the American public understood this and did not support those policies, and Bush's campaign was using the flip-flop charge to eschew this. Bush's critics claimed that the arguments for Bush's "resoluteness" and Kerry's "flip-flopping" were an attempt to avoid discussing that problem. This amounts to more of a "horse race" discourse, a critique of campaign strategy by the campaigns themselves, rather than a debate about policy positions.

Whether it is called, flip-flopping, waffling, or a lack of backbone, intent is an essential element for pandering to be considered deceptive. A politician can waffle without being deceptive. This discourse of "intent" as "political calculation" is examined in Haifeng Huang's research. Huang (2010), a professor of political science at the University of California, Merced, constructs a model of political campaigns where

dishonesty is thought of in two ways. First, there is the lying candidate, a candidate who is dishonest about his or her policy position. The lying candidate has a clear position but publicly advocates for a different position in order to win votes. Second, there is the pandering candidate, a candidate who does not have strong feelings on an issue, but publicly advocates a particular policy in order to win votes. Interest groups and lobbyists can then sway the pandering candidate after he or she wins election, persuading him or her to implement a policy that is most advantageous to them and/or the politician for any number of reasons, including but not limited to, improving campaign fund raising prospects for re-election, pleasing an established campaign donor, or simply having party leadership "whip" the politician forcing him or her to tow the party line (p. 334). Any one or multiple factors can sway the pandering candidate after he or she has won election.

One problem with Huang's model is that it does not allow for a third possibility. Candidates may (honestly) state a position during a campaign and then implement a different policy after being elected because of realpolitik; some things simply cannot be accomplished. For example, in a televised primary debate on January 31, 2008 Democratic presidential candidate Barack Obama (then a U.S. Senator from Illinois) stated that he opposed having an individual mandate as part of a health care reform package. An individual mandate for health care is the idea that the government would require all Americans to purchase health care insurance in the same way consumers in most states are legally required to purchase car insurance. Obama used this position to differentiate himself from his main opponent, Sen. Hillary Clinton, using this policy difference to his political advantage. Yet, despite his opposition during the campaign, when he was president in 2010 Obama signed the Affordable Care Act, which contained

just such a provision. According to Huang's construction Obama is either a lying candidate or a pandering candidate. Either Obama did not actually oppose the individual mandate but said that he did in order to win voters away from Clinton during the Democratic primary, or he did not feel strongly on the issue but claimed to, pandering to Democratic primary voters in order to win their votes, and then proceeded to be swayed by advocates for the individual mandate once he was in office.

This construction does not take into account the *possibility* that in this case Obama honestly opposed the individual mandate but he supported and signed the bill because political reality demanded it. It is entirely possible that during the 2008 Democratic primary Obama sincerely believed the individual mandate was bad public policy but that he signed a bill containing it because he made a political/ethical calculation that the good that would come from signing said bill outweighed the bad. Similarly, it is entirely possible that George H.W. Bush sincerely did not intend to raise taxes when he made the "read my lips" comment but was forced into doing so by political reality.

These examples are useful for a few reasons. First, they reiterate the point that the voters, other political actors, critics, and analysts can never really know for sure whether a political actor is lying. It is possible to build models to analyze probabilities and rationales behind lying and pandering, as Huang does in a very interesting analysis. However, it is impossible to have some extrasensory insight into the candidate's mind to know whether a lie was told, pandering happened, or if a candidate such as Obama or George H.W. Bush made a sincere statement of his policy position while miscalculating his ability to turn that policy position into actually implemented policy.

Second, the Obama and Bush examples are useful *vis-à-vis* Huang because they demonstrate how descriptions of lying in politics can be problematic. In this particular example, and the literature reviewed by Huang, lying and pandering are presented as the only options. Huang cites Kartik and McAfee (2007), who created a model where candidates either honestly state their true position or feel free to pander and advocate whatever position will be most helpful in getting elected. In Huang's model of electoral competition his "candidates are fundamentally office-oriented" (p. 335), meaning they are focused on winning election to a particular office even if that means implementing a policy they do not support. In other words, "all candidates are ultimately office seeking in that their utility is zero if they lose the election and they are willing to announce anything in order to get elected" (p. 337).

The only problem with this is the conclusion that lying and pandering are the only options, that even the candidate who honestly states a position can be presented in political discourses as calculating because he or she is "ultimately office seeking," an interpretation that implies an inherent dishonesty in all or most political communication and undermines the faith that is necessary for maintaining a political system. Perhaps, if it does not imply lying as an inherent necessity, it at least implies lying as a constant possibility. This creates a situation where any time a politician speaks the question of whether she is lying is a constant; it is always there as background noise.

Of course, this perception extends well beyond Huang's model to the political discourse that framed Bush's "resoluteness" or "steadfastness" as being just as dishonest. In his analysis of the 2004 election, Stahl (2008) discusses the Bush campaign having "had four years to fine-tune Bush's Texas cowboy persona: a straight talking, rough-

around-the-edges man of the people" (p. 79). The implication here is that this was an illusory image, an argument that was common about Bush, that he was "all hat and no cattle," an old Texas saying describing someone who pretends to be a rancher but does not do the real work of ranching.

The Obama example, and many political actions like it, are part of a general public perception of cynicism about the political process, specifically about promises made on the campaign trail. In a 2010 Rasmussen poll of likely voters, 81% of respondents said they believed that politicians do not keep the promises they make in campaigns. This public perception stands in contrast to Sulkin's (2008) findings that, in fact, most politicians after winning an election at least try to do what they promised during the campaign. This raises the question, why is there such a strong public perception that politicians are only liars and panderers? Why is there a perception that the political process itself is all charade and façade? The answer is in the discourses of deceit; the ways in which political actors describe lying in politics is part of the cynicism in politics. When politicians are thought of as "ultimately office seeking … willing to announce anything in order to get elected" there is little hope for faith in a political system.

VIII. Looking Forward

This typology was written for a few reasons. First, as was discussed at the beginning of the chapter, no one has written a stand-alone typology of political deception. All of the existing typologies, with the exception of Chisholm and Feehan, have been written as just a section of a larger research project, and Chisholm and Feehan wrote their typology on deception in general not political deception specifically. This chapter was

written to contribute to the existing literature by devoting a chapter length analysis to this discussion of defining deception in its different forms.

It was also written to demonstrate that political deception has a variety of faces; it takes on many forms and is a complicated concept. Even within each category there are subspecies. Each of the categories in this chapter could likely be the subject of their own individual chapter or even book length analyses. So this chapter establishes a foundation for future research on how to think about and define various forms of political deception and how to think about each example on its own. This chapter was also designed to identify the ways in which deception will be discussed in this dissertation. It was important to establish that this project is not just about politicians who tell lies and the fact that lying is not the only form of deception in which politicians engage.

Each of these types of political deception plays some part in the remainder of this dissertation but some are more prominent than others. For example, chapter six, the chapter on The Rachel Maddow Show and the tea party, is largely about myth making and spin. Myth making is seen in the big picture of the discussion, the way the two sides talk about the historical roots of the appropriate way to engage in political debate, while spin is in the smaller day-to-day discussions defining the tea party group FreedomWorks. Chapter seven, the fact checkers chapter, is about on one hand the way American news engage in their own myth making about their role as watchdogs on power. It is also about how members of the press describe politicians as engaging in one of the six types of deception. For example, chapter seven will show how the fact checking discourse is perhaps a little too careless with its use of the word “lie” to describe political discourse.

Finally, chapter eight looks at the difficulties for defining what a lie is and the challenges that creates for finding a solution to political deception that goes beyond simply thinking in terms of the marketplace of ideas argument. This typology sets up much of the discussion in the chapters that follow. Chapter eight's analysis, however, requires a little more discussion. The next chapter will serve that purpose by delving into the ways in which the law has handled and continues to handle political deception.

Chapter 5 – The Law and Political Deception: How is it Handled?

I. Introduction

The concept of a "dominant discourse" can be described in various ways. It can be called "conventional wisdom" or "common sense." It could perhaps even be called a "cliché." One reason dominant discourses become dominant is because they are repeated so often. There are two overlapping dominant discourses about political campaigns that are repeated over and over in the judicial discourse, court decisions, and academic research cited in this chapter. An old saying often repeated by people who work in politics sums up the first: "*politics ain't beanbag*." That phrase, originating in a newspaper column in 1895, means that politics is not a child's game (Goddard, n.d.a., para. 2).[1] Politics can be a rough and ugly business not for the feint of heart.

The ugliness in American politics reaches back at least to the 1800 Presidential campaign between Thomas Jefferson and John Adams. The (sometimes anonymous) pamphleteering used by both sides in 1800 (Lerche, 1948) evolved into what legendary political consultant Walter Quigley called "dynamiting" newspapers, mock newspapers used to attack candidates (Jonas, 1957)[2] and later the contemporary art of what Harsin (2006) refers to as rumor bombs. Rumor bombs today, Harsin argues, are the product of how those practices employed in early campaigns have evolved in the contemporary

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[1] *Politics Ain't Beanbag* is also the title of the memoir of John "Pitt" Pittenger (2005). Pitt served as the dean of the Rutgers School of Law-Camden in the 1980s. He served in the Pennsylvania State Legislature and as the Pennsylvania secretary of education under Gov. Milton Shapp. Most importantly he was my friend and the first person to give me lessons in how to manage a political campaign. For that I am grateful.

[2] Quigley used "dynamiting" newspapers as ways to anonymously attack political opponents. They were produced to appear as impartial news publications when in reality they were partisan campaign literature.

environment of converging media corporations, public relations information management, and "war communication strategies" (p. 89).

The second dominant discourse is the argument that political culture is best left unfettered and that, even if there is some ugliness and deception, these unfortunate byproducts will be weeded out by debate. In other words, the best cure for bad speech is not regulation but rather more and better speech to counter the bad speech. This is best exemplified by U.S. Supreme Court Justice Hugo Black's argument in *New York Times v. Sullivan* (1964) that, "An unconditional right to say what one pleases about public affairs is … the minimum guarantee of the First Amendment" (p. 297). While the Court has said false and erroneous speech on its own has no value and enjoys no First Amendment protection from government proscription (*Garrison v Louisiana*, 1964, p. 75), Black takes the argument in the opposite direction where such speech not only *is protected* but government intervention to stop that personal behavior is seen as a far greater danger than speech that deceives the public and/or does reputational harm to its target. In its simplest form this argument is manifest in Thomas Jefferson's statement, "I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it" (Jefferson, 1791, para. 3).

This chapter will examine this legal discourse surrounding the regulation of political deception. Section II will look at the regulation of political deception at the state level examining statutes found in state election codes on state legislature websites and in the Westlaw database, which are catalogued in Appendix A. Section III will discuss how similar laws have made their way into state and federal courts and the legal discourses that emanate from these cases. Finally, this will be followed by a discussion of three

recent cases: *Susan B. Anthony List v. Driehaus*, *281 CARE Committee v. Arneson*, both were decided in January 2013, and *U.S. v. Alvarez*, decided in June 2012.

II. Attempts at State Regulation of Political Deception

There is a longstanding notion of free speech in America as a "marketplace of ideas." This argument, originating from U.S. Supreme Court Justice Oliver Wendell Holmes's dissent in the case of *Abrams v. United States*[3] (1919), is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (p. 630). In other words speakers should compete to persuade the public, free from government restriction, and may the best ideas win the day. If free speech and political debate in the U.S. constitute a "marketplace of ideas," then sincerely believed false information would certainly constitute a "market failure" (Brietzke, 1997, p. 965), and lying in politics, as defined in this dissertation's typology, must be "an unfair trade practice" (p. 967).

Even as these "markets" fail, and despite the criticism of some scholars who see the analogy as being overly influenced by capitalist and commercial ways of thinking about speech (Barron, 1967; McChesney, 2000; Stein, 2006), this analogy continues to guide free speech and deception in political philosophy and the law. If politics is a marketplace, then the regulation of that marketplace is a process of maintaining the integrity of the market. Deception in the marketplace is a failure of the integrity of the market, which is a failure of the integrity, perhaps in some extreme cases the validity, of elections.

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[3] In *Abrams v. U.S.* (1919) the defendants dropped leaflets from a window in New York City voicing opposition to World War I. They specifically advocated "curtailment of production of things … essential to the prosecution of the war" (p. 617). They were convicted of violating the Espionage Act. The U.S. Supreme Court upheld that conviction. Holmes dissented arguing that the First Amendment protected the defendants' speech.

This section of this chapter will examine the ways in which some U.S. states have attempted statutory solutions to these problems of market failure. If politics is a marketplace then these statutes could be seen as protecting the public in cases of detrimental reliance, a legal term applied to situations where, if it is reasonable to expect that a customer would not know something about a product and the seller of that product takes advantage of that ignorance, thus selling something under false pretenses, there is detrimental reliance. The same could be said for politicians "selling" ideas. If a candidate or elected official takes advantage of the public's lack of knowledge, and dependence upon a political leader for that knowledge, there is a detrimental reliance. There are very few statutes in existence that address deception in politics. This research found thirty-one statutes, in twenty-five states, which are listed in Appendix A.

One reason there are so few such statutes is because when they come before the courts it is difficult to defend their constitutionality in the face of First Amendment absolutism. Of the thirty-one statutes contained in Appendix A, three contain some textual reference to the concept of electoral integrity. Alaska makes it illegal to make a political statement if "the result of the statement places the integrity of the election process in substantial doubt" (False Statements in Telephone Polling, n.d., para. 2). The Louisiana statute attempts to "assure that elections are held in a fair and ethical manner" (Political Material; ethics; prohibitions, 2011). The statute begins with a paragraph about the state interest in protecting the ethics and fairness of having an informed electorate and cites the value of a voter's ability to evaluate the person or group responsible for a political message. Finally, in a footnote, the Washington State truth-in-political-advertising statute states, "the political process will benefit from vigorous debate that is

not made with actual malice and is not defamatory" (Political advertising or electioneering communication, 2009). Another footnote states that defamatory statements made about candidates "damage the integrity of elections" (Political advertising or electioneering communication, 2009). It goes on to argue that the quality of political discourse and the faith of the electorate in the political system are undermined by such forms of speech.

There is something valuable in a statute in which the concept of electoral integrity is alluded to in the actual text of the law. The majority of the statutes in Appendix A simply state the action that is being regulated. These three statutes, from Alaska, Louisiana, and Washington, make it a point to say that the state takes seriously the integrity of its political system. The discourses of deceit in politics and the rough and tumble nature of campaigns bring into focus the political process as a system of "detrimental reliance" of which the public is a victim.

In *People v. Wogaman* (1984), the Michigan Court of Appeals held that the purpose of the detrimental reliance standard is to "protect the unwary and negligent from the deceit of those who would take advantage of another's negligence or incompetence" (pp. 826-827). In other words, detrimental reliance is designed to protect someone, who may be unaware of something, from being taken advantage of by those who are aware. For example, in *Michigan v. Reigle* (1997) the Michigan Court of Appeals found that a funeral home had misled its customers about the quality of caskets they were sold and that there was evidence of detrimental reliance on the part of the customer in this transaction. The essence of detrimental reliance is that the customer has relied upon the

seller for important information and was harmed by the seller's withholding of that information and thus a deception has occurred and harm has been done.

Detrimental reliance can be a useful principle, beyond its application in commercial transactions, to the broader public problem of political deception. As much of the discourse surrounding the marketplace of ideas argument implies, a political campaign, whether it tells the truth or engages in one of the forms of deception outlined in chapter four, is a necessary part of how the public decides who will govern. Campaigns are primary sources of information about the candidates, and citizens use them to make decisions. When members of the public vote, making those decisions about leadership, they depend on the campaigns to inform them about their candidates and how those candidates will address the problems facing the community. When a campaign deceives the public in any way, there is a situation of detrimental reliance and the public, ill informed and thus making a potentially bad, perhaps even disastrous decision, becomes a collective victim.

Attorney Colin B. White (2009), arguing in favor of a truth-in-political-advertising law, summarizes one obstacle for the statutes examined here in his discussion of *St. Amant v. Thompson* (1968), where he argues "the Court resigned itself to the fact that in order to protect publications that are true, the First Amendment must protect erroneous publications as well" (White, 2009, pp. 17-18). This problem is also summarized in Justice Holmes's oft-quoted phrase, "freedom for the thought that we hate" (*United States v. Schwimmer*, 1929, p. 655). This judicial discourse, and the notion that the cure for bad speech is not regulation but more good speech to counteract it, in the

wake of *U.S. v. Alvarez*, "creates a sizeable hurdle for any law that seeks to regulate false speech" (Lieffring, 2013, p. 1056).

In *Alvarez*, the U.S. Supreme Court in a 6-3 vote, found Section (b) of the Stolen Valor Act (2006), which prohibited "false claims about receipt of Military decorations or medals," to be an unconstitutional violation of the First Amendment. In this case Xavier Alvarez, who was a member of the Three Valleys Water District Board of Directors in Claremont, California, violated Stolen Valor when he gave a speech in which he falsely claimed to be a 25-year veteran of the U.S. Marine Corps who had won the Medal of Honor. The U.S. Supreme Court affirmed the U.S. Ninth Circuit Court of Appeals' overturning of Alvarez's conviction under Stolen Valor holding that a statute could not regulate false speech as a category alone but that false speech combined with some other social ill, such as perjury or fraud, could be regulated. *Alvarez* will be discussed in greater detail later in this chapter but these are the important points to know about it for the purposes of section II.

In order that a statute may withstand a constitutional challenge like that in *Alvarez* it is essential that it preserve "the state's interest in maintaining an enlightened electorate while also protecting the free exchange of ideas and information which is vital to public debate" (Conn, 1993, p. 517). As shown in Appendix B there are three ways to categorize how some states have attempted to do just that. These are (a) election conduct statutes, (b) affiliation statutes and (c) campaign message statutes. The first category is likely the most resistant to challenge on First Amendment grounds. The third category, given the 2012 Supreme Court decision in *U.S. v. Alvarez* discussed later in this chapter, are likely

least resistant to such challenges. The rest of this section will define each of these three categories and discuss how the statutes in the categories vary state-by-state.

Conduct-of-Elections Statutes

The first group of state statutes restrict citizens from engaging in some form of deception that would interfere with the clear and compelling government interest in the fair and efficient conduct of elections. Legal scholar Richard Hasen (2013) argues that a law restricting speech that interferes with such conduct has the "strongest case for constitutionality" if it is narrowly drawn (p. 71). Examples of such speech would be that which either (a) interferes with the fair and efficient execution of the governmental function of holding an election or (b) disenfranchises an individual or group of the right to vote. Some of these statutes describe such deceptions as potentially occurring through the creation and dissemination of facsimiles of ballots that include false information intended to mislead voters. A violation might include when political actors impersonate government agents through speech or misappropriation of, or creating facsimiles of, government documents.

For example, the state of Arizona makes it illegal to mail false information about an election on documents forged to give the appearance an agent of the state government created them (Deceptive mailings, n.d.). Louisiana has a similar but more specific statute that makes it illegal to mail a facsimile of a ballot in which the candidates are designated with incorrect ballot numbers. So if a Democratic campaign wanted to deceive Republican voters into accidentally voting for the Democratic candidate, it might mail to registered Republicans ballot facsimiles on which the ballot number printed next to the

Republican candidate is actually the ballot number for the Democratic candidate, thus inducing those voters to erroneously vote for the Democrat.[4]

While Arizona's statute is about only forged government documents and Louisiana's statute makes it illegal to lead a voter to cast a legal ballot for the wrong candidate, Missouri addresses deception that would lead voters to cast ballots that would be eliminated for not meeting legal standards. The text of § 115.631(7) bans the practice of "furnishing any voter with a false or fraudulent or bogus ballot" (Election authorities and conduct of elections, 2012). Wyoming similarly addresses the "bogus ballot" problem but also makes it illegal to falsify voting instructions (Falsifying election documents, n.d.).

Practices that might be prohibited by such statutes exist as shown in reports from Common Cause, a non-partisan, non-profit political advocacy organization focused on empowering public political participation. For example, in one Pennsylvania township, voters received a letter bearing the township seal informing them that, due to expected high turnout in the 2008 election, Republicans should vote on Tuesday and Democrats should vote on Wednesday (Common Cause, n.d.a., p. 3). Since elections are only held on Tuesdays, this letter was likely intended to depress Democratic voter turnout in the 2008 election by sending registered Democrats to the polls the day after the election. In another report examining ten swing states, Common Cause (n.d.b.) found similar practices happening in the form of "flyers, mailers and increasingly robo-calls" (p. 4). In

[4] Not all states have ballot numbers next to candidate names. The most infamous example of this, just to illustrate the point, would be the state of Florida in the 2000 presidential election. In that election the candidate names and ballot numbers were aligned awkwardly. Democrat Al Gore was number five on the ballot and Reform Party candidate Pat Buchanan was number four. However, due to the strange alignment of the numbers and names some voters intended to vote for Gore but accidentally voted for Buchanan. If readers are interested in seeing an image of the ballot I have included a link to one in my dissertation filter on my Delicious page: https://delicious.com/rob.spcr/dissertation.

that report the organization found at the time only one of the ten swing states, Missouri, had a deceptive practices law in place to address such problems (p. 4).

California's statute has an interesting twist: The speech that is regulated is speech made to the public via the state. Under California Election Code § 13307, candidates may provide a statement of no more than 200 words describing their qualifications for holding the position for which they are running. According to § 13307(4)(b), each voter is sent a copy of a sample ballot along with a voter's pamphlet containing these candidate statements. California Election Code § 18351 (n.d.) makes it illegal to make "a false statement of a material fact in a candidate's statement." In past cases courts have knocked down statutes that criminalize false statements made by politicians to the public (*Minnesota v. Jude*, 1996; *Rickert*, 2007; *Garrison*, 1964). This California statute might be a little more difficult to challenge because it does not simply address a statement made directly from a candidate to the voters. It is a statement a candidate makes on a government document that is filed with election officials. Lying in such a statement should be seen as fraud equivalent to falsifying campaign finance documents. This statute does not regulate false statements on their own; it regulates false statements made in tandem with falsifying government documents. Thus this statute would probably withstand constitutional scrutiny.

Affiliation Statutes

Five of the 31 statutes addressing political deception are categorized as 'affiliation statutes." They address the problem of false identification of affiliation with a campaign. This category breaks into two sub-categories based upon how each law defines and thus regulates the problem of affiliation. Three of the statutes – from Alabama, Kansas, and

Louisiana – regulate affiliation as an external problem. That is, it is illegal to misrepresent yourself as speaking on behalf of a campaign with which you have no affiliation. The other two statutes, both of which are from Ohio, regulate affiliation as an internal campaign problem. These statutes make it illegal to gain employment or volunteer with a campaign with the intention of impeding its progress. These two statutes, § 3517.21 and § 3517.22, deal respectively with infiltrating a campaign for a candidate running for office and an advocacy campaign.

The external and internal affiliation statutes address two kinds of affiliation-related deception. In external affiliation deception, one need not have any contact with the campaign in question. For example, a political actor could go door-to-door, talking to voters while pretending to be affiliated with an opponent's campaign and spreading lies about that opponent. This deceit would not require the political actor to have any contact with that campaign; the deception would be perpetrated against the public. On the other hand, internal affiliation deception is perpetrated against the public *and* the campaign. A political actor volunteering for a campaign and then sabotaging it is an example. The subterfuge could be internal, harming the campaign without contact with the public; or it could use the campaign's resources to send false information to the public, thus deceiving both the campaign and the voters.[5]

[5] An example of this would be when Karl Rove, campaign manager for President George W. Bush's two successful presidential runs, pretended to be a volunteer for a Democratic candidate for state treasurer in Illinois in 1970. He stole letterhead from the Democrat's campaign and printed flyers advertising a party at the campaign headquarters promising "free beer, free food, girls and a good time for nothing" (Cannon, et al., 2003, p. 10).

Campaign Message Statutes

Twenty-four of the thirty-one statutes contain a section addressing the truth or falsity of messages disseminated from campaigns to the public.[6] This third category of statutes can be broken into four sub-categories, those that address: (a) false information about a candidate, (b) false information about an issue (c) false information about a candidate or an issue, and (d) false statements of incumbency. Sub-categories (a) and (b) reflect the fact that some statutes recognize a difference between false information about a person and false information about the potential effects of a ballot initiative. Category (c) is necessary because some of these statutes combine both offenses of (a) and (b) into a single statute. These statutes regulate deception in a variety of ways, and while there is some overlap, there is variation in how each one functions, the actions they address, and how they address them. There is a variety of regulated behaviors with different punishments, but they are all directed at the same problem; they all, in one way or another, make it illegal to deceive voters in order to induce them to vote in a certain way, whether that vote is cast on a candidate or an issue.

Two statutes that stand out are Oregon § 260.555 (Prohibitions relating to circulation, 2011) and Wyoming § 22-24-125(c) (Misrepresentation of petition, 2012). What makes these two unusual is that, where the other statutes on the list address the problem of lying to the voters in persuading them to vote a certain way, Oregon and Wyoming make it illegal to lie about a ballot initiative or recall petition to induce a voter to sign it. So the distinction is the timing of the falsehood. Violators of these two statutes

[6] My research found thirty-one statutes that address political deception. Of those there are three that fall under multiple categories because they have sections that serve different functions. These statutes are Louisiana § 18:1463, Ohio § 3517.21, and Ohio § 3517.22. So there are thirty-one statutes in total, five affiliation statutes, six election conduct statutes, and twenty-four campaign message statutes.

have timed their disinformation or misinformation to be employed in order to get their issue before the public. Oregon's statute is strictly about issues; Wyoming's statute includes ballot initiatives and recall petitions.[7]

These three subcategories also make it important to distinguish between false statements about an issue and those made about a person. In his concurrence in the Washington Supreme Court's decision in *Washington v. 119 Vote No! Committee* (1998) Justice Phil Talmadge makes just such a distinction. Candidates who are the target of false speech have a variety of avenues for attempting to remedy the problem. They can use the court system through a defamation lawsuit when warranted, they can wait until the next election to run again and clear their name in the debate of that campaign, and those who live in Washington state, can under the state constitution, Article II, Section 8, even ask the legislature to not seat their opponent on the grounds that the dishonesty of the campaign disqualifies him or her from holding office. Conversely, Talmadge argues, a ballot measure "enacted on the basis of a campaign of lies" has little chance of being overturned by the necessary 2/3 majority of the legislature (p. 708).

In a way the speech surrounding a ballot measure needs even greater protection from the abuses of falsehoods than speech for or against the election of a candidate. An

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[7] A recall petition is used when voters are dissatisfied with an elected official and want to have that official removed from office. Supporters of a recall circulate petitions that are signed by voters. Once the requisite number of petition signatures has been obtained the question of recall is put on the ballot and the general public votes to either recall the elected official, replacing him or her with another candidate, or to keep the currently serving official in his or her position. There was a high profile recall of California governor Gray Davis in 2003 when actor Arnold Schwarzenegger replaced Davis (Finnegan, 2003). In the summer of 2012 Wisconsin's governor Scott Walker avoided being recalled in an election (Davey & Zeleney, 2012).

A ballot initiative is when voters circulate petitions to have a question put before the public for a vote. The procedure for getting a question on the ballot, and what kinds of questions can be placed on a ballot, vary from state to state and county to county. Voters can vote on issues such as whether to raise taxes or allow liquor sales in their town. In 2013 Pequea Township, in Pennsylvania, held a ballot initiative and voted to allow liquor sales there for the first time since before prohibition (Intelligencer Journal, 2013).

elected official holds office for a limited period of time. He or she will have to stand before constituents and ask for re-election. A ballot measure that passes on the basis of intentional falsehoods or even just sincerely believed misperceptions might have more lasting and damaging effects on a community. It is generally easier to remove a lying politician from office than overturn a ballot initiative passed through disinformation and misinformation. The ballot initiative requires a greater amount of work to get it on the ballot before it is even considered by the public.

Washington State's statute is broken into three sections all of which address campaign messages about a candidate. They make it a misdemeanor to defame a candidate, make a false statement of incumbency, or to falsely claim that a candidate received an endorsement. These are all speech-related statutes. Ohio takes a different approach to the issue by not only addressing false incumbency but also a whole list of other things about which a candidate or surrogate might deceive the public. Ohio § 3517.21 addresses, among other things, false statements about the candidate's qualifications, military service, and mental health (Infiltration of campaign, 1995).

Ohio also presents an interesting problem for the distinction between candidate-related and issue-related deception. Both Ohio statutes, § 3517.21 and § 3517.22, use the phrase "reckless disregard" to describe the offenses being addressed. They describe false speech in an election or issue campaign, respectively, in almost identical language to be any statement a person might "post, publish, circulate, distribute, or otherwise disseminate" during a campaign for a candidate or issue "knowingly and with intent to affect the outcome of such campaign." Both statutes have subsections making it illegal to

make a false statement, "either knowing the same to be false or acting with reckless disregard of whether it was false or not." This is the wording of both Ohio statutes.

The fourth category, false incumbency, includes five statutes. They make it illegal for a candidate to falsely hold himself or herself out to the public as the incumbent running for re--election. On its face, this would seem a reasonable thing to regulate, something easily proven and narrowly drawn restriction. If John Smith is the congressman from the 16th District of California who is running for re-election, he can call himself the incumbent. If Mary Wilson is his challenger, she cannot. It would be quite difficult to reasonably argue in a courtroom that Wilson mistakenly thought of herself as the incumbent, that somehow in error she thought she was already a member of Congress when she was not. The rationale behind such a statute is to prevent candidates from giving the public a false impression of their level of experience.

The case of *Lostracco v. Fox* (1986) gives a perfect example of one such statute as it was applied and how a court responded when the statute was challenged. In *Lostracco* a candidate was found to have violated Michigan § 168.944 (False designation of incumbency, 1997) in a 1984 election for circuit judge in Shiawassee County. Lostracco accused Fox's campaign of circulating materials giving the false impression Fox was the incumbent judge, which was in direct violation of Michigan § 168.944 (False designation of incumbency, 1997). The court found Fox's materials "as a matter of law" were "misleading to the electorate in that the language used therein [did] give the impression that Defendant Fox [was] an incumbent Circuit Court Judge when in fact he [was] not" (p. 620). An important point here is the court's holding that this was a false statement of fact, reiterating the point above, that it can be proved that someone either is

or is not an incumbent. *Lostracco* also demonstrates that, despite Mary Wilson's hypothetical problems created by the statute, there is a legitimate use in preventing someone who is not an incumbent from using the term to deceive the voters. The court said the harm to Lostracco in lost votes would be "irreparable and permanent" and infringed upon his "right to seek office in a fair election" (p. 621).

In its decision, the Michigan Court of Appeals ordered the Fox campaign to discontinue use of the offending language in its campaign materials, saying "continued violation of [§ 168.944] would cause irreparable harm in the election" (p. 621). Interestingly, the court also ordered Lostracco, "shall not make use of this Order in any paid political advertisement during this campaign" (p. 620). In other words, while the court was applying a statute that limited Fox's speech, it also handed down a decision ordering Lostracco not to attempt to use the court's decision as part of potential campaign attacks against Fox. In making this decision, the court held, "the right of freedom of speech or expression is not unlimited" (p. 622). It also made the point, citing *Garrison v. Louisiana* (1964), an important case involving freedom of speech and judicial campaign discourse that will be covered in the next section, that "knowingly false statements and the false statements made with the reckless disregard of the truth, do not enjoy constitutional protection" (p. 623).

A false incumbency law also withstood a constitutional challenge in *Ohio Democratic Party v. Ohio Elections Commission* (2008). In this case the Ohio Tenth District court of appeals held that Ohio R.C. § 3517.21(B)(1), a false incumbency statute, was constitutional (Infiltration of campaign, 1995). The court rejected the arguments of the Ohio Democratic Party that the law was overbroad and vague. The court also rejected

the argument that implying incumbency is subjective, holding "the standard for determining what a statement communicates is based on the reasonable reader standard, not what a particular person may subjectively perceive" (para. 20).

The Constitutionality of Statutes

Before moving on to the discussion of judicial discourse it is useful to look at how the above statutes would hold up under constitutional scrutiny. This will assist in understanding what courts do when they examine the constitutionality of a statute, whether these statutes might stand up against such scrutiny, and why or why not. This requires defining three important legal concepts before delving into the discussion of the statutes: judicial review, intermediate scrutiny, and strict scrutiny. This discussion also requires a very brief reiteration of the case of *U.S. v. Alvarez* (2012) because that case will now be an important part of any decision on the constitutionality of the statutes in question here.

Judicial review is a central legal concept here. Marquette University Political Science professor Christopher Wolfe (1994) says that traditionally judicial review, emanating from *Marbury v. Madison* (1803),[8] is defined as "the judges' power to strike down law," a power that is "rooted in their duty to enforce the constitution" (p. 242). The Cornell University Legal Information Institute (LII) (n.d.) defines judicial review as the idea that "the actions of the executive and legislative branches of government are subject

[8] In *Marbury v. Madison* (1803) President John Adams, in the final days of his presidency, appointed William Marbury as a justice of the peace in the District of Columbia. His appointment was signed by President Adams and approved by the U.S. Senate. However, the paper form affirming his appointment was not delivered to him because Adams left office, Thomas Jefferson took office, and upon taking office he ordered his Secretary of State, James Madison, to not deliver the form thus making the appointment void. Marbury challenged this decision and the U.S. Supreme Court took up the case (McBride, n.d., para. 2). Judicial review comes out of this case in the Court's holding that if an act of one of the other branches of government is in conflict with the U.S. Constitution then the Court must follow the constitution (Marbury, 1803, p. 177).

to review and possible invalidation by the judicial branch" (para. 1). With the statutes and cases in question in this dissertation judicial review would mean deciding whether a statute conflicts with the basic values of the First Amendment: Does this statute violate a person's right to free speech? If so, it cannot be allowed to stand.

Two other concepts that will be important to understanding this discussion, and the court case discussion that follows, are intermediate scrutiny and strict scrutiny. These are two tests the courts use to decide whether a law violates the constitution. The Cornell LII (n.d.a.) says to pass intermediate scrutiny a law "must further an important government interest by means that are substantially related to that interest" (para. 1). In other words, the government must have good reason for passing a law and the law must be clearly related to that reason. Strict scrutiny, which is a more difficult standard to pass, is the idea that a legislature "must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest" (Cornell LII, n.d.b., para. 1). In other words, the government must have a *really* good reason for passing a law and the law must not punish behavior that is protected by the constitution.

As explained earlier in the chapter *U.S. v. Alvarez* (2012) involves a local politician in California named Xavier Alvarez who claimed to have military experience and honors he did not actually have. These were demonstrably false statements. The courts in this case, the Ninth Circuit and the U.S. Supreme Court, recognized them as "fabrications" (Ninth Circuit, 2010, p. 1201) and "an intended, undoubted lie" (U.S. Supreme Court, 2012, p. 2542). Alvarez was found to have violated Section (b) of the Stolen Valor Act (Ninth Circuit, p. 1201), a law that made it illegal for individuals to take

credit for military awards they did not earn with Section (b) specifically addressing the Medal of Honor. Alvarez made a motion to dismiss on the grounds that the law was unconstitutional "both on its face and as it applied to him" (Ninth Circuit, p. 1201). The Ninth U.S. Circuit Court of Appeals agreed, overturning his conviction and finding Section (b) of the Stolen Valor Act to be unconstitutional. The federal government appealed to the U.S. Supreme Court and the Court upheld the Ninth Circuit court decision. This case will be discussed at greater length later in this chapter but it should be noted here because, as Hasen (2013) argues, the case has created "a regime in which broad laws targeting false speech stand little chance of being upheld regardless of the topic" (p. 69). The constitutionality of these statutes must be discussed in the context of the *Alvarez* decision.

This first category of statutes, election conduct statutes, is likely to be the most resistant to constitutional challenge for a few reasons. First, the U.S. Supreme Court has recognized the government's ability to efficiently conduct an election as a compelling interest for upholding a law that passes strict scrutiny (*Burson*, 1992). An example of speech that interferes with this function would be Hasen's example of a message telling voters, "Republicans vote on Tuesday, Democrats vote on Wednesday" (p. 71).[9] Despite his argument that *Alvarez* creates a significant roadblock for false speech legislation he argues that the states "should have the power to criminalize such speech" (p. 71).

The first category should also be upheld to protect the legitimacy of the government and public communiqués from that government. Allowing the fraudulent use of government insignia under the First Amendment could potentially cast a shadow of

[9] While Hasen is using this as a hypothetical it should be noted that this actually did happen in a Pennsylvania township in 2008 (Common Cause, n.d.a., p. 3).

illegitimacy over all government communication. The plurality in *Alvarez* (2012) note, "there are statutes that prohibit falsely representing that one is speaking on behalf of the government, or prohibit impersonating a government officer" (p. 2546). They held that their decision in *Alvarez* did not apply to such laws.

The third reason the statutes in the first category should withstand constitutional scrutiny even in light of *Alvarez* is that they do not restrict falsehood alone, but falsehood in combination with some other social ills: fraud and impersonation of a government official and disenfranchisement of voters. The Court's holding in *Alvarez* "rejects the notion that false speech should be in a general category that is presumptively unprotected" (pp. 2546-2547). Such false speech must be combined with some other social ill in order to be restricted. The statutes in the election conduct category meet this standard.

The second category of affiliation statutes could go either way on the question of constitutionality. Some such statutes are not aimed at false speech alone but false speech combined with fraud for some form of gain. For example, Hasen (2013) uses the hypothetical scenario of a person pretending to represent a political party or campaign and soliciting donations for said party or campaign (p. 71). Such a law, Hasen argues, "seems well within the type of anti-financial fraud law that it appears all on the [Supreme] Court accept as constitutionally permissible" (p. 71). This is exemplified in the case of *Michigan v. Dewald* (2005) in which Dewald pretended to be affiliated with both the Bush and Gore presidential campaigns during the 2000 presidential race in order to solicit money from donors. This case will be discussed more in the next section.

Affiliation can also be a matter of infiltration as addressed in the Ohio statutes, § 3517.21 and § 3517.22. Here the deceptive speech is combined with an act of fraud perpetrated against a potential employer (i.e. someone lies in order to get a job with a campaign so they may sabotage that campaign). Such an infiltration would likely follow the precedent set by *Food Lion v. Capital Cities/ABC* (1999) where two reporters concealed their identities in order to infiltrate and report on unsanitary practices at a Food Lion grocery store. The court in that case upheld the reporters' First Amendment rights to report on Food Lion's conduct but also held that the reporters, by applying for a job and then sharing information in this manner, had "breached their duty of loyalty" and "committed a trespass" (p. 524). However, one could also imagine a situation where an affiliation statute would be on constitutionally shaky ground. What if this false affiliation speech were not combined with financial fraud but was just deceptive speech alone?

Consider the hypothetical scenario of a Democratic activist going door-to-door posing as a Republican, saying repulsive and false things about the Republican Party platform, in order to deceive voters into supporting the Democratic Party. They could knock on the door and say, "Hi. I'm with the local Republican Party and we're urging voters to support our puppy kicking agenda. We need to start kicking more puppies in this town." This would be illegal in Alabama, Kansas, and Louisiana. Yet, given the *Alvarez* decision it is easy to imagine a court striking down a law that is aimed at a clear act of deception. If the legitimacy of military awards does not require First Amendment protection, as Justice Samuel Alito laments in his *Alvarez* dissent, and can be saved by counterspeech, then surely the legitimacy of someone's affiliation with one political party or another does not require the protection of the law. Voters will discuss the accusations

made by this hypothetical activist, compare notes, do a little digging and figure out that these are the lies of an activist intended to tarnish his opponent's party. From there it is only a short step to the Republican Party issuing statements calling out the fraud and setting the record straight. At least that is how the idealists, and the U.S. Supreme Court's plurality in *Alvarez*, imagine it happening.

Campaign message statutes will probably be the most difficult to defend under the *Alvarez* legal regime. Each of the four subcategories here would be treated differently. Handling the "false information about a candidate" category would depend upon the wording of the legislation. It would have to meet the actual malice standard set by *New York Times v. Sullivan* (1964). Even then it would likely be difficult to win a case against a critic making false and defamatory statements about a candidate. This question is still unsettled since the U.S. Supreme Court's decision in *Susan B. Anthony List v. Driehaus* in June 2014. In that case the Court held that the anti-abortion organization Susan B. Anthony List (SBAL) had standing to challenge the constitutionality of Ohio Rev. Code Ann. §3517.21(B) (*Susan B. Anthony List*, 2014).[10]

There is a greater constitutional problem with the issue statutes than with the candidate statutes. While candidate statutes might withstand constitutional scrutiny through the actual malice standard, falsity in issue campaigns do no reputational harm to any individual; there is no defamation in those statements and this fact has proved problematic for such laws. The basic argument of *Washington v. 119 Vote No! Committee* (1998), which overturned a Washington statute banning false statements of material fact

[10] The U.S. Court of Appeals for the Sixth Circuit had held that SBAL and another group, Coalition Opposed to Additional Spending and Taxes (COAST), did not have standing to challenge the Ohio statute in question. The U.S. Supreme Court reversed and remanded that decision. At the time of this writing the case is still waiting to be heard by the lower court.

made with actual malice, was that while the state relied on the actual malice standard they attempted to apply it to the protection of ideas rather than to that of a person's reputation. The court found this a misplaced application of defamation law (p. 697-698). In her concurrence Justice Barbara Madsen held there was a governmental interest in protecting reputations but that political debate, even if it contains falsehoods, should be protected from state restrictions and, calling on the marketplace of ideas argument, said voters "are able to make an informed choice based upon freely advanced competing ideas … and can compare what they hear and read with the text of a proposed measure" (pp. 700-701).

Finally, the false incumbency statutes are likely to be taken down by the *Alvarez* precedent. The *Alvarez* court held that the truth about military honors could easily be protected by a database where any citizen could go to look up who was won the Medal of Honor (p. 2551). There is no need for a law banning such speech; the solution is for citizens to look up any suspect individual claiming to have been awarded such an honor. If the Court feels that such a high military honor can be protected in this way they will likely see incumbency as being equally protected by citizen research.

Punishment

One last point to discuss is how these statutes punish political deception. Five of these statutes stand out from the rest on this point. The majority of the statutes either punish falsehoods with fines and/or incarceration or treat the situation as a civil dispute where one party sues another or asks a court for an injunction to prevent the further use of a certain phrase in campaign materials. Five of the states stand out in that, if a candidate is found in violation of their statute, they can be removed from office or prevented from holding office.

For example, Washington § 42.17A.750 states if there is any violation of Chapter 42 of the state's election code, an election "may be held void and a special election held" in order to "protect the right of the electorate to an informed and knowledgeable vote" (Civil remedies and sanctions, 2013). Alaska, Florida, North Dakota, and Oregon have similar stipulations denying a violator of election law the office to which he or she was elected or even impeaching the governor or lieutenant governor. Removal from office for violation of these statutes demonstrates the importance of electoral integrity and the legitimacy of the power to govern being based upon the legitimacy of the election.

The form of punishment is just one way to classify a truth-in-politics law. This, along with the language of the law, will alter what it does and the range of activities to which it can be applied. The law can apply to one candidate or campaign lying about another candidate or campaign. It can be about the campaign lying about an issue. This is different from a candidate lying about the character of his opponent, making a personal attack, which is clearly not the same as making a false statement about the opponent's position on an issue or the facts surrounding the issue itself. Here it is important to acknowledge the difference between arguing that a person is a "bad" person as opposed to arguing that an idea is a "bad" idea. The next section of this chapter will discuss how courts have handed down decisions in cases applying or challenging statutes like the ones discussed in this section.

III. Judicial Discourse in Political Deception Cases

When looking at how the courts have handled false political speech, or false speech in general, the starting point for contemporary legal thinking has to be *New York Times v. Sullivan*. In *Sullivan* (1964) the U.S. Supreme Court examined whether a form

of speech "forfeits [First Amendment] protection by the falsity of some of its factual statements and by its alleged defamation" and held that, "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test for truth" (p. 271). In other words the Court was saying that the First Amendment does not say, "Congress shall make no law" unless the speech being legislated is false. This refusal to recognize any test for truth stands in contrast to the times courts have said false speech has no constitutional value as the U.S. Supreme Court did in *Gertz v. Welch* (1974, p. 340).

Sullivan and its progeny, up through *Alvarez*, have created a mixed bag for First Amendment jurisprudence and false speech. While *Sullivan* may have been decided correctly, protecting the ability of the press to criticize government and making it more difficult for those government officials to take punitive actions against that press, the decision is not without its problems. Donald Lively (1986), president of Charlotte School of Law, argues that while the *Sullivan* Court "determined that constitutional protection does not hinge upon the truth of an idea or belief" (p. 480) less than a decade after that decision the Court started to pull away from this view of false speech and the First Amendment (p. 481). Lively was making this argument in 1986. Almost thirty years later, with the *Alvarez* decision, it appears the Court is heading in the opposite direction toward what University of Washington professor of law Ronald Collins (2013) calls a near-absolutism, "which establishes a virtually impossible bar for the government to overcome" for regulating speech (p. 428). One of the key arguments of this dissertation is that despite the Court's argument in *Alvarez* the level of protection afforded to false

speech has not always been subject to this "near-absolutism" and that, while there is some good to come from the *Sullivan* decision it is not without its problems.

While it is important to acknowledge that an overly litigious political culture is not going to be conducive to free and fair elections it is also important to note the problems with blind faith in the marketplace of ideas. There is plenty of strong evidence, as discussed in this dissertation, that the marketplace of ideas very often does not work out for the best. A belief in the self-correcting process, or sharing Milton's faith in some unique quality of truth for asserting itself in the marketplace, is a misplaced trust that can do harm to a political system just as much as any restriction on speech. It is time to push back just a little against the absolute faith in the marketplace and to recognize some occasional need for legislative or judicial intervention in that marketplace.

In *Sullivan* civil rights activists took out an ad in the *New York Times* in 1960 that accused police in Montgomery, Alabama, of abusing activists, students, and Dr. Martin Luther King Jr. The problem was that the ad contained false information, describing events that never took place or describing them inaccurately (*New York Times v. Sullivan*, 1964, pp. 258-259). L.B. Sullivan, who was a city commissioner in Montgomery, sued the *Times* for defamation, although his name appeared nowhere in the ad, arguing that, since he was the commissioner in charge of the Montgomery police force, false accusations against the police amounted to false accusations against him and were thus defamatory. Sullivan sued the *Times* and won in the Alabama trial court and was awarded damages of $500,000, enough to have potentially bankrupted the *Times* at that time. That ruling was upheld in the Alabama Supreme Court (*New York Times Co. v. Sullivan*, 1962). The U.S. Supreme Court overturned that ruling, arguing:

> [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. (p. 270)

The Court ruled in favor of the *New York Times* because Sullivan was a public official and such officials should have to meet the actual malice standard if they sue a critic for making false statements. Making a false statement with actual malice means the speaker acts "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280).

This landmark case is important not only because of the precedent it set for many other cases about false and defamatory speech but also because it raised important issues about the ability of citizens to freely criticize those in power in government. Lewis (1992) argues that in this case Sullivan's target was "the role of the American press as an agent of democratic change. He and other Southern officials … were trying to choke off a process that was educating the country about the nature of racism and was affecting political attitudes on that issue" (p. 42). Standing back and viewing this case in terms of its historical importance it can be seen as protecting the important "breathing space"[11] necessary for critiquing government action. It is also important to view the case in terms

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[11] The Court used the phrase "breathing space" in *Sullivan* arguing that the "erroneous statement is inevitable in free debate" and it must be protected by the First Amendment (pp. 271-272). Simply put, speakers must be allowed to make mistakes or they will be afraid to speak for fear that potential errors may result in a lawsuit or worse. The Court's use of this phrase is a quote from their decision one year before *Sullivan* in *NAACP v. Button* (1963). In that case the National Association for the Advancement of Colored People (NAACP) was charged with violating a Virginia statute banning the "improper solicitation of any legal or professional business" (*NAACP v.* Button, 1963, p. 419). The Supreme Court found the application of that Virginia statute to the NAACP to be an unconstitutional violation of their First and Fourteenth amendment rights.

of its application solely in its moment in that history. As Lewis (1992) points out by the time *Sullivan* was decided southern officials had racked up "nearly $300 million in libel actions against the press" (p. 36). Lewis says that libel lawsuits were used by those southern officials "as a way of repressing the movement for civil rights" (p. 35). They believed they could sue the press into oblivion to end news coverage of their abuses.

The *Sullivan* Court made a strong statement for protection for even false criticism of public officials. Even with the strong defense of speech against potential chilling effects (*Sullivan*, 1964, p. 300), the Court still allows defamation laws to stand under the more stringent actual malice standard. In addition to creating a more stringent standard the Court in *Sullivan* took the power for restricting defamation away from the states and constitutionalized it through two responses to the Alabama Supreme Court. First was the Alabama court's argument that the First and Fourteenth amendments did not apply in this case because it was a civil action, not a criminal action brought by the state. To this the U.S. Supreme Court replied, "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel" (p. 277). Second, the U.S. Supreme Court held that

> the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. (p. 264)

With this the Court made defamation a Constitutional concern holding that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct" (p. 283).

An important point to note in this discussion is how difficult it is for political figures to win defamation lawsuits. In the realm of defamation law the courts make a distinction between the bar that must be met by public figures and public officials, as opposed to private figures, in order to win a defamation lawsuit. In the *Sullivan* case the U.S. Supreme Court said at the very beginning of their decision that this was the first case where they faced the question of whether the First Amendment limited in any way a public official's ability to recover damages for defamation. The Court held that the standard implemented by the Alabama court did not sufficiently protect the First Amendment right to criticize public figures and officials and that the evidence in the case failed to meet the higher standard necessary for such protection.

From the *Sullivan* case came the actual malice standard, the highest standard to meet in a defamation case, which requires a public figure or public official, as plaintiff, to prove the defendant made a statement "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280). In *Gertz v. Welch* the Court decided that private individuals should be held to different standards than public officials when bringing a defamation suit. The court said that private citizens lack the access to channels of mass communication that is enjoyed by public officials (p. 344). They also held that people who run for office knowingly choose a life that will involve greater public scrutiny and should expect that some false statements will be made about them (p. 345). Private individuals, conversely, do not make this choice. The Court ended up ruling that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual" (p. 347). *Gertz* and *Sullivan*

present an interesting contrast in how *Sullivan* constitutionalized defamation vis-à-vis public figures but left it to the states vis-à-vis private figures.

The *Gertz* Court also made a distinction between the standards to which a plaintiff is held and the kind of damages that may be awarded. They said that a plaintiff seeking damages for actual injuries need only be held to the negligence standard. A plaintiff seeking punitive damages must meet the actual malice standard (p. 349). In *Gertz* the Court found there to be a state interest in protecting the reputations of private individuals in a way that was not essential for public figures or public officials.

In these two decisions we find the court recognizing multiple ways for handling defamation based upon context. Justice Hugo Black, joined by Justice William Douglas in a partial concurrence/partial dissent in *Rosenblatt v. Baer* (1966), makes no room for such splitting of differences as he writes a more strongly worded rebuke against the very idea of defamation laws:

> The only sure way to protect speech and press … is to recognize that libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments. I repeat what I said in the *New York Times* case that "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." (p. 95)

Reacting to this argument, an important point of this chapter is that, while an absolutist and market-oriented conception of the First Amendment is a dominant one in judicial discourse, it is in reality not so easy a thing to maintain, even for someone who argues for

it as forcefully as Black, Douglas, and Alexander Meiklejohn the well known philosopher and author of *Free Speech and its Relation to Self-Government*.

One argument from Meiklejohn stands out in particular. This is the argument for the protection of ideas. Meiklejohn (1961) argues there is something more dangerous and powerful than government that restricts our ability to speak freely:

> The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned. (p. 263)

So while Meiklejohn (1961) was a self-described free speech absolutist, having written an essay titled "The First Amendment is an Absolute," he also directs our attention toward an important flaw in the idea of a self-correcting marketplace – the flaw of human weakness in the fear of new ideas. Robert Entman and Steven Wildman (1992) argue that this is a bridge between market and social-responsibility orientations toward speech. The market philosophy sees competition, free from government restriction, as the best stance on communication policy. The social responsibility school sees unfettered markets as not only less efficient but also potentially socially harmful. Yet, these two schools of thought find common ground "in their shared assumption that diversity should be a primary goal of communication policy" (Entman & Wildman, 1992, p. 7).

A key point of this chapter is to argue that the First Amendment is in fact not an absolute. Even Meiklejohn (1948) admits as much, arguing that we should not expect to

be free "from regulation, but from undue regulation" (p. 38). In other words, it is not regulation itself that is problematic, but rather when that regulation becomes burdensome. This is best addressed through the overbreadth doctrine as discussed by U.S. Supreme Court Justice Samuel Alito in his dissent in *United States v. Stevens* (2010). Quoting the Court's decision in *United States v. Williams* (2008)[12] Alito writes:

> The overbreadth doctrine "strike[s] a "balance between competing social costs" … the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some application is perfectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech. (p. 1594)

The social costs connected to the false political speech discussed above include a misinformed electorate; election fraud; disenfranchisement of voters; officials elected under false pretenses, bringing into question the validity of their holding of the office; and the enactment of referenda measures the electorate may have voted against had they been properly informed. The question of this section of the chapter is what the judicial discourse says about these social costs, whether they necessitate regulation and whether such regulation would be undue and burdensome.

The judicial discourse surrounding the cases discussed in this section elucidates a disagreement in free-speech theory and politics between an absolutist position against any form of restriction on speech and a position that acknowledges the need for some minor limits on speech. What the absolutist position often fails to acknowledge, and what

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[12] In *U.S. v. Williams* (2008) the Court addressed the constitutionality of the PROTECT ACT, a federal statute that criminalized "the pandering or solicitation of child pornography" (p. 1835). The Court held that the statute was constitutional (p. 1846-1847).

this chapter is in part arguing, is that if an absolutist and market-oriented position on political speech is going to be the dominant guiding principle of First Amendment jurisprudence, it is essential that jurists, legal scholars, politicians, their surrogates, and political observers acknowledge the social costs of that perspective. It is not enough to only voice platitudes about the beauty of freedom of speech and to never discuss the deceptions the courts have often allowed it to protect. It is not enough to hold out free speech as a tool of the governed to balance the power of the governing and not acknowledge the uses of speech by the governing to suppress the governed. It is not enough to extol the virtues of free speech as if those virtues carry with them no corresponding vices.

This echoes Schauer's (2010) argument that throughout First Amendment history there has been little effort to address the issue of the legal protection of verifiably false speech. He argues Milton and Mill addressed truth as a theological question. However, he points to key judicial figures, such as Hand, Holmes, and Brandeis, as having avoided the question in the 20th century. Schauer says, "nearly all of the components that have made up our free speech tradition … have had very little to say about the relationship between freedom of speech and questions of demonstrable fact" (p. 907). Again, there are strong disagreements at work here. There is the need to find a balance between the right to criticize public officials, even if that criticism may contain factually false statements or at least false implications, and the right of the public hearing the criticism to make decisions about its government that are based upon sound reasoning and accurate information. This right of the governed to criticize the governing is probably the most important of any free speech issue. In the hierarchy of speech types the U.S. Supreme Court has bestowed

criticism of the government the highest of protections arguing that discussion of public matters and government "has always rested on the highest rung of the hierarchy of First Amendment values" (*Carey v. Brown*, 1980).[13]

Only slightly less important are the speech rights of two candidates to criticize one another and engage in political debate in order to inform the public and persuade it to vote for one candidate over the other, the process of choosing the governing class. This process takes on two slightly different qualities based upon the candidates' incumbency statuses. A race between two non-incumbents will have a different power dynamic from a race between an incumbent and a challenger. It is not always the case, but there is greater potential for power balance in the former than in the latter. Having the power of incumbency usually means greater access to the levers of fundraising, potentially more media attention for every utterance, and an air of power that comes with being a sitting member of a legislature or the executive branch. The challenger often appears weak in comparison. When a challenger takes on an incumbent, it is as a citizen challenging the power of government, forcing a member of the governing class to re-earn the consent of the governed.

No matter which of the contexts above, or how forms of speech are hierarchized, there are unresolved problems with balancing various social interests in the judicial discourse. There are tensions between the right to speak freely and the social costs of allowing lies and falsehoods to spread freely; the right to criticize the government and the need to ensure an informed electorate; the idea that free debate will produce the best

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[13] *Carey v. Brown* (1980) deals with an Illinois statute that made it illegal to peacefully picket in residential areas while exempting picketing from labor organizations. The U.S. Supreme Court held that the statute was unconstitutional in part because there was no reason to afford protection to labor speech in a way that was not enjoyed by non-labor speech (pp. 465-466).

results, contrasted with the argument that laws are necessary for the orderly conduct of such debates. There is a need to protect freedom while recognizing the potentially negative social consequences of that freedom. This problem is summarized by contrasting quotes from two court cases, *Storer v. Brown* (1974) and *Gertz v. Welch* (1974).

The *Storer* case addressed the constitutionality of a California law that required that any independent candidate for elected office not have been affiliated with a political party in the preceding year. Storer was an independent candidate who claimed this law violated his First Amendment right to freedom of association. The U.S. Supreme Court disagreed, siding with the state of California, and arguing that the statute in question "furthers the State's interest in the stability of its political system" (*Storer*, 1974, p. 736). The Court held that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes" (p. 730).

As noted above, in *Gertz* the Court held that the *New York Times* actual malice standard should not be applied to a private figure as it is to public figures and public officials. While the Court ruled in favor of the target of defamation in *Gertz*, it did state:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in the false statements of fact. (pp. 339-340)

Even within this holding is a discursive conflict between three important points. First there is the argument that there is no such thing as a "false" opinion.

A necessary distinction here is that between statements of opinion as opposed to statements of verifiable fact. For example, the statement "Senator Smith is as corrupt as they come" is an opinion and not actionable. The statement, "Senator Smith voted in favor of that military appropriations bill because the CEO of Boeing gave him campaign donations in exchange for that vote" is a qualitatively different kind of statement. It is something verifiable and potentially defamatory because it is a specific accusation that a politician was bribed. One could look at Senator Smith's campaign donation disclosure's and find no donations from the CEO of Boeing and see the statement is at least false; falsity being one of the four elements of a defamation case. However, even this statement is not necessarily an open and shut defamation case. In 2014 singer Courtney Love was sued for defamation after she tweeted that her former attorney was "bought off" (Knoll, 2014, para. 7). Love won that lawsuit and part of her argument was that her tweet was her opinion and therefor not defamatory (Grow, 2014, para. 4).

The second point is that harmful ideas and opinions are best counteracted by helpful ideas. In other words, the marketplace of ideas must be allowed to work. We need not rely on statutes and lawsuits to defend against false attacks on our reputations. We need only defend against them and the truth will prevail. In the context of *Gertz* this is a discussion of statements of opinion but this distinction between opinion and fact brings in a third important point.

Even though the court does not want government interference in the correcting of harmful speech, arguing that we can depend on the marketplace to be self-correcting in dealing with opinions, there is nevertheless no constitutional value in verifiably false statements of fact. This idea of debate, free from the interference of judges and juries,

being the best process stands in contrast with the *Storer* decision's statement that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes" (p. 730).

The Court addressed similar questions in *Rosenblatt v. Baer* (1966). In this case Rosenblatt wrote a newspaper column commending newly elected county commissioners for their money management. In his column he asked, "what happened to the all the money last year?" Baer, who lost his county commissioner's seat in the previous year's election, sued Rosenblatt for defamation. He won his lawsuit in the New Hampshire Superior Court but the U.S. Supreme Court overturned that decision. While the Court sided with Rosenblatt they did hold that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation" but that in the *Rosenblatt* case these interests were in conflict with the First and Fourteenth amendments (p. 86). So in this part of the judicial discourse there are two things in question. First, what is the proper balance between free speech and protection of reputation of political leaders? Second, where is the proper venue in which to address such questions? *Brown v. Florida* (2007) provides answers to both questions.

Greg Brown, who was the property appraiser for Santa Rosa County, FL, sued Robert Burgess and Hilton Kelly, two of his political opponents, for recovery of costs and lawyers fees after Burgess and Kelly had filed ethics complaints with the Florida Commission on Ethics against Brown in the midst of a political campaign. It was noted during the lawsuit that Burgess and Kelly were supporters of Brown's 2004 campaign opponent, Leon Cooper, the implication being that the ethics complaints were filed in order to benefit Cooper politically. In this case Stephen F. Dean, Administrative Law

Judge of the Division of Administrative Hearings, had ordered Burgess and Kelly to reimburse Brown for his costs because of the finding that the ethics complaints were politically motivated. The Florida Commission on Ethics remanded the decision after Dean retired. Because of his retirement the case was given to Administrative Law Judge Lisa Nelson in the Florida Division of Administrative Hearings who overturned it. Brown appealed this overturning to the Florida First District Court of Appeals.

Both of the above questions, about balancing freedom and reputation and the question of the venue in which to do so, are addressed in the Florida First District Court of Appeals decision. The court noted:

> In the course of the final hearing [by the Florida Commission on Ethics], many of the commissioners expressed the view that the complaints by Burgess and Kelly were among the most egregious examples of misuse of an ethics complaint to harm a political opponent. They described the complaints as "blatantly political" and "shameful." Nevertheless, the commission denied Brown's request for costs and attorney fees. (p. 556)

On the question of reputation and free speech, *Brown* presents an interesting legal conundrum. Burgess and Kelly argued they should not have to reimburse Brown for his fees because his complaint did not meet the actual malice standard from *New York Times v. Sullivan*. The court of appeals held this argument to be flawed because the statute in question, Florida § 112.317(8)[14] (False or malicious charges, 2011), stated that a complainant is liable for an ethics complaint subject's costs and attorney's fees if the complaint is made with the "knowledge that the complaint contains one or more false

[14] In *Brown v. Florida* the court of appeals states in footnote #1 that the statute § 112.317(8) was renumbered to § 112.317(7).

allegations or with reckless disregard for whether the complaint contains false allegations of fact." The appeals court found it "significant, in our view, that the term, 'actual malice,' does not appear in the text of the statute" (p. 558).

This is a point in the decision where language becomes especially important. The court states that when writing the statute in 2004, the Florida Legislature omitted the phrase "actual malice." It also notes the distinction between § 112.317(8) and § 104.271(2) (see Appendix A). The former does not contain the actual malice standard, while the latter does. This leads the court to hold the legislature's exclusion of this language was purposeful, that the exclusion points to a distinction between political deceptions made in typical campaign speech as opposed to deceptions made under oath before an ethics commission. The court says to apply the actual malice standard in this case would be to "read into the statute language that is not there" (p. 559).

This answers the question of the judicial discourse's balancing of reputation and free speech. It builds upon the U.S. Supreme Court's holding in *Beckley Newspapers Corp. v. Hanks* (1967) in which "the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and 'actual malice' in the traditional sense of ill-will" (*Gertz*, 1974, p. 334). *Beckley* reversed a defamation decision that went against a newspaper, with the Supreme Court finding the trial court gave the jury erroneous instructions on the application of the actual malice standard and that evidence in the case failed to support Hanks' claim that the newspaper editorials were published with actual malice, "that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not" (*New York Times v.*

Sullivan, 1964, p. 280). Actual malice is a judicial tool for creating that balance between the protection of reputation and the protection of free speech.

This distinction between Florida statutes § 112.317(8) and § 104.271(2) also answers the second question about differing regulations of speech based upon the venue in which the speech happens. The court employs a hypothetical scenario in which Burgess and Kelly might have made (false) accusations of corruption against Brown in the press. Brown could have chosen to argue back or ignore them. Instead the accusations were made in an official ethics complaint, thus drawing Brown into the court system, giving him no choice but to have to fight. In other words, the First Amendment does not give one the "right to initiate a legal proceeding based on false allegations" (p. 560). As the court notes, under Florida law, "the plaintiff in a malicious prosecution case need not prove actual malice" (p. 560).

The judicial discourse uses "venue" as a tool for interpreting the law and for characterizing both speech and the regulation of political deception. For example, actual malice is held to be a necessity for any legislation punishing defamatory speech in one venue (campaign speech) but not necessarily in another (court filings). This sets aside the concept of qualified privilege, which protects speech such as when a witness recounts "an official government report or statement and remain[s] immune from libel even if the publication of the material defames someone" (Pember, 2011, p. 214). A journalist making a defamatory statement in court testimony differs from a situation where an individual makes a false statement about a political opponent in court testimony or an official document. For example, if Rep. Smith is running for reelection and supporters of his challenger go out on the campaign trail and falsely claim that Smith took campaign

donations in exchange for voting in favor of an appropriations bill the courts are likely to say that his opponents' political speech, even if it is false, is protected by the First Amendment. Conversely, if his opponents sit on the witness stand in a courtroom or file a complaint with an ethics commission, both of which would be sworn statements, the courts are going to correctly say that the same deceptive statement is not protected by the First Amendment under those circumstances. This is a recognition that the same statement receives different levels of protection under different circumstances.

The courts have a self-awareness, seeing how litigation can be a tool used by political combatants, sometimes even characterized as tools of frivolity. While it is certainly important that all citizens have open access to the judicial system it is also important to recognize citizens do not have a right to abuse that system with false and frivolous accusations such as those exemplified by *Brown v. Florida*. The court in *Brown* recognizes deception as enjoying less protection in official filings than it would in the venue of a political campaign, where the *Beckley* Court limits the power of accusations of defamation by a political candidate against a newspaper. It also problematizes deception in different ways in each venue. In the course of a political campaign, a non-defamatory falsehood is just part of the process. In a courtroom it can be a crime, an obstruction of justice, something that interferes with the proper functioning of the judicial system. The courts themselves thus become tools of restraint, limiting the power of litigation and legislation to hinder speech against a political opponent, while also restraining the use of official legal mechanisms (i.e. ethics complaints) as political tools of deception.[15]

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[15] Alongside *Brown v. Florida* the 2013 decision by the United States District Court of Minnesota in the *281 CARE* case notes that the Minnesota statute challenged there requires complainants to file their complaints under oath with the possible penalty of perjury and having to pay the attorney's fees for the target of a false complaint (*281 CARE*, 2013, pp. 24-25).

Another example of this restraining power is in *Badeaux v. Southwest Computer Bureau* (2006). In this case, Lloyd Badeaux was a candidate for the Lafourche Parish[16] presidency in Louisiana. During his campaign, Southwest Computer Bureau, a Louisiana company that maintains a voter database and helps candidates and consultants run campaigns,[17] mailed an anonymous letter to voters in the parish that Badeaux claimed contained false and defamatory information about him. The Louisiana district court declared the plaintiff did not establish a right of action or a cause of action and that La. R.S. § 18:1463, a law restricting defamatory speech about a candidate, was unconstitutional.[18] On appeal, the Supreme Court of Louisiana held that the plaintiff did establish a right of action, but upheld the decision that he failed to establish a cause of action. In other words he did not, in his claim, specify what defamatory statements were made against him.

This case is important to this discussion because of the way it demonstrates the idea of restraint on judicial power. In much of the discourse about political deception and the law there is a focus on the power of the courts to restrain the speech of political actors. There is the idea of the chilling effect of defamation lawsuits or potential fines and prison time for false statements. What makes the *Badeaux* case interesting in relation to that discourse is that the Louisiana Supreme Court is recognizing the power of the judiciary to restrain the legislature from addressing the problem of political deception.

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[16] In Louisiana a parish is the equivalent of a county. So what Badeaux was running for would be the equivalent of a county executive position in another state.

[17] According to their website, "The Political Division of Southwest Computer Bureau has been maintaining the Louisiana state voter file for over 20 years. Catering to political candidates and consultants, we offer a wide variety of products and services to facilitate the most effective campaigns" (SCBI, n.d., para 3).

[18] A right of action means the law applies to the person in question. A cause of action means a particular situation is actionable under the law. So the plaintiff has to answer two questions. Does the law apply to me and does it apply to the specifics of this situation?

The Louisiana Supreme Court said the lower court should not have even addressed the constitutionality of the statute in question (pp. 1217-1218).[19] Here the power of the judiciary is problematized as overreach in its function as a check and balance on legislative power.

That same year in Louisiana, the First Circuit Court of Appeal affirmed a trial court's motion to strike a lawsuit that was brought under the same law. In that case, James Lamz, a candidate for Slidell City Court in 2004, sued his opponent, John Wells, saying he repeatedly made false statements about Lamz. The court held that Wells' speech was protected by the First Amendment and, under Louisiana Article 971, a statute limiting lawsuits that might chill protected speech, the trial court granted Wells' special motion to strike. Article 971 was passed by the Louisiana legislature in 1999 in an attempt to prevent what it saw as the frivolous use of the court system for lawsuits intended to chill political criticism. In the eyes of the First Circuit, *Lamz v. Wells* (2006) fell under that category of frivolity.

The court added that Louisiana had a problem with an increase in such frivolous lawsuits and that Article 971 was enacted "to encourage continued participation in matters of public significance and to prevent this participation from being chilled through an abuse of judicial process" (*Lamz v. Wells*, 2006, p. 796). The judicial discourse in this case reinforced a restraint placed on litigation as a chilling tool. The chilling-effect

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[19] In overturning the declaration on the constitutionality of the statute the Louisiana Supreme Court took a justifiably reprimanding tone toward the lower court.

> Thus, the district court could have resolved the issue of whether plaintiffs stated a cause of action for defamation under La. R.S. § 18:1463 on nonconstitutional grounds and should have done so. As this court has previously stated, "We have consistently held that courts should refrain from reaching or determining the constitutionality of legislation unless, in the context of a particular case, the resolution of this is essential to the decision of the case or controversy." (pp. 1217-1218)

argument, part of the marketplace-of-ideas construction, restrains the law from being an essential part of addressing political deception, instead placing the impetus for correcting the record on the participants in the political process. This is problematic because, as lawyer Jeffery Barnum argues, it is based on a somewhat poor assumption. Barnum (2013), discussing Justice Stephen Breyer's concurrence in the *Alvarez* decision, characterizes Breyer's formula for assessing the constitutionality of a speech restriction as balancing the harm done by that speech against the constitutional harm done by the law in question (pp. 541-542). The formula also includes "the mitigating effects of counterspeech" (pp. 543-544). The problem with including counterspeech as part of the formula, Barnum argues, is that the Court will treat counterspeech as "a dependent constant with its value fixed" (p. 544). In other words when assessing a speech related restriction the Court inserts counterspeech as a constantly present variable even if there is no hint of it in a given situation. "No need for government restriction here," the Court will say, "for there is always counterspeech." It matters not whether there actually is counterspeech or if the potential counter-speakers have access to channels of communication. The Court takes it as a given.

What is also interesting about Article 971 is that it is a legislative attempt to limit the judicial system as a political weapon. So the law, in this case La. R.S. § 18:1463, is seen as a restraint on speech and another law, Article 971, is created to place a restraint on the first law. Legislation is a tool for limiting the power of legislation and the judicial system is a tool for restraining the power of the judicial system.

One sees such an abuse of the judicial process in the Delaware case *Abbott v. Gordon* (2008) where a losing candidate attempted to use a clearly frivolous lawsuit after

losing an election. In this case Richard Abbott, who lost his 2002 Republican primary bid for re-election to New Castle County Council in Delaware, alleged his opponents used government resources to defeat him and deny him his constitutional right to serve in government. At first the language of this decision gives the impression that the lawsuit is on its face absurd, with the court saying Abbott accused the defendants of "conspiring to vote against him" (p. 1). Technically speaking any meeting of a candidate's opponent's campaign is a meeting to "conspire to vote against him." What makes this case only a little more than a joke is Abbott's claim that his opponents were "using county resources to release false information relating to Abbott's representation of a developer" (p. 2).

While Abbott's claim is serious, that government resources were used for political deception, as in *Badeaux* he failed to establish credible evidence to support it or "to set forth any specific statement which could support a defamation claim" (p. 3). The court's response to Abbott's lawsuit is summed up nicely in the first paragraph of its analysis of the case, which is worth quoting in its entirety – if for no other reason than the entertainment value of its tone toward Abbott's lawsuit.

> Abbott's complaint is a last-ditch effort, by a disillusioned and defeated candidate for re-election, to vindicate himself through the judicial process, long after his failure to achieve his goals politically. Notwithstanding a long line of state and federal authorities to the contrary, Abbott attempts to characterize his timeworn dispute with the individual defendants as a violation of his constitutional right to re-election-a right for which he provides no legal or constitutional support-in order to collect damages that

> he allegedly sustained by his loss of a primary election almost six years ago. (p. 4)

While taking Abbott to task for his lack of evidence, the court employed traces of marketplace-of-ideas theory and the issue of politics and venue. The decision found that Abbott was using "the judicial process" to attempt to accomplish what he could not do at the ballot box. In other words, the venue where political leaders persuade the public to consent to governance is the campaign, not the courthouse.

While the *Badeaux* and *Abbott* cases may be frivolous and their respective courts' decisions to avoid litigious interference with the political process makes sense in these cases, there are times when this argument is not so clearly correct. For example, the use of exaggerated claims or hyperbolic language can be deceptive even in cases where some readers may fully understand the language is not meant to be taken literally. According to the court, Badeaux did a poor job presenting evidence to support his claim of defamation. Abbott was presented by his court's decision as crazy, or desperate, or just plain in denial of losing his election.

In 1965 Charles S. Bresler came under criticism, like Badeaux and Abbott, but unlike them Bresler's case carries a little more weight given the nature of the criticism. Bresler was a real estate developer and member of the Maryland House of Delegates who was applying for a permit to build high-density housing on land he owned. Bresler also owned land the city was attempting to obtain in order to build a school (*Greenbelt v. Bresler*, 1970, pp. 8-9). During the permit hearings "some people had characterized Bresler's negotiating position as 'blackmail'" (p. 7). This characterization appeared in the

Greenbelt News Review. Bresler sued the newspaper for defamation complaining that it had "imputed to him the crime of blackmail" (p. 8).

The jury and the Maryland Court of Appeals both found in favor of Bresler. During the course of the trial, however, the judge instructed the jury on the actual-malice standard in a way that the U.S. Supreme Court felt "permitted [the jury] to find liability merely on the basis of a combination of falsehood and general hostility" (p. 10). This was, according to the Supreme Court, an "error of constitutional magnitude" (p. 10). Clearly "falsehood and general hostility" fall far short of "actual malice" as described in *Sullivan*. The reason this was such a significant error is because the Court set down in *Sullivan* precisely the standard to which a public official, as plaintiff in a defamation case, should be held and the court's incorrect instructions to the jury failed to hold Bresler to that standard. The U.S. Supreme Court found that the newspaper articles in question were "truthful and accurate" (p. 12) that "the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported" and reversed the lower court decisions (p. 13).

In reversing the decisions, the Supreme Court held that, "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable" (p. 14). This is one of those examples of the Court saying to a defamation plaintiff, "politics ain't beanbag," which is one of the two most prominent arguments of the judicial discourse, the idea that political discourse can be rough, filled with "rhetorical hyperbole" and "vigorous epithets." In the *Bresler* decision, the court states that political debates in general, and Bresler's in specific, can be "heated" (p. 13) and that

in the course of such a heated discussion, Bresler's negotiating position was characterized by some as blackmail. The newspaper merely reported on that. Bresler's attorney attempted to argue the newspaper knew he had not committed blackmail and still used that term and, therefore, acted with actual malice. The Court did not buy that argument.

Another Delaware case, *Doe v. Cahill* (2005), puts a slightly different twist on a similar situation, in the process raising the problem of secrecy as a potentially deceptive practice. *Cahill* echoes problems raised by *McIntyre v. Ohio Elections Commission* (1995)[20] in which the U.S. Supreme Court ruled that an Ohio statute banning the practice of using anonymous campaign literature was unconstitutional. One difference is that McIntyre's speech in that case was only semi-anonymous. Her flyers did not contain her name but she was standing there handing them out herself. This stands in contrast to the almost complete anonymity of Doe, who is not even named in the lawsuit, standing behind the protection of the anonymity of a blog and an Internet service provider. In the *Cahill* case Patrick Cahill was a city councilman in Smyrna, Delaware, about whom Doe anonymously posted allegedly defamatory statements on a blog. Cahill sued Comcast to reveal Doe's identity and the Superior Court of Delaware found for Cahill, ordering Comcast to unmask the anonymous user. Doe appealed the decision to the Supreme Court of Delaware, which found in favor of Doe, reversing the Superior Court's order.

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[20] In the *McIntyre* case Margaret McIntyre was standing outside of her local school board meeting handing out flyers opposing a tax increase. She ran afoul of the Ohio statute in question because she did not include her name as the source of the information contained on those flyers. Even if she violated the spirit of the law, it can hardly be said that McIntyre was attempting to hide her identity if she herself was standing in front of a building distributing her political message on paper by hand. Admittedly those flyers extend well beyond her hands and the hands in which she places them, to be passed along to other voters who may never see her and will not know her as the source, thus giving her the power of semi-anonymity. At any rate the U.S. Supreme ruled in her favor and struck down the law. Sadly the Court's decision came after McIntyre had passed away.

The Delaware Superior Court's decision begins with the usual arguments about the Internet being a democratizing force and giving voice to many who were previously shut out of the political process. The court notes that anonymity in political speech has been part of the American tradition since the days of pamphleteering and at least semi-anonymity is an inherent part of Internet communication (p. 456). The court also cites research claiming an increase in John Doe Internet defamation cases (p. 457). The decision expresses fear that defamation lawsuits could be used as what is known as a SLAPP tactic, or strategic lawsuits against public participation, which is when someone in a position of power uses litigation to sue someone with less power, and less money, in order to silence the critic. University of Florida Associate Professor of Law Lyrissa Lidsky (2000) argues that the use of defamation lawsuits as a tool for unmasking anonymous speakers "may subject the [speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes" (p. 890). Lori Potter, a lawyer and contributing writer for the First Amendment Center website, argues that SLAPP lawsuits place the critic in a weakened financial position, she is unable to withstand litigation, and this requires her to end her speech in order to end the lawsuit. SLAPP lawsuits, by definition, are frivolous because the point of the suit is not to win but rather to create a financial burden that stops the speech in question and discourages future speech. Potter (2002) argues that, "the mere filing of the suit — or just the threat of a suit — accomplishes that purpose" (para. 8).

As in the above cases, the *Cahill* case creates a discourse where the courtroom and the campaign are contrasting venues in which political opponents battle and the

decision frames the courtroom as the incorrect venue for such battles. The problem with the *Cahill* case, as with other cases above, is that its conclusion is to give First Amendment protection to deception, in this case deception as secrecy, in order to prevent legislative or litigious interference with the marketplace of ideas. Justice Antonin Scalia challenged this holding in his dissent in *McIntyre*, arguing that the majority, which ruled the Ohio statute banning anonymous political literature was unconstitutional, were stretching the boundaries of the judiciary's power. He argued the majority was invalidating "a species of protection for the election process … exist[ing] in every State except California" and "discover[ing] a hitherto unknown right-to-be unknown while engaging in electoral politics" (*McIntyre*, p. 371). Scalia laments the majority's deference to John Stuart Mill, as they cite Mill's book *On Liberty* as support for their argument, rather than the decision-making of the rightfully elected legislators of the states who passed these statutes.

There are five words that stand out in particular in Scalia's dissent: "protection for the election process." Scalia goes on later in his dissent to quote *Eu v. San Francisco County Democratic Central Committee* (1989) in which the Court held that "A State indisputably has a compelling interest in preserving the integrity of its election process" (p. 231). Scalia proceeds to argue, referencing his own words from *Burson v. Freeman* (1992),[21] "So significant have we found the interest in protecting the electoral process to be that we have approved prohibition of political speech *entirely* in areas that would impede that process" (p. 379). Scalia asks if this right to anonymous speech is so

[21] In *Burson* the Court held constitutional a Tennessee law requiring people soliciting votes on Election Day to be at least 100 feet away from the door of the polling place.

important that even "the protection of the electoral process cannot be purchased at its expense" (p. 379).

One might ask a question in tandem with Scalia's dissent in *McIntyre* and his concurrence in *Burson*. The First Amendment allows for the protection of electoral integrity through the regulation of *how* a speaker speaks (i.e. anonymously or identified). The First Amendment also allows the state to prevent speakers from even occupying a particular space (i.e. they must be at least 100 feet away from a polling place). The questions is, why then does it disallow the regulation of the expansive reach through space afforded to mediated speech that propagates falsehood and thus draws into question the integrity of the electoral process? This is where *Cahill* really comes into question. There are two possible scenarios that must be addressed that are raised by Scalia's dissent and anti-SLAPP laws that challenge the frivolous lawsuits used by the powerful to silence the powerless. It is difficult, though not impossible, to know for sure which of these potential scenarios most closely resembles reality. To really know for sure would require some insight into the kind of man Cahill actually is.

The first scenario is that Cahill is a powerful local politician in his town of Smyrna. He has political and economic connections around the town and uses his connections in corrupt ways to enrich and entrench himself. In this scenario, because of the fear of reprisal from powerful interests, the anonymity of Cahill's critics is understandable because this might be the only way to unseat an entrenched and corrupt politician who might otherwise use the levers of power to punish his critics. One need look no further than John Peter Zenger, as the majority in *McIntyre* note (p. 361), to find such an example of powerful political interests using the levers of power to punish a

critic. Zenger was a printer who published newspapers in the American Colonies before the revolution. In 1733 he was brought before a court in the Royal Colony of New York on charges of seditious libel for publishing an article critical of the Royal Governor[22] (Lewis, 2008, pp. 4-5). In such a case it is clear why anonymity is a useful, perhaps even necessary, tool politically and why curbing anonymity might have a chilling effect on speech. In this hypothetical, despite Scalia's objections, the protection of anonymity might enhance the integrity of the electoral process.

In the second scenario Patrick Cahill is an honest and decent public servant who works hard for the people of Smyrna. He brought this lawsuit to unmask his anonymous attackers because they are hiding behind the anonymity of a blog in order to freely distribute false and defamatory information about him. In this scenario the protection of anonymity amounts to an unfair protection of deceptive practices that, as Scalia laments, harms the integrity of the electoral process, not to mention the reputation of a decent man. In this case the laws preventing SLAPP lawsuits, blocking the abuse of the court system, are inadvertently preventing Cahill from bringing a lawsuit that would help him to restore his reputation. Anti-SLAPP legislation and concerns about litigation as a political weapon, such as that described in *Cahill* and *Badeaux*, also reiterate the recognition of the differences between deception in a court and deception in a campaign. Echoing the decision in *Brown v. Florida*, the argument here is that if a candidate's opponent criticizes her in the newspaper, the battle is joined in the venue of the

[22] Zenger was technically guilty of seditious libel, "which made it a crime to publish anything disrespectful of the state or church or their officers" even if it were true (Lewis, 2008, p. 2). In the Zenger case the jury returned a verdict of not guilty using what is known as jury nullification, when a jury essentially ignores the law in order to do what they think is right.

campaign. An official ethics complaint or lawsuit takes the dispute to a new level in terms of financial and reputational costs, not to mention the emotional toll.

In both of the above scenarios it is, as Scalia argues, electoral integrity that should be of the utmost importance. In recognizing that importance, we also recognize anonymity as both a potential threat to and protection of the integrity of campaigns and governing. We must also recognize that anonymity gives political combatants greater leeway to engage in campaign speech that may be uglier than usual. That is not to say that ugliness necessitates anonymity, just that is makes the ugliness easier to perpetrate. It should also be noted that anonymity can be ambiguous.

This is demonstrated in the case of *Tomei v. Finley* (1981). *Tomei* hinges on a strange aspect of Illinois state law where, in each election in which a new slate of township representatives is fielded, they are formed as a separate political committee rather than as part of one of the two political parties. Lyons Township, at the time of the events in this case, was a Republican stronghold. The Democrats in Lyons took control of the township board for the first time in 1977, when their candidates formed a committee that confusingly gave the false impression they were the Republican candidates (p. 696).

In 1980 David Tomei and Morgan Finley, the heads of the local Republican and Democratic parties respectively, met to discuss that year’s township election. Finley proposed a coalition election committee and joked that, if the Republicans were not interested, the Democratic candidates could run as the Representation for Every Person Party or REP for short. Finley's joke was a reference to that 1977 election in which Democrats won, at least in theory, because voters were confused as to their slate of candidates' actual party affiliation. The Republican Party rejected Finley's proposed

coalition committee, and the Democrats subsequently formed the REP Party, distributing campaign literature containing the message "Vote REP" (p. 697).

Tomei and members of the Republican Committee of Lyons Township asked the U.S. District Court for the Northern District of Illinois, for an injunction against the defendants, the Democratic Committee of Lyons, arguing that their use of the phrase "vote REP" in their campaign literature gave voters the false impression the Democratic candidates were Republicans and would lead voters who intended to vote Republican to inadvertently vote for Democrats. In ruling for the Republicans the court quoted *First National Bank of Boston v. Bellotti* (1978)[23] in that decision's holding for "Preserving the integrity of the electoral process, preventing corruption" and maintaining an informed electorate as "interests of the highest importance" (pp. 788-789).

The court characterized the Democrats' argument that the injunction would violate their free speech rights as an attempt to "wrap themselves in the mantle of the First Amendment" when they were "seeking to poison the stream, to deprive voters of a free choice by diverting the intended exercise of the franchise to an unintended result" (p. 698). There are two points that have to be noted about this opinion. First, the court draws a connection between political advertising and the regulation of commercial advertising, which could be problematic since the Supreme Court has made a distinction between political speech and purely commercial speech (*Valentine v. Chrestensen*, 1942).

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[23] *First National Bank of Boston v. Bellotti* (1978) is a case addressing the constitutionality of a Massachusetts statute restricting corporations from spending money on communications directed at supporting or defeating a ballot measure that was not directly related to the corporation's interests (p. 767). In *Bellotti* the U.S. Supreme Court struck down that statute holding that it placed an excessive burden on the First Amendment right to freedom of speech (p. 776). While the Court acknowledges the importance of the integrity of the electoral process they found the state's argument in support of the statute in question unpersuasive on those grounds.

Second, there is the court's use of the actual malice standard in deciding to allow the injunction of the deception in question.

Johnson-Cartee and Copeland (1997) argue that the reason the district court's *Tomei* decision was not overruled by a higher court is because of the use of the "actual malice" standard in conjunction with commercial false advertising precedent in the cases of *Bates v. State Bar of Arizona* (1977) and *National Commission on Egg Nutrition v. FTC* (1978). They also note that previous decisions on political advertising had not made reference to commercial advertising cases. Johnson-Cartee and Copeland argue that, had the decision not included the actual malice standard in its rationale, it likely would not have been upheld (p. 194). These two things are problematic, first, because commercial speech and political speech enjoy different levels of protection under the First Amendment.

The U.S. Supreme Court has addressed this distinction between commercial and political speech on multiple occasions. For example, in *Valentine v. Chrestensen* (1942) the Court upheld a New York City ordinance, § 318 of the Sanitary Code, banning the handing out of leaflets on city streets. In that case F.J. Chrestensen had created a double-sided flyer with an ad for his submarine tours on one side and a protest message "against the action of the City Dock Department in refusing [Chrestensen] wharfage facilities at a city pier for the exhibition of his submarine" on the other (p. 53). According to the U.S. Supreme Court decision the police advised Chrestensen that his leaflet violated § 318 but he "proceeded with the printing of his proposed bill and started to distribute it. He was restrained by the police" (p. 53). Chrestensen was granted an injunction against the continuation of the city stopping him from handing out his leaflets. The Circuit Court of

Appeals upheld that injunction. Lewis Joseph Valentine, the Commissioner of the New York City Police Department, appealed to the U.S. Supreme Court (p. 54). The U.S. Supreme Court upheld the city ordinance and reversed an injunction against the city's enforcement of it, holding that if Chrestensen's argument were successful, any business wanting to distribute advertising leaflets "need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command" (p. 55). The Supreme Court has also ruled that commercial speech enjoys First Amendment protection in several other cases, including *Bates v. State Bar of Arizona*, (1977) and *Virginia Pharmacy Board v. Virginia Consumer Council* (1976). However, while courts have knocked down truth-in-advertising laws in a political context (*Minnesota v. Jude*, 1996; *Washington v. 119 Vote No! Committee*, 1998) there are similar laws enforced by the FTC regulating commercial speech that do not violate the First Amendment because the courts have said that commercial speech and political speech enjoy different levels of protection.

The second issue, the actual malice standard, is also likely to be problematic in the context of the *Tomei* case because of the decision in *Washington v. 119 Vote No Committee!* (1998). In *199 Vote No!* the Washington State Supreme Court was faced with the question of the constitutionality of Washington § 42.17.530(1)(a), which "prohibit[ed] any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact" (p. 693). As noted in the previous section, the *119 Vote No!* decision found that statute to be unconstitutional because it was overly broad. The majority on the Washington Supreme Court held that defamation law and the actual malice standard are about an individual's reputation and not false statements about issues. It even went so far as to echo Hugo Black's argument that "libel laws are

abridgments of speech and press" (*Rosenblatt v. Baer*, 1966, p. 95). The majority held that "the statutory requirement that malice be proved by a high standard of proof does not cure … the chilling effect of possible governmental sanction" (p. 696). By questioning the actual malice standard, and its potential effect on the "faint of heart" (p. 696) in this context the Washington court, however inadvertently, calls into question the power of that standard to protect against the chilling effect of the law. One might ask, if the actual malice standard cannot protect against the chilling effect in the context of this Washington statute then how can the legal system have any faith in the actual malice standard in the context of defamation law?

This case came before the Washington Supreme Court after the trial court found that the 119 Vote No! Committee had not violated the statute in question. It was appealed to the state's supreme court by the American Civil Liberties Union (ACLU) as a challenge to the constitutionality of the statute. While the majority decision sided with the ACLU, the concurring opinions offer arguments that contribute to the judicial discourse surrounding political deception. Justice Richard Guy concurred that the 119 Vote No! Committee did not violate the statute, but disagreed with the argument that the statute was constitutionally invalid. Guy argued, "Intentional, malicious lies do not foster debate; they foster deception and manipulation of the voting public" (p. 699).

In a separate concurrence, Chief Justice Barbara Madsen argued that the statute was facially unconstitutional as it applied to ballot initiatives but not as it applied to individual candidates. Madsen stated that the "interest in reputation is what distinguishes speech concerning an initiative measure … and speech regarding individuals" (p. 700). Madsen also argued that cases such as *New York Times v. Sullivan* (1964) and *Monitor*

Patriot Co. v. Roy (1971)[24] only dealt with instances of protected speech, which does not address the fact that "where the actual malice standard is met, speech may subject the speaker to pay damages without running afoul of the First Amendment" (p. 700). In other words, as discussed above, the actual malice standard helps to balance the need for protecting reputations with the need for protecting the First Amendment. Madsen does, however, agree with the majority decision that since there is no issue of reputational harm in speech about a ballot initiative the statute does run afoul of the First Amendment and the actual malice standard is not enough to save it from that fact.

While Guy and Madsen differed slightly with the majority, the sharpest criticism of the decision came from Justice Phillip Talmadge's concurrence. His opinion echoed arguments in *Tomei* and made for a perfect counter-argument to the dominant judicial discourse of the marketplace of ideas that protects deception. Talmadge wrote, "Today the Washington Supreme Court becomes the first court in the history of the Republic to declare First Amendment protection for calculated lies" (p. 701). Talmadge argued that

[24] In *Monitor Patriot v. Roy* Alphonse Roy was a candidate in the New Hampshire State Democratic Party's primary election for U.S. Senate in 1960. During that campaign the *Monitor Patriot* newspaper published an editorial in which they referred to Roy as a "former small-time bootlegger" (p. 266). Roy lost the election and then sued the *Monitor Patriot* and the North American Newspaper Alliance (NANA) for defamation because of the "bootlegger" claim. Roy won his lawsuit in the New Hampshire trial court and the New Hampshire Supreme Court affirmed that decision (p. 270). The *Monitor Patriot* and NANA appealed to the U.S. Supreme Court. In *Roy* the U.S. Supreme Court took issue with the trial court judge's instructions to the jury on how to decide if Roy's history as a bootlegger was a public or private matter, which would thus affect whether Roy would be considered a public or private figure vis-à-vis defamation law and the actual malice standard. The Court held that the judge's instructions had made it easier for the jury to find the defendant liable for defamation in this case. This, the Supreme Court argued, placed a restrictive burden on political speech and was inconsistent with the First Amendment. They overturned the lower court's decision.

the decision was so broad it made it impossible for any future statute punishing lies to "survive a First Amendment challenge" (p. 701).[25]

Talmadge continued with the point that there is a "mountain" of court decisions to contradict the majority finding that "the First Amendment condones deliberate falsehoods in campaigns" (p. 705). He also disputed the argument that § 42.17.530(1)(a) was overly broad.

> The statute speaks to only one person: the calculating liar, who with clear mind and steadfast, deliberate purpose, coldly composes and diligently distributes knowing lies to effect a desired political result. The statute chills only this devious liar, not free speech. In short, 'The actual malice test penalizes only the 'calculated falsehood.' (p. 707)

While Talmadge is putting forth arguments similar to those in *Tomei* in light of *New York Times v. Sullivan* and the more recent rulings in *Alvarez*, *U.S. v. Stevens*, *Minnesota v. Jude*, and *Washington v. 119 Vote No! Committee*, among other cases, it is difficult to imagine *Tomei* would stand if it were to take place today, and it is difficult to imagine the current U.S. Supreme court would find his arguments compelling.

This is unfortunate. However, the *Tomei* court's statement that the Democrats in that case were wrapping themselves in the First Amendment, an argument that freedom is sometimes the last refuge of the scoundrel, and deception is a disenfranchisement of the voters, are compelling arguments and should become part of legal thinking about the First Amendment and deception in politics. Up to this point this chapter has explored the history of political deception and the law. It has looked at the legal discourse of various

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[25] Talmadge's opinion is a concurrence and not a dissent because he argued that the 119 Vote No! Committee did not violate the existing statute, but disagreed with the court's finding that a state has no interest or power to regulate lies in campaigns "no matter how egregious the lies may be" (p. 701).

statutes and how cases like *Tomei*, *119 Vote No!*, and *Sullivan* have created a complex and sometimes conflicted line of thought on deception and free speech. The final section of this chapter looks at the status of these issues in the legal system as of 2014 as they apply to three recent cases.

IV. Three Recent Cases: *Alvarez*, *281 CARE*, and *Driehaus*

Social theorists and philosopher Brian Massumi (2002a) says, "Sensation is the registering of the multiplicity of potential connections in the singularity of a connection actually under way" (pp. 92-93). In other words, within every actuality are potential alternatives felt as background noise. As it is true in the human body it is also true in the body politic. Legal debates are filled with "potentials." In the verbal sparring of justices and lawyers are felt many, if not all, of the potential outcomes of a decision. A legal argument is the working out of those potentials, the mapping of outcomes, in which speculation is a legal tool for deciding how best to manage a political system. The procedure asks the participants to travel down the roads and narrow alleyways of political debate, to attempt to see a potential wrong turn or an assailant in waiting. Legal discourse is a process of asking, what could go wrong?

U.S. v. Alvarez (2013)

The potential "going wrong" in the legal discourses discussed thus far, and in the discourse of *U.S. v. Alvarez*, is the idea of giving the government the power to decide what is true and what is false and to then punish falsity. In *Alvarez* a U.S. Supreme Court plurality evoked "Oceania's Ministry of Truth" from George Orwell's classic book *1984* (p. 2547). Here again, sensation bubbled up, as the justices call on the reader's emotional response to notions of authoritarianism, a potential outcome of restrictions on lying, so

easily elicited by the mere mention of Orwell. The Court asks: What could be the potential outcome of a decision that allows the Stolen Valor Act to stand? The plurality answers, "Permitting the government to declare [lying about military service] to be a criminal offense … would endorse government authority to compile a list of subjects about which false statements are punishable" (p. 2547).

Being such a recent decision[26] *U.S. v. Alvarez* has not yet received a great deal of attention. However, Susan Richey and John Greabe (2013) argue that it "seems destined nonetheless to enjoy a prominent spot in the First Amendment firmament" (p. 293). Legal scholars have voiced both support (Wood, 2011; Womack, 2013; Priddy, 2013) and criticism (Schlect, 2011; Krauss, 2012; Barnum, 2013; Lieffring, 2013) for the Court's decision. Before the decision was handed down Brian Schlect (2011) and Christina Wells (2012) argued that the Stolen Valor Act (SVA) should be found unconstitutional. Similarly, Ashley Messenger (2012) writes in agreement with the Court's decision on the unconstitutionality of the SVA. Richard Hasen (2013), while recognizing the problem of false political speech, voices concern that false political speech statutes could "be the subject of manipulation by government authorities who want to favor one side or the other in an election" (p. 56).

Michael Krauss (2012) connects *Alvarez* to *Snyder v. Phelps* (2011), in which the U.S. Supreme Court held that the First Amendment gave a religious group the right to protest military funerals. Krauss argues *Alvarez* and *Phelps* were decided incorrectly and thus "exacerbated a misuse of the First Amendment" (p. 2). Jeffrey Barnum (2013) and Helen Norton (2013) both make a case for following Justice Breyer's concurrence to amend the SVA in light of *Alvarez*. Richey and Greabe (2013) argue that Congress

[26] As of this writing *U.S. v. Alvarez* is only a little more than two years old.

should rewrite the SVA to protect the Medal of Honor "as a collective membership mark by means of trademark infringement legislation" (p. 293). Any rewriting of the statute could be difficult because, as Vikram Amar and Alan Brownstein (2013) argue, *Alvarez* failed "to provide a clear answer to the key question," which was "How should the First Amendment treat factual lies?" (p. 498). Their contention is that taking the plurality decision, the concurrence, and the dissenting opinions together "we have no clear resolution of that question" (p. 10).

The *Harvard Law Review* (2013) says that before *Alvarez* the "general constitutional status of false statements of fact" remained "murky at best." (p. 2113). Unfortunately, according to Amar and Brownstein, confusion about the matter seems to persist. This dissertation, will contribute to the ongoing discussion of *Alvarez* by taking the position that the effects of the decision on American political culture will be problematic. Staci Lieffring (2013) argues that after *Alvarez* it "seems likely that the Court would strike down any attempt to regulate false, non-defamatory campaign speech" (p. 1061). The problem is that, if we concede Gen. William Suter's (2012) argument that "if we put all liars in prison there would be no bed space in prison" (p. 248) political deception is harmful in many ways and "low-value lies … undermine First Amendment interests" (Barnum, p. 163). Protecting such deception under the First Amendment does more to harm than help freedom of speech. The problem of political deception requires some consequences beyond counterspeech in the marketplace of ideas.

It is useful to reiterate here how this case started with a public official, Xavier Alvarez, who in a public speech falsely claimed to have served in the military and to have won the Medal of Honor. He was found guilty of violating the section (b) of the federal

statute known as the Stolen Valor Act, which made it illegal to make such false claims. Alvarez appealed his conviction to the Ninth U.S. Circuit Court of Appeals who overturned his conviction and found the statute to be an unconstitutional violation of the First Amendment. The federal government appealed this decision the U.S. Supreme Court only to have the high Court affirm that decision.[27]

The Ninth Circuit court found the Stolen Valor Act proscribed a class of speech that was "not sufficiently confined to fit among the narrow categories of false speech previously held to be beyond the First Amendment's protective sweep" (p. 1200). While the Ninth Circuit recognized that courts have said that certain forms of false speech do not enjoy Constitutional protection, "All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements[28] that serve to narrow what speech may be punished" (p. 1200). The court found this act to be a content-based regulation that failed to meet the standard of strict scrutiny and declared it "not narrowly tailored to achieving a compelling government interest" (p. 1200). Conversely, the government, and Judge Jay Bybee's dissent in the Ninth Circuit's decision, argued that the speech regulated by the Stolen Valor Act "fits within those 'well-defined' and 'narrowly limited' classes of speech that are historically unprotected

[27] In response to the Court's decision the U.S. Congress rewrote the statute to make it illegal to falsely claim to have won the Medal of Honor in order to gain some benefit from that false claim (i.e. money, property, military health care benefits). President Barack Obama signed the new version into law in June 2013 one year after the Supreme Court's decision (Jordan, 2013).

[28] By "additional elements" the Ninth Circuit court meant that in order to convict Alvarez the government should have been required to prove his "false statement was (1) knowing and intended to mislead, (2) material, and (3) did mislead" (p. 1212). Instead, in order to convict Alvarez, the government needed only to demonstrate the he made a false statement, nothing more (p. 1212). The Court also suggests that similar legislation, such as impersonation statutes, are "drafted to apply narrowly to conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled" (p. 1212).

by the First Amendment" (p. 1202). The government appealed to the U.S. Supreme Court, attempting to protect the constitutionality of the statute.

The Supreme Court heard oral arguments for the case in February 2012. In July 2012 it announced its decision to uphold the Ninth Circuit's finding that the Stolen Valor Act was unconstitutional. The plurality decision in *Alvarez* started by establishing that the Court, with a few exceptions, has not allowed content-based restrictions on speech. The exceptions of most importance for this chapter were speech acts such as "fighting words," defamation, and fraud (p. 2544). The plurality held that "false statements have no value and hence no First Amendment protection" but stated that the Court has only allowed the restriction of such speech in rare instances such as defamation cases (pp. 2544-2545). The final point of importance to the discussion was that the Court has "not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more" (p. 2545).

These last two points, the narrow category of speech that can be proscribed and the fact that the Court had never before been confronted with a question like the one posed in *Alvarez*, can be viewed in tandem. In making the argument about the content-based exceptions under the First Amendment the plurality says lying alone cannot be proscribed and that the Court has never had to rule on a law with such a restriction. There must be some other ill carried along with the lie that there is a compelling governmental interest in restricting. The plurality uses the example of perjury as a lie that the government may punish. Perjury is illegal not only because it is false but also "because it can cause a court to render a 'judgment not resting on truth'" (p. 2546). Applying the reasoning of the plurality opinion, the Stolen Valor Act could have been saved by adding three words: "for personal gain." The plurality in *Alvarez* held that allowing Stolen

Valor's restriction "absent any evidence that the speech was used to gain any material advantage" would give the government "unprecedented" and "broad censorial power" (p. 2548). Following this logic, if the legislation had been written to punish taking credit for unearned military honors in order to enhance job qualifications or be elected to office, the legislation might have survived constitutional scrutiny.[29]

Similarly, one could turn Justice Kennedy's words toward the cause of a truth-in-political-advertising law. Kennedy wrote that perjury undermines a court's ability to render a decision based on truth. Lying in campaigns does the same to the public's ability to *render a vote* based on truth. Williams (2007) argues, "Implicit in the right to vote is the right to cast that vote based on accurate information" (p. 340). The electoral process is not only a competition between ideas; it is a decision about to whom the power to govern should be given. How can the claim to power be legitimate if that decision is not based on truth? When a grand jury, twelve citizens in a juror's box or a judge or justice is given false information and the speaker of that false information gives it knowingly with the intent of impeding the justice system, this action is acknowledged by the court as criminally punishable. Why is the same not true of knowing falsity in the court of public opinion? As Williams says, "These are more than just platitudes. The essence of democracy itself presumes an electorate guided by accurate information and participating in rational, thoughtful decision making" (p. 341).

What is most problematic about the plurality decision in *Alvarez* is the holding that, contrary to the contentions of Bybee and the U.S. government, Stolen Valor was not

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[29] I would like to acknowledge the suggestion of this idea from my friend Maj. Nicholas McCue, a Judge Advocate General lawyer in the U.S. Air Force. He suggested this possibility in a discussion we had about the Supreme Court's decision. I am grateful to him for helping me think through this issue.

narrowly tailored. Even advocates of truth in advertising laws must admit some concern about the idea of giving a government the power to judge what is true and what is false. Allusions to Orwell may be hyperbolic and overwrought at times, but there should be a real concern about such governmental judgments. It is precisely this concern that drove the U.S. Supreme Court and the Ninth Circuit to take speech they acknowledged was demonstrably false and to give it First Amendment protection. As a contrasting pair of examples, during his first campaign and throughout his time in office many of President Barack Obama's critics would commonly claim that he was a socialist. This is a subjective matter of interpretation upon which most people would not want the U.S. government rendering truth declarations. Conversely, a person either won the Medal of Honor or did not. The truth of this statement is not a matter of subjective judgment or open to the manipulation of data.

Alvarez thus becomes part of what Bybee, in his Ninth Circuit dissent, sees as a collection of contradictory conclusions in Supreme Court First Amendment jurisprudence. Bybee cites eight examples[30] of decisions in which the Court made some variation on the statement that false speech does not enjoy First Amendment protection. Following Bybee's point, there seems to be an equal and opposite situation in which no matter what the facts of a case are, and even though the Court has said knowingly false statements are not protected, the government cannot seem to be able to win such a case. Writing in a tone that one could describe as frustrated, similar to that in Talmadge's concurrence in *119 Vote No!*, Bybee argues the Ninth Circuit came to a "remarkable" and

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[30] The eight examples Bybee cites, in the order in which he cites them, are: *Gertz v. Welch* (1974), *BE & K Construction Co. v. N.L.R.B.* (2002), *Hustler Magazine v. Falwell* (1988), *Keeton v. Hustler Magazine* (1984), *Bill Johnson's Restaurants Inc. v. N.L.R.B.* (1983), *Herbert v. Lando* (1979), *New York Times v. Sullivan* (1964), and *Garrison v. Louisiana* (1964).

"faulty principle" that despite citing the Supreme Court's many decisions arguing that knowingly false statements do not enjoy Constitutional protection "the majority holds that Alvarez's *knowingly* false statement of fact is entitled to *full* constitutional protection" (p. 1219).

Bybee proceeds to make an important distinction between protected and unprotected false statements by noting the Supreme Court made an exception for some forms of protected false speech. Citing *New York Times v Sullivan* Bybee argues that erroneous speech that is critical of a public official's public conduct is protected because of an interest in protecting political debate and preventing self-censorship of criticism of public officials that might be created by a fear of lawsuits or governmental punishment. Bybee's point here offers an important and useful distinction in the regulation of different kinds of political speech.

In the *New York Times* case, the Supreme Court handed down a ruling that protected the rights of citizens to criticize the official conduct of public officials even if that speech contains some erroneous statements. This is generally a good thing. Sometimes in political speech, and in other types of expression, mistakes are made and sometimes speech that is factually false is disseminated. However, the *Alvarez* case is not about citizen speech about the public conduct of public officials. This case is about a public official *knowingly* lying about his record in an attempt to improve his public standing and thus his electoral potential. There are good arguments to be made in favor of public officials lying to the public, chief among them being protection for the execution of national security measures, but there are no good arguments in favor of a public official being legally allowed to lie for no reason other than to improve his public image.

There is no way in this case to plausibly argue that Alvarez simply misspoke. Both the U.S. Supreme Court and the Ninth Circuit, even as they give Alvarez's speech First Amendment protection, describe that speech as a purposeful misrepresentation. It is difficult to imagine a speech act that more readily fits the description of a "false statement of fact," that "interfere[s] with the truth-seeking function of the marketplace of ideas," (*Hustler Magazine v. Falwell*, 1988, p. 52) and that "harm[s] both the subject of the falsehood *and* the readers" (*Keeton v. Hustler Magazine*, 1984, p. 776) and that should *not* have First Amendment protection. The U.S. Supreme Court should have recognized a difference between those speech acts by citizens criticizing a public official, however unfairly, and a false statement made by a public official explicitly intended to mislead the public. To place these two forms of speech under the same protection of the First Amendment is an error of both a legal and political nature.

***281 CARE Committee v. Arneson* (2013)**

This error has ramifications well beyond an incident with a little-known, small-town politician in California who lied about military service. Waiting in the wings behind *Alvarez* was another case, *281 CARE Committee v. Arneson* (2013), which involved Minnesota § 211.B06 (see Appendix A), a statute making it illegal to prepare or distribute campaign material containing false information about a candidate or the effects of a ballot question. The *281 CARE* case is important for two reasons. The first reason is that, after the Eighth Circuit Court of Appeals found the statute to be unconstitutional, Arneson, the County Attorney for Blue Earth County, Minnesota, appealed to the U.S. Supreme Court. In its response to the appeal, 281 CARE[31] Committee cited the Ninth Circuit decision in *Alvarez* as a key point in its argument against Arneson's case. The

[31] The 281 CARE Committee's name stands for Citizens Acting for Responsible Education.

second is that the statute in question is an amended version of a statute that was found unconstitutional by the Minnesota Court of Appeals in *Minnesota v. Jude* (1996).

The *281 CARE* case centers around a proposed 2007 school funding ballot initiative in the Robbinsdale Public School District of Minnesota. The 281 CARE Committee opposed this initiative and the initiative lost. The superintendent of the district said in an interview with statewide media that the district was "exploring ways to deal with the false information [281 CARE Committee] spread about the initiative" (*281 CARE v. Arneson*, 2011, p. 626). 281 CARE interpreted this to indicate a threat of litigation under § 211.B06 and claimed this led the organization to not participate in a campaign against another ballot initiative in 2008.

In order to understand what happened in the *281 CARE* case one must first look at *Minnesota v. Jude* (1996) because the statute addressed in *281 CARE* is an amended version of a statute addressed in *Jude*. In that case Thaddeus Victor Jude was a Republican candidate for the U.S. House seat in the 6th Congressional District of Minnesota in 1994 running against incumbent Democrat William Luther. During that election season Jude's campaign ran TV ads claiming that, when they were both in the Minnesota State Senate, Luther blocked legislation authored by Jude that would have ended a Minnesota prison furlough program. This accusation was made specifically in the context of one case in which a defendant was out on furlough and sexually assaulted a woman and her two daughters. The ad claimed that had Luther not blocked Jude's legislation the aforementioned crime would not have happened.

Jude lost the election and Luther was re-elected to his house seat. After the election Jude and his campaign manager, Steven Knuth, faced charges of violating

Minnesota § 211B.06 the Minnesota Fair Campaign Practices Act, a law prohibiting false campaign speech. Contrary to the claims made in Jude's ad, the statute would not have applied to this case because it went into effect in 1987 and applied only to crimes committed after that year. The sexual assaults were committed in 1983, which means the ad gave voters the false impression that Luther's vote led directly, or at least indirectly, to the terrible crimes described above. After a grand jury indictment, Jude and Knuth moved to dismiss on the grounds that § 211B.06 was unconstitutional. The trial court agreed, and the state appealed to the Minnesota Court of Appeals.

That court affirmed the decision arguing that the "trial court concluded that the extension of criminal liability to those who have only a 'reason to believe' their campaign material is false makes the statute unconstitutionally overbroad. We agree" (*Minnesota v. Jude*, 1996, p. 753). After the *Jude* decision, in 1998, Minnesota amended the statute to apply in cases where someone disseminates information "the person knows is false or communicates to others with reckless disregard of whether it is false" (False political and campaign material, 1998). The amended statute stood unchallenged since being amended until coming before the courts in *281 CARE*.

The Eighth Circuit Court of Appeals found that the statute posed a potential chilling effect on 281 CARE's speech because, although the group was not necessarily planning on engaging in speech that would violate § 211.B06, it was planning to "engage in conduct that could reasonably be interpreted as making false statements with reckless disregard for the truth." Therefore it had "reasonable cause to fear" being charged with violation of the law (*281 CARE v. Arneson*, 2011, p. 628). The court thus argued, "the

likelihood of inadvertently or negligently making false statements is sufficient to establish a reasonable fear of prosecution under the statute" (p. 629).

The Eighth Circuit argued that the fear of prosecution under § 211.B06 would have a chilling-effect on the 281 CARE Committee's right to free speech. While the court is making a chilling-effect argument they are not making a very good one. For example, the court holds:

> [281 CARE] allege a desire to use political rhetoric, to exaggerate, and to make arguments that are not grounded in facts. … The tactics plaintiffs have clearly alleged that they want to use come close enough to speaking with reckless disregard for the truth that we can say it would be objectively reasonable for plaintiffs to modify those tactics in light of potential consequences from section 211.B06. (p. 630)

There is something strange about this argument. The court said 281 CARE planned on using what essentially amounts to deceptive practices. These are techniques of exaggeration, which may not constitute a lie, as defined in the typology of this project, but do constitute a deception. 281 CARE wanted to exaggerate the effects of a ballot initiative in order to turn public opinion in favor of its position, a position the public might oppose if given correct information rather than 281 CARE's exaggerated version of the information. It suggests 281 CARE, like the Democratic Party in the *Tomei* case, might be trying "to deprive voters of a free choice by diverting the intended exercise of the franchise to an unintended result" (*Tomei v. Finley*, p. 698).

281 CARE and the Eighth Circuit both explicitly acknowledge intent on the part of 281 CARE to mislead the electorate in order to achieve what it wants. The court also

notes that 281 CARE has been the target of previous accusations of violating § 211.B06. In the end the Eighth Circuit acts as an enabler to this behavior, finding that "the Supreme Court has never placed knowingly false campaign speech categorically outside the protection of the First Amendment" (pp. 633-634). This flies in the face of the *Gertz* decision in which the Supreme Court held there was "no constitutional value in false statements" and that while false statements are to be expected in a free debate they nevertheless are "not worthy of constitutional protection" (p. 340).

While the Eighth Circuit did state that there were constitutional concerns surrounding § 211.B06 they also said there needed to be more development of the arguments about whether the statute passed strict scrutiny. The court thus declined to rule on the constitutionality of the statute and remanded the case to the district court. The 281 CARE Committee appealed to the U.S. Supreme Court to answer the question. After the *Alvarez* decision the U.S. Supreme Court denied certiorari for the *281 CARE* case and remanded it to the U.S. District Court of Minnesota. Given the *Alvarez* decision, one might have expected the court to find § 211.B06 unconstitutional, but surprisingly it ruled in favor of Arneson and found the statute to be constitutional. Arneson argued that, applying the standard set by *Marks v. United States*,[32] when a plurality decision such as

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[32] *Marks, et al. v. U.S.* was a case in which the petitioners were convicted of interstate commerce of obscene materials. Their conviction happened after the U.S. Supreme Court's holding in *Memoirs v. Massachusetts* (1963) but before the Court's decision in *Miller v. California* (1973). However, their trial did not begin until after the *Miller* decision was announced (*Marks*, 1977, pp. 188-189). The trial court applied the standards set in *Miller*, standards which "expanded criminal liability," in comparison to the *Memoirs* decision, for obscenity charges (p. 194). The Supreme Court said that *Memoirs* was the court decision "by which petitioners charted their course of conduct" (p. 191). They overturned the conviction and remanded the case for "further proceedings consistent with this opinion" (p. 197). In other words the petitioners' trial should have been conducted under the standards set in *Memoirs* not those set in *Miller*.

The *Marks* case gave birth to the "narrowest grounds doctrine" that says, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (p. 193).

Alvarez is used as a precedent, because it is a plurality and not a majority decision, the plurality from said precedent with a narrower standard of judgment should be applied to subsequent cases. In this case, the narrower standard, or controlling opinion, would be the concurrence from Justices Stephen Breyer and Elena Kagan. That concurrence in *Alvarez* argued that intermediate scrutiny, not strict scrutiny, should apply to false speech statutes. This is because while false speech has "less social value than other types of speech … it could still "serve useful human objectives" (*281 CARE v. Arneson*, 2013, p. 10). Thus, using *Alvarez* as a precedent for finding on the constitutionality of Minn. Stat. § 211B.06 would require "a 'proportionality' analysis in which suitably narrow restrictions of false speech would survive constitutional challenges" (p. 10).

Noting that it needed to apply only intermediate scrutiny to the statute, the court nevertheless applied strict scrutiny, arguing that if the law met the higher standard, it certainly would meet the lower one.[33] The district court held that Arneson demonstrated a compelling state interest in "limiting the dissemination of knowingly or recklessly false statements about the effects of ballot initiatives" (*281 CARE v. Arneson*, 2013, p. 16) and showed that the statute in question addressed that interest (p. 19). The court also found the statute to be narrowly tailored (p. 21). The court made two other interesting and relevant points.

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[33] As discussed above, intermediate scrutiny and strict scrutiny are standards a court will use to decide whether a law violates the U.S. Constitution. Intermediate scrutiny is the idea that a law must advance a government interest and do so in a way that is clearly related to that interest (Cornell, n.d.a.). Strict scrutiny says there must be "a compelling government interest" in passing a law and the law must be narrowly tailored to meet that interest (Cornell, n.d.b.). Strict scrutiny is a more difficult standard to meet. The Minnesota district court in the 2013 *281 CARE* decision decided the less exacting intermediate scrutiny was applicable. In layman's terms this means Minnesota had to demonstrate to the court that (1) there was some government interest in preventing purposefully false statements in campaign advertisements and (2) that § 211B.06 was related to that interest. The court decided the statute met both of those requirements.

First, it found that while the statute did restrict political participants from knowingly making false statements about the effects of a ballot initiative, it "does nothing to restrict a person from disparaging the government using false statements" (*281 CARE v. Arneson*, 2013, p. 22). The court also takes a small but important step toward pushing back against the marketplace-of-ideas argument. It concedes that for "more fiercely contested ballot measures" counterspeech may be enough to solve the problem of lies and misinformation. However, "for ballot measures regarding less controversial topics, or regarding local issues, counterspeech may not always suffice or even exist at all" (p. 29). This concern is supported by the Project for Excellence in Journalism's 2013 State of the News Media report that found that from 2005 to 2012 the coverage of politics and government in local news had been reduced by 50% (Jurkowitz, et al., 2013, para. 60). In other words, the market does not always work itself out, sometimes the market fails to provide information or provides it inadequately, and sometimes some government action is necessary to remedy the problem. One way in which government can act to remedy the problem is through an election commission such as the one in Ohio. This role of government is the central question of the *Driehaus* case.

***Susan B. Anthony List v. Driehaus* (2010)**

In *Susan B. Anthony List v. Driehaus* (2013a) an advocacy group engaged in speech that shows how deception is not always so clear cut but often a matter of interpreting the meaning of words and what a law actually does. The case began when an anti-abortion advocacy group called the Susan B. Anthony List (SBAL) attempted to purchase space for a political advertisement on a billboard owned by Lamar Advertising in Ohio's First Congressional District during the 2010 congressional midterm election.

The text of the ad contained the claim that then-incumbent Rep. Steven Driehaus had "voted FOR taxpayer-funded abortions" (2011a, p. 414). This claim referred to Driehaus's vote in favor of the Patient Protection and Affordable Care Act (PPACA).[34] According to the history in the opinion of the U.S. District Court for the Southern District of Ohio, Western Division, Driehaus's lawyers "met with Lamar, and Lamar subsequently agreed not to post the Ad on its billboards" (2011a, p. 414). SBAL disseminated the message in other media and Driehaus filed a complaint with the Ohio Election Commission arguing the claim in the SBAL ad was false and violated Ohio Rev. Code § 3517.21(B)(9) and (10) (see Appendix A). Section (B)(9) bans false statements about a candidate's voting record. Section (b)(10) bans general false statements about a candidate that are made knowingly or with reckless disregard for the truth and are intended to influence the outcome of an election.

After some legal wrangling, both parties agreed to postpone having a hearing before the Ohio Election Commission. Driehaus went on to lose re-election and dropped his complaint against SBAL. However, this was not the end of the road for this case. In December 2010 another political organization, the Coalition Opposed to Additional Spending and Taxes (COAST), joined by SBAL, filed a Second Amended Complaint alleging that their free speech rights had been chilled by the Driehaus lawsuit and that the Ohio statutes in question were unconstitutional violations of the First Amendment. COAST claimed it was similar to 281 CARE Committee in its lawsuit, that it refrained from sending an issue advocacy email critical of Driehaus because it was "[f]earful of

[34] The PPACA, sometimes referred to as the ACA, Affordable Care Act, or Obamacare, was the healthcare reform bill passed by the U.S. Congress and signed by President Obama in 2010. It was a controversial piece of legislation that created contentious debates such as the one surrounding Steve Driehaus's re-election campaign.

finding [itself] subject to the same fate as the SBA List, *i.e.*, dragged before an inquisitional government agency who will sit in judgment of the truth of political speech and being subjected to extensive and intrusive discovery (2011a, p. 416). COAST claimed this not only infringed upon its ability to criticize Driehaus in his bid for re-election, but also infringed upon its ability to criticize candidates in the future in federal, state, and local elections. Simply put, COAST was arguing, like 281 CARE, that it was being subjected to a chilling effect. The organization claimed that it was not only anxious about future speech but also, at the time, withheld other issue advocacy emails about the cost of a local streetcar project in Cincinnati for fear of being brought before the Ohio Elections Commission[35] on similar charges.

Unfortunately for COAST the U.S. District Court for the Southern District of Ohio, Western Division held it could not address mere hypothetical complaints brought against it by a third party in response to hypothetical statements COAST might plan on making during a campaign (2011a, p. 420). The court ruled that because the Ohio Election Commission could investigate only someone against whom a third party filed a complaint, the commission has no power to prosecute, and since no such complaint had been filed against COAST, the court could not review its complaint. Simply put, the court held that the "speculative threat of future, groundless action is insufficient for COAST to establish standing to proceed" (2011a, p. 422). In summary, the Southern District Ohio Court dismissed the case because, it held COAST did not have standing to bring the lawsuit in the first place. Thus the court did not address the question of the law's

[35] In instances such as this someone such as Rep. Driehaus can file a complaint with the Ohio Election Commission. The commission will hold a hearing on that complaint and can issue a ruling on the truth of the claim in question or could potentially refer the incident to the appropriate law enforcement agent if there is evidence that a crime was committed.

constitutionality. They did, however, make some problematic arguments that need to be addressed here.

Like the argument in the *281 CARE* case, the court's argument in the *Driehaus* case has some logical problems in its free speech and chilling effect arguments. The court's response to COAST finds that the group claims that (1) its speech is true (therefore it does not violate the statute) but (2) at the same time the statute is a threat to their free speech rights because of the fear that it may be used to punish the group for engaging in the very speech it claims on its face does not violate the statute (2011a, p. 422). There is a strange logic in the chilling effect argument used by 281 CARE, COAST, and SBAL; it is a strange logic that can be seen in, and should call into question, the chilling effect argument more generally. This argument amounts to saying that one's actions do not violate a statute but that one is nevertheless afraid of being accused of violating said statute.

There also seems to be an element of judicial activism at work for the groups in these cases. For one thing, as court documents show, Driehaus lost his bid for re-election on November 4, 2010, and subsequently "filed a motion to withdraw his complaints" with the Ohio Election Commission (OEC) on November 12, 2010. On December 2, 2010, the OEC granted Driehaus' motion and terminated the proceedings against SBAL. This should have been the end of the issue. Driehaus lost his race, and he dropped his complaint. It seems that legal proceedings should have stopped at that point. However, SBAL and COAST decided to challenge the constitutionality of the Ohio statute. This also resulted in Driehaus launching a countersuit for defamation.

Driehaus' countersuit against SBAL cited five separate statements in which the group claimed Driehaus "voted FOR tax-payer funded abortion" (2011b, p. 426). In his countersuit against SBAL Driehaus claimed that not only was it false to state he had voted for tax-payer funded abortions but that he had been "among the members of Congress whose efforts ensured" there would be no tax-payer funding of abortion in the Affordable Care Act (*SBAL*, 2010, p. 8). Driehaus's countersuit argued that SBAL "falsely characterized him as voting for a bill that includes taxpayer-funding for abortions, when the SBA List knows the exact opposite to be true" (*SBAL*, 2010, p. 8). In a claim that sounds similar to the arguments made by the *Tomei* court, Driehaus' suit claimed "SBA List's disinformation campaign against Mr. Driehaus … left voters misinformed at a critical period in the campaign and irreparably damaged his reputation in the community" (*SBAL*, 2010, p. 8). Where the U.S. Eighth Circuit Court of Appeals in the *281 CARE* case from 2011 seemed intent on enabling deception, the *Driehaus* court was willing to hear the countersuit for defamation and at least allow for the possibility that there might be some accountability if it was found that SBAL had done something wrong.

The court cited as a flaw in SBAL's argument for dismissal of Driehaus' counterclaim for defamation contradictions between the content of SBAL's campaign materials and its court defense of those materials. On the one hand, SBAL claimed the phrase "'taxpayer-funded abortion' is an ambiguous term without common meaning" (*SBAL*, 2011b, p. 429). The court found this argument to be implausible on two grounds. First, taking a somewhat mocking tone, the court held it is "nonsensical to find that a nationally recognized organization would consistently use ambiguous terms to convey its

message" (2011b, p. 429). In other words, the court was skeptical of the idea that an established, nationally known political advocacy organization would not communicate its ideas clearly, in unambiguous terms. The U.S. District Court for the Southern District of Ohio, Western Division also held that there is, in their opinion, actually very little ambiguity in the phrase "taxpayer funded abortion." It devoted multiple paragraphs to explaining why this argument is unpersuasive, stating there is a fairly clear definition: "money derived from tax revenues that had been appropriated by law to pay for abortions" (2011b, p. 429). The court also found the phrase to not be as ambiguous as SBAL claimed because a Google search on it returned "approximately 536,000 results, which further supports a finding that the phrase is commonly used" (2011b, p. 429).

The second problem the court saw with SBAL's argument was its repeated use of the words "fact" and "truth" throughout its literature. In its criticism of Driehaus it stated, "it is a fact" that Driehaus voted for taxpayer funded abortion. The SBAL claimed it wanted Driehaus' "constituents [to] know the truth of his vote" (2011b, p. 429). In rejecting SBAL's request for summary judgment against Driehaus' claim for defamation, the court found that the use of such phrases seemed to contradict the claim that SBAL was using purposefully ambiguous terms. The court also noted that even though SBAL used the words "fact" and "truth" it failed to identify any provision in the PPACA that provided any funding for abortion (2011b, p. 435). One problem with SBAL's argument the court did not point out is that the use of ambiguity, which would fall under the category of spin in this dissertation's typology, would seem to indicate a desire to mislead. SBAL claimed it was using a term it felt was ambiguous and combining it with the words "truth" and "fact."

This indicates two possibilities. First, SBAL knew what it was saying was not necessarily a fact or, at the very least, knew it was overselling its claims to the truth. The second possibility is that SBAL thought what it was saying *was in fact unambiguous* and it was merely claiming ambiguity in an attempt to win the lawsuit. It is impossible to read the minds of the group members or their lawyers and thus impossible to say which of these scenarios is the case. It is, however, possible to say SBAL's arguments were flawed and that the court is pointing out those flaws.

***Alvarez*, *Driehaus*, and *SBAL*: Looking forward**

The *Driehaus* case reached another turning point in January 2013,[36] the same time as the *281 CARE* case, less than a year after the *Alvarez* decision. While these two cases saw decisions at the same time, they came to very different conclusions about the how deception should be handled in their respective scenarios. These differences are important. For one thing, 281 CARE Committee lost the argument that a truth in political advertising law could not apply to a ballot initiative because there is no reputational harm. The issue of reputational harm played out in the *Driehaus* case in that he argued that his reputation was damaged and lost because he was unable to convince the court of this. The court did find, when looking at the facts of the case, "when one walks through the elements of a claim for defamation, the required allegations are present here" (*SBAL*,

[36] As of the time of this writing the *Driehaus* case is hanging in legal limbo. Susan B. Anthony List challenged the constitutionality of the Ohio statute and the Sixth Circuit Court of Appeals found they did not have standing to bring such a challenge (*Susan B. Anthony List*, 2013b). The U.S. Supreme Court agreed to hear an appeal to the Sixth Circuit's decision. However, the high Court did "not decide on the constitutionality of the Ohio statute, but rather, whether SBA List has grounds to bring its case" (Viebeck, 2014, para. 13). While Ohio Attorney General Mike DeWine said he intended to fulfill his duty and defend the statute in the *Susan B. Anthony List* case he also said he planned "to file a separate legal brief that [would] challenge the law's constitutionality" (Eaton, 2014, para. 18). As noted earlier in this chapter the U.S. Supreme Court reversed the lower court's decision and remanded the case.

2013a, p. 6). However, despite the presence of the required elements, the court granted SBAL's request for summary judgment.

Judge Black's holding in *Driehaus* amounts to saying that, while the necessary elements of a defamation claim were present, SBAL was protected by the First Amendment because even false statements about a politician's position on an issue or the effects of his vote on a piece of legislation are protected by the freedom of speech. Supporting this holding Black cites *Manasco v. Walley* (1953)[37] in which the Supreme Court of Mississippi held that stating someone took a certain position, when he in fact did not, cannot be considered defamatory because there are respectable people on both sides of the issue. In the *Driehaus* case, SBAL questioned the politician's pro-life bona fides. This may have been inaccurate but it was not defamatory because many respectable people are on both sides of that issue.

It is a reasonable interpretation to believe that 281 CARE Committee and Susan B. Anthony List disseminated political information that was at the very least purposefully ambiguous in a misleading way, if not unambiguously false and intentionally misleading. That is not necessarily to say these groups lied. As the typology developed in chapter 4 argues, even if the groups were misleading people, they may not have been lying. Setting aside *Tomei*, where Democratic candidates named their campaign committee "REP" to mislead voters into thinking they were Republicans, what the judicial discourse examined

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[37] In *Manasco v. Walley*, Ben Walley was a representative in the Mississippi State Legislature who was running for re-election. During the course of that campaign Manasco published in his newspaper, *The Greene County Herald*, an article criticizing Walley for de-prioritizing work on certain highways in the county. Walley claimed this editorial was false and reflect poorly upon his "honesty and integrity and moral character" (p. 622). Walley also claimed that the false editorial had caused him to incur costs in the form of having to publish handbills correcting the record and in the loss of business for his law firm (p. 625). The Mississippi Supreme Court disagreed holding "it cannot be said that the newspaper article complained of reflected upon the honesty, integrity or moral character of the plaintiff" (p. 626).

in this chapter indicates is that it is quite difficult to hold groups accountable for misleading voters. Such a difficulty is problematic.

The ability to mislead with impunity is a disenfranchising force. Interfering with a voter's ability to cast an *informed* vote is an interference with her ability to cast the vote that will result in outcomes she finds desirable. To protect the "right to lie" under the freedom of speech is not simply an act of protecting a right from interference; it is also a failure to protect the rights of others to cast their votes on the basis of accurate information. It is to tell the practitioners of deception they may have free reign while ignoring the consequences of their practices for the voters. Despite the fact that Minn. Stat. § 211B.06 was allowed to stand, the decision in *Alvarez* and the logic behind the 2011 decision in *281 CARE Committee* indicate future problems for attempts at accountability for deceptive practices in politics.

These three cases leave the question of acceptable legal remedies for political deception up in the air. They were decided at three levels in the legal system, with *Alvarez* coming from the U.S. Supreme Court, *281 CARE* being remanded by that same court to the Minnesota district court, and the *SBAL* case also being remanded by the U.S. Supreme Court to the U.S. Court of Appeals for the Sixth Circuit. So while the court system has addressed the issue of political deception at various levels these three cases indicate there is still much to be said about it.

V. Conclusion

In *Rosenblatt v Baer* (1966), U.S. Supreme Court Justices Hugo Black and William Douglas made strong arguments in favor of an absolutist approach to freedom of speech and against the very existence of libel laws. They make a compelling argument,

using the case of colonial printer John Peter Zenger as support for the position that government power sometimes is used to intimidate and punish legitimate criticism of that power (p. 96). Through a discussion of the Zenger case, they argue that juries rather than judges should make decisions about both the law and the facts of the case in a libel trial. The problem for the argument of this chapter, that this judicial discourse enables political deception, is that Black and Douglas are absolutely correct. Government agents, such as the judge in the Zenger case who had two lawyers disbarred for no reason except that they dared to defend Zenger, clearly can abuse their power. Laws restricting seditious libel, defamation, and political deception, such as those contained in Appendix A, can be used as an axe, not a subtle tool, to not merely tamp down but to chop down those who dare to question power.

However, it must be said that Black and Douglas's arguments have their own problems. They fail to recognize the lies punished by libel laws, if left unchecked, have their own uses for power. Yes, top-down governmental power can constrain those who rightfully criticize it, like an axe chopping at a tree. Yet, power does not work by axe alone, and the small deceptions, the reputational and defamatory damages done to critics, the scalpels of a million tiny lies misleading voters, can be just as readily employed by governmental power to undermine those who rightfully criticize it. Contrasted with the brazen violence of the axe openly chopping away at democratic freedoms, the freedom to lie acts like root rot, eating away at the tree, undetected until it is too late. This is not to mention that powerful private interests can use such deceptions to undermine legitimate governmental power that protects the democratic freedoms of the less powerful. Black and Douglas, at least in their partial concurrence/partial dissent in *Rosenblatt*, would have

the First Amendment protect those lies and defamations. For the sake of an idealization and absolutist interpretation of the First Amendment, lies must be protected speech in order to protect honesty, to let the market flourish, even if it flourishes with dishonesty.

Oliver Wendell Holmes called it "freedom for the thought we hate." Thomas Jefferson said, "I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it." The problem with the marketplace of ideas argument, libertarianism, the idealization of an absolute right to (even in some cases falsely) criticize public officials is these arguments paint an overly optimistic picture of liberty, a picture that rarely if ever includes the "inconveniences" to which Jefferson refers. In their rush to protect the right to criticize power through false statements, Black and Douglas fail to recognize, or at least acknowledge, that the government can just as easily use such unfettered falsehoods as an abuse of power. They also fail to acknowledge that First Amendment absolutism does not "differentiate between laws that expand or support and those that curtail speech" (Stein, 2006, p. 7).

The concluding argument of this chapter is fairly straightforward and comes in three parts. First, an informed public is necessary to a functioning democratic political system. Not only is an informed public a functional necessity, but also for one individual or group to undermine it is a violation of the autonomy of other individuals. Political deception is a form of coercion that takes away another's individual right to freely choose leaders. When the consent to be governed is given under false pretenses, it ceases to be consent and becomes freedom forfeited through subtle coercion, sometimes without those forfeiting the freedom even being aware of the coercion.

Second, the First Amendment jurisprudence examined above makes the regulation of such deception a difficult prospect. Part of the problem is the tendency toward First Amendment absolutism even in the face of unambiguously purposeful deceptive acts. A coincident problem is the sometimes-inconsistent nature of First Amendment jurisprudence. In her book *Speech Rights in America*, Laura Stein (2006) points this out in the context of the differing regulatory stances toward different media.[38] Holderness et al. (2000) see inconsistency in obscenity law. The judicial discourse examined above shows similar inconsistency in regulatory approaches to deception.

For example, in *Alvarez* the Supreme Court and Ninth Circuit both acknowledge unambiguously that Xavier Alvarez was a liar and that he did violate the law in question. A fraud was committed. Yet Alvarez was left unpunished and the law he violated was knocked down as unconstitutional. This is contrasted with the *Tomei* decision. *St. Amant v. Thompson* (1968) is another example that follows court decisions that acknowledge a statement as being at least false if not an outright deception and yet allow the false statement to stand behind First Amendment protection. This is problematic because the courts are protecting behavior that clearly does harm to others and to the integrity of the political process.

In this case St. Amant was a candidate for public office in Louisiana. During a televised speech he made accusations of corruption against Thompson, a deputy sheriff in East Baton Rouge. Thompson sued St. Amant and won $5,000. This ruling came before *New York Times v. Sullivan*, after which the trial court was asked to rehear the case. A

[38] A good example of what Stein is talking about is the fact that the courts find a licensing system for broadcast media to be acceptable because there is a limited bandwidth and licensing is necessary for managing it. The courts would not allow for a similar licensing system applied to print media because there is no compelling government interest for one and such a licensing system would be an example of prior restraint on the First Amendment right to freedom of the press.

request it denied. The Louisiana Court of Appeals (*Thompson v. St.* Amant, 1966) reversed the ruling, arguing it failed to meet the actual malice standard set by *Sullivan*. The Supreme Court of Louisiana (*Thompson v. St.* Amant, 1967) then reversed that decision, arguing that St. Amant had acted with reckless disregard, thus meeting the *New York Times v. Sullivan* actual malice level of fault. The case finally made its way to the U.S. Supreme Court.

In its decision, the Court (*St. Amant v. Thompson*, 1968) held that St. Amant did not take the time to confirm the veracity of his accusations against Thompson and noted that he erroneously believed that he was not responsible for doing so because he was quoting someone else's statements about those claims. However, the Court ruled that there was not sufficient evidence to demonstrate St. Amant had acted with actual malice. This case neatly summarizes the arguments surrounding the regulation of political deception with two contrasting quotes, one from the majority decision, and the other from Justice Abe Fortas' dissent.

The majority held 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" (*St. Amant v. Thompson*, 1968, pp. 731-732). The majority thought that while it may be important to strive for truth in political discourse, and it is reasonable to expect individuals to be careful when making accusations against others, the highest, most important desire is to protect freedom of speech. It is especially important to protect the freedom to criticize government the majority held, even if that means we inadvertently protect lies and careless falsehoods in the process. This stands in contrast to Fortas's argument that "the First Amendment is not

so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities" (p. 734).

Reiterating the problem of inconsistency, contrast the majority holding in *St. Amant* with the Michigan Court of Appeals decision in *Michigan v. Dewald* (2005). During the 2000 race for president the defendant, Jerome Westfield Dewald, started two political action committees (PACs), Friends for a Democratic White House and Swing States for a GOP White House. One was ostensibly supporting Al Gore, the sitting vice president, a Democrat, the other George W. Bush, his Republican opponent. Dewald then solicited donations, collecting approximately $700,000 in the process (p. 172). Dewald was found guilty of violating the Michigan false pretenses statute, MCL § 750.218(4)(a), by holding himself out as affiliated with the Gore and Bush campaigns in order to solicit donations.[39]

The court notes that in a fraud case such as this one "minimal circumstantial evidence is sufficient to prove a defendant's intent" to deceive (p. 173), whereas proving defamation of a public official calls for the actual malice standard. In this case the court says the defendant used George W. Bush's name in his solicitation letters. This, combined with a cease and desist letter from RNC lawyers telling Dewald it was illegal to do so, were enough evidence for the court to affirm Dewald's intent to deceive and thus his conviction (p. 174). Citing its decision in *Lostracco* the court held that,

[39] Dewald's crime was a general violation of a Michigan false pretenses statute. In other states, such as Alabama and Louisiana, there are laws specifically addressing the illegality of falsely representing one's self as affiliated with a campaign. With a slight variation on deception in affiliation Ohio has two statutes making it illegal to infiltrate, and gain employment with, a campaign or advocacy group with the intention of impeding the goals of that campaign or organization.

> Both the state and federal constitutions recognize the fundamental rights of free speech and expression and provide great protection for speech in the political arena. However, this protection is not absolute. … even in the area of political speech, "[k]nowing misrepresentations are not constitutionally protected free speech." (p. 178)

The *Dewald* decision makes clear that there are limits to free speech in politics. It also demonstrates that, while some of the statutes in Appendix A might not withstand Constitutional scrutiny, the false affiliation laws could – especially if a false affiliation interferes with the proper functioning of a campaign. In the case of *Dewald* it was his use of donor lists to raise money illegitimately, making it more difficult for the Gore and Bush campaigns to raise money, that could be said to interfere.

The case of *Garrison v. Louisiana* (1964) also demonstrates the problem of dealing with political deception and the tension at work in the judicial discourse surrounding it. Garrison was the district attorney of Orleans Parish, which is the city of New Orleans. In a press conference he made statements highly critical of judges in his parish, accusing them of laziness, taking excessive vacation time, and corruption. He was found guilty of criminal defamation. This is different from a civil lawsuit for defamation where a defendant can end up paying damages to a plaintiff. Most states have civil lawsuits over defamation where with the rare instance of criminal defamation, such as in the *Garrison* case, the defendant can be sent to prison. This conviction was affirmed by the Louisiana Supreme Court, which led to his appeal to the U.S. Supreme Court. The biggest problem with the statute in question in the *Garrison* case was that, as the Court notes, it "direct[ed] punishment for true statements made with 'actual malice'" (p. 78). In

other words, under this law, even truth was not a defense against criminal charges. One cannot help but flash back to John Peter Zenger standing in a courtroom and see how jury nullification might be good for Mr. Garrison.

In this case the U.S. Supreme Court made three important points that are relevant to this discussion. First, the state cannot punish someone for making true statements even if those true statements are made with ill will. The Louisiana law in question here was unconstitutional because it did just that. Second, the law attempted to prevent unfair criticism of the private lives of public officials. However, criticism of public conduct may sometimes touch on private conduct. For example, the vacation time taken by a public official is private but also reflects on conduct of his or her public office. Finally, the *New York Times* standard protected Garrison's right to criticize the conduct of public officials, such as the judges in question in this case. Thus the court reversed Garrison's conviction and found the law unconstitutional.

There is one other important point made by the Supreme Court about truth and falsity in political speech vis-à-vis the First Amendment. The Court stated:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That

> speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premise of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. …"[40] Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. (p. 75)

In this case there is a need to protect both Garrison's speech and the general right to criticize public officials but to do so without confusing future courts with the impression that a precedent is being set that any and all criticism of government, including false criticism, should enjoy the protection of the First Amendment. In the end the court finds this balance, protecting Garrison's speech, arguing, "We do not think, however, that appellant's statement may be considered as one constituting only a purely private defamation. The accusation concerned the judges' conduct of the business of the Criminal District Court" (p. 76).

This is the third point in the concluding argument of this chapter, that the judicial discourse creates a political environment in which truth, or at least our ability to get as close to it as possible, is sometimes sacrificed on the altar of a free market of ideas, thus

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[40] In this passage the Court is quoting the case *Chaplinsky v. New Hampshire* (1942). In *Chaplinsky* the Court cites Zechariah Chafee's book *Free Speech in the United States* as the source of their argument.

making it difficult to use the law as a tool for punishing deception. This is especially true of *Alvarez*, which is the most recent decision discussed here, that is opening a whole new set of possibilities for the protection of purposeful lies, speech fitting the first category of deceptive speech in the chapter 4 typology, on the part of political leaders and their critics.

The conclusion to which the preceding premises lead is that it is important that our political system creates a non-criminalizing mechanism by which deception is deterred rather than corrected post-dissemination. In other words, if political speech is going to be discursively constructed and treated as a good traded in a marketplace, there needs to be a mechanism to address what amounts to "market failure" in the system of political discourse. This argument will be addressed in chapter eight, along with a proposal for a campaign ethics council, which will deter deceptive practices through an official recognition of lies without criminalization that leads to fines or imprisonment

Chapter 6 – The Fine Line Between "Organic" and "Organized": Rachel Maddow, FreedomWorks, and the Tea Party

I. Introduction: Organic, Organized, and/or Genetically Modified Taste Making

The study of politics is a study of aesthetics. This is not a study of aesthetics in terms of the quality of an image, asking what makes a work of political art "good" or "bad," but rather the study of aesthetics as the way musical notes resonate (or do not resonate) with listeners. It is not a matter of defining a work by whether it meets a critical threshold that sees the work as being of the highest quality. The political as aesthetic is the musicality of the message, how it strikes a chord with a particular audience in a particular moment. What aesthetic will appeal to the audience and what will not? It is also the tenor of emotional terms that vibrate in tune with the audience, when the audience and the performer are *feeling* in the same key. It may not be a *true* key, but that is not important because what makes a political message e/affective is that it is in a *True* key.

This is not to reduce political ideology to political preference, meaning that deeply held principles become the equivalent of preferring blue wall paint over red. Nor is it to equate beliefs to "tastes," whether that is a taste for red over blue or taste as a sense or sensation. It is an attempt to understand the discourses of deceit, and politics in general, as more than the mere instrumentalism of 20th century social science as described by American University professor of communication Christopher Simpson (1994), where communication was thought of "as an instrument for persuading or dominating targeted groups" (p. 6).

This chapter will analyze the political aesthetic discomfort at play in the discourse of Rachel Maddow in contrast with that of Dick Armey and Matt Kibbe, two prominent tea party advocates. This will be followed by a discussion of the four categories into which the discourse of deceit surrounding the tea party and Maddow can be broken. First, political action is idealized. Whether activist or average citizen the participant is expected to meet certain standards of behavior. Second, there is discussion of how much activists know and how they come to know things. For example, when an organization circulates information that is advantageous to them critics will call it propaganda but the organization will call is education. Third, political activity is discussed in purely strategic terms. This is the "horse race" coverage or strategy frames discussed in the first chapter of this dissertation. Finally, there is the question of the authenticity of a political movement. Are people acting out of a genuine desire for some policy to implemented or are they being stoked by powerful interests? This categorization scheme will set the stage for specific discussions of the tea party from various discursive artifacts, most importantly *The Rachel Maddow Show* (*TRMS*), but also other cable and network news programs. The chapter will conclude with a discussion of the nature of grassroots movements and the relevance of Antonio Negri's concepts of constituent and constituted power.

Before proceeding with that analysis this brief introduction to the chapter will give some background on Maddow, Armey and Kibbe, FreedomWorks, and the tea party movement. It will also explain what it means to talk about politics as an aesthetic experience. If politics as aesthetic is more than taste making and takes communication to be more than the instrumentalism of the 20th century social scientists, then what is it?

What does it mean to transform politics into an aesthetic? Historian Martin Jay (2010) says the "univocal meaning of aestheticized politics" has never really been "satisfactorily settled" (p. 106) although he did make an "attempt to sort it out" (p. 214).

In that attempt Jay (1992) argues that for some theorists politics as aesthetic is the opposite of reason; it is political action as artistic expression, the political equivalent of l'art pour l'art, or "art for art's sake." He points to "a deadly anarchist's bomb thrown into the French chamber of deputies in 1893," and Mussolini's son-in-law comparing "bombs exploding among fleeing Ethiopians in 1936 to flowers bursting into bloom" as a few examples of l'art pour l'art (pp. 43-44). These instances are so incredibly problematic because the human suffering they accompany is of little to no concern to political aestheticization. The perpetrators of such acts of violence perceive them as beautiful because they are political. The deaths do not matter. What matters is the advancement of the goals of the political actor.

For others, Jay says, politics as an aesthetic experience is "not understood as the opposite of reason, but rather as its completion, not as the expression of an irrational will, but as the sensual version of a higher, more comprehensive notion of rationality, not as the wordless spectacle of images, but as the realization of a literary absolute" (p. 46). When a political actor employs violence it is not the act of an irrational individual but the perfectly sensible completion of a rational line of thought.

At this point Walter Benjamin's take becomes essential. Benjamin, an important German-Jewish Marxist philosopher, applied his critique of the aestheticization of politics to Fascism arguing that it attempted to "organize" the masses but wanted to do so without altering existing structures of property ownership. He said Fascism strived to

take away the masses' right to eliminate property and substituted for that right, "a chance [for the public] to express themselves" (p. 241). This, Benjamin argues, shows the "logical result of Fascism is the introduction of aesthetics into political life" (p. 241). For Benjamin the spectacle, as in public demonstration, is an important part of the aestheticization of politics. Instead of having the ability to alter the state of affairs the public merely has the ability to express feelings about them. University of Wisconsin political scientist Murray Edelman (1995) makes an important point: "The prominent reliance upon spectacle, ritual, and symbol in the Third Reich is the prototypical case, but the practice is pervasive in democratic states as well" (p. 91). So to note that both Fascism and contemporary American politics share an aestheticization is not an attempt to make a claim for any other similarities between the two or to compare any American politicians to Fascists.

Along with the importance of spectacle to political aesthetics is philosopher Jacques Ranciere's (2010) idea of politics as dissensus or, "a conflict between a sensory presentation and a way of making sense of it, or between several sensory regimes and/or bodies" (p. 139). By this Ranciere means that politics is about a collective discernment, creating a new form of "*dissensual* 'common sense'" (p. 139). Put more simply, politics is the process of altering collective ways of feeling, of perceptions of what is "common sense" and the use of spectacle in that cause. For example, in the 19th century it was "common sense" that women should not be given the right to vote. The Suffragette movement disrupted this sensibility about gender and political participation. The Suffragettes were a symbol of dissensus, which Ranciere says, "is not a confrontation

between interests or opinions. It is the demonstration … of a gap in the sensible itself. Political demonstration makes visible that which had no reason to be seen" (p. 38).

There are four ways in which the above descriptions of the aestheticization of politics are useful to this analysis. First there is the idea of giving the masses "a chance to express themselves." One critique of the tea party since its beginnings in 2009, that it is overly scripted, or that it is astroturf, is the perfect example of this. The critique that will be discussed later in this chapter is that tea party groups like FreedomWorks give people little more than the opportunity to express themselves. The second way this discussion is useful is in Martin Jay's (1992) question about whether "the critique of 'the aesthetic ideology' in certain of its guises may itself rest on mystifications" (p. 43). He argues that Walter Benjamin and others' critiques of fascism as aesthetic, as using spectacle, takes on its own qualities of aestheticism. The same line of thinking can be applied to Rachel Maddow and the tea party. Maddow may critique the tea party as a spectacle, as the product of aesthetics although she does so without use of the term, however Maddow's critique has its own political aesthetic qualities.

Third is Ranciere's idea of dissensus and politics as "mak[ing] the invisible visible" (p. 139). Ranciere argues that politics is about the process of "refiguring space" (p. 37). Protestors take a space that is designated for one thing and refigure it as a space for demonstrating, for political advocacy. The tea party protests and responses to them exemplified this during the 2010 health care debate. Town hall meetings with politicians are designated as spaces for a certain kind of "civil" exchange (i.e. speaking to one another in respectful tones, citizens ask questions and politicians answer). By standing up and yelling, tea party activists refigured the space of the town hall meeting. The yelling is

certainly not the moral equivalent of throwing a bomb into the French chamber of deputies but they are both an aestheticization of politics in that the focus is on the act; the discourse surrounding both the advocacy for this tactic and the critique focus a great deal on the yelling as a tactic rather than the content of the yelling as a deliberative process.

Finally, to think of politics as an aesthetic experience is to see that there is a fuzzy line between reflex and reflection. It is to recognize the power of political branding to elicit reflexive responses, as American University of Paris professor Jayson Harsin (2006) argues, "Branding functions on speed and impulse, not time-consuming deliberation" (p. 101). The difference between impulse and deliberation is similar to the difference between something being either organic or organized. The big question arising from the discourse of deceit about the tea party is whether the movement was an organic product of impulses of the public or the organized product of deliberation and planning by corporate interests. Some of the political discourse in this analysis indicates that it might be a little of both.

The discourse of deceit that this chapter examines shows how the distinction between organic and organized political actions came into play surrounding the political campaign that became the founding of the tea party, a conservative or Right-wing political movement that sprung up as a response to the financial crisis of 2008, its aftermath, and particularly the Obama Presidency. Some consider the movement to have been sparked by a cable news rant by CNBC commentator Rick Santelli (Murphy, 2012). Santelli criticized, live on the air from the Chicago Mercantile Exchange, the Obama Administration's proposal to assist homeowners facing foreclosure (CNBC, 2009). This

was just a single moment among many that signaled rising anti-government sentiment at this time that gradually resulted in the tea party movement.

In particular, this chapter focuses on the coverage of a tea party-affiliated organization called FreedomWorks (FW). FW was, at the beginning of the tea party movement, a conservative libertarian political advocacy organization that was being run by a retired Republican Texas Congressman named Dick Armey and a libertarian political activist named Matt Kibbe.[1] The group was founded in 2004 when two existing conservative political organizations, Citizens for a Sound Economy and Empower America, merged. The press release announcing the founding of FW said the group's mission was to "broaden the national fight for lower taxes, less government, and more economic freedom" (FreedomWorks, 2004, para. 1).

The group's grassroots authenticity was questioned in coverage by the cable news outlet MSNBC[2] and its primetime lineup of hosts: Chris Matthews, Ed Schultz, Keith

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[1] Armey had a very public falling out with Kibbe and FW in 2012 that resulted in Armey being forced out of the organization (Corn, 2013).

[2] MSNBC was chosen as a starting point for this discourse because of its ideological dissimilarity to the tea party movement. The political climate in cable news during the Obama years had become one of partisanship that was less akin to the idea of an objective press and more like the media environment of partisan newspapers in contemporary England or Colonial America where news outlets are explicitly linked to political parties. For example, in England the *Guardian* newspaper is the Labour Party newspaper and the *London Times* is the Conservative Party newspaper. In the early post-colonial era in America there was a similar set-up with some newspapers being explicitly Federalist, the party of John Adams, or explicitly Democratic-Republican, the party of Thomas Jefferson. In the Obama years the major cable news channels, Fox, MSNBC, and CNN, had fallen into similar patterns. MSNBC transformed into a liberal balance to the perceived conservatism of Fox (Stanley, 2012). In the *New York Times* Alessandra Stanley argued for a "uses and gratifications" perspective that viewers were seeking cable news coverage that would "echo what they already think" (para. 3). A McClatchy-Marist poll published a month before the article would seem to confirm that in its indication that a viewer's choice in channel (MSNBC or Fox) was a good indicator of their likely opinions on issues ranging from taxes, to national security, to the role of government in American society (Ordonez, 2012, para. 2). A Pew study found clear partisanship in comparing MSNBC and Fox's coverage of their opposing candidates in the 2012 presidential election. That study showed that MSNBC was more partisan than Fox with a 23-to-1 ratio of negative to positive stories about Republican nominee Mitt Romney. This is compared to Fox's 8-to-1 negative to positive ratio in its coverage of Democratic incumbent President Barack Obama (Pew staff, 2012c, para. 13). So during the Obama years it was well established that MSNBC had a liberal slant in how it covered the news.

Olbermann and, in particular Rachel Maddow. This chapter looks at news transcripts and how they link outward to other discursive artifacts, combining together to form a political/ideological debate about the nature of the tea party movement, the authenticity of various types of political speech, and the role of money in the process.

This chapter will show that, to varying degrees, the four primetime hosts on this network at the time, especially Maddow, presented a discourse, surrounding the tea party movement in general and FW in particular, that problematized these political actors as inherently deceptive. The supposed public relations practices employed by FW and the common terms used to describe them are not new. Maddow and others described FW as a corporate front group and repeatedly use the term "astroturf," which refers to an "artificially-manufactured political movement designed to give the appearance of grass roots activism" (Goddard, n.d.b., para. 1). In addition to these accusations MSNBC coverage called the tea party a "rent-a-mob,"[3] and a "belligerent, organized crowd of hecklers,"[4] participating in "scripted protests."[5] These are just a few examples of the kinds of things that were said about the tea party by those anchors that will be discussed in this chapter.

These examples from MSNBC's coverage are contrasted with the coverage found on CNN, Fox News, the nightly network newscasts on NBC, CBS, and ABC, and coverage on National Public Radio. The research done for this chapter found that where MSNBC developed a strong narrative that FW was an astroturf organization, the coverage of the other networks largely, and uncritically, presented FW as "grassroots."

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[3] *The Rachel Maddow Show*, MSNBC, 3 April 2009

[4] *The Rachel Maddow Show*, MSNBC, 3 April 2009

[5] *Countdown with Keith Olbermann*, MSNBC, 3 August 2009

Despite the conventional wisdom about the widely held liberal bias of these media outlets there was little to no critical analysis of the grassroots self-presentation of the tea party movement and organizations like FW.

One goal of this analysis is to shift and expand discussions of civility in politics, to see this discourse as going beyond dichotomous notions of civility as good and incivility as bad. The media content this chapter discusses connects civility to authenticity; depending on the political perspective of the analyst in relation to the activist being discussed, the discourse sees displays of political passion as either staged or stoked incivility or as the genuine expression of "colorful," self-motivated citizens frustrated by perceptions of centralized state power. Under this examination, authenticity is transformed into a problem of aesthetics.

The analysis looked at transcripts from MSNBC, CNN, Fox News, NBC, CBS, ABC, and NPR, from January 20, 2009, to January 20, 2012, the first three years of the Obama Presidency, which discussed FreedomWorks. This timeframe was chosen because it was a period of intense political debates about the economic crisis that had started during the previous administration and President Obama's handling of that crisis, along with the President's proposal for changing the health care system. These issues became a catalyst for the tea party movement of which FW was a part. The Lexis-Nexis database was searched for all transcripts that mentioned FreedomWorks over the course of those three years. This returned 275 news transcripts[6] from fifty news programs over the course of the three-year period in question. A discourse analysis, as described in chapter 2 of this dissertation, was performed on these transcripts. The goal of this analysis was to look at

[6] A breakdown of the number of programs on each network and the names of the programs is contained in Appendix D.

how reporters and political commentators covered FW and whether astroturfing as a discourse of deceit was part of that coverage.

The marquee political actor in this process was Rachel Maddow, the host of the MSNBC news/talk program *The Rachel Maddow Show (TRMS)*. Maddow, and other commentators who shared her liberal political leanings, engaged in this aestheticization of politics in coverage of the tea party movement in two ways. First, there is a critique of the authenticity of the outrage expressed by that movement. This is a disagreement about where it comes from, its catalyst, who controls it, who activates it, and most important, who *benefits from it*. Second, there is a problematizing of the very expression of outrage; what is at work in the political discourse of tea party critics is what University of Massachusetts communication professor Emily West (2009) refers to as an emotion regime, a way of behaving that is based upon "socially privileged guidelines for expressing emotion" (p. 2). This ties into Bratich's (2003) arguments about liberalism's technologization of thought, its attempts to "ensure that people's public and private behavior will be conducted according to appropriate standards of civility, reason, and orderliness, outside of State regulation" (p. 72).

In Maddow's critique civility becomes not only a matter of appropriate behavior, but is problematized as an issue of (in)authenticity, hence its categorization as a discourse of deceit. Key to Maddow's argument is the idea that the tea party protestors' outlandish behavior is a "staged" outrage that has either (a) been stoked by misinformation from corporate, Right-wing political interests or (b) is being acted out by protestors exaggerating their outrage to give the general public a false impression of what was happening at town hall meetings. This chapter will look at the coverage of FW, breaking

that coverage into four categories based on how it represented the group. It especially looks at how emotional appeals are employed in the coverage. University of Sussex professor of cultural studies Ben Highmore (2010) argues that if politics is just about rational appeals designed to inform and alter beliefs using empirical evidence, a sort of marketplace of ideas, then aesthetics may be more of a problem than a useful tool for examining politics (p. 135). Employing aesthetics to analyze politics is thus a way to call into question the value of that marketplace conception. Examining Maddow and Armey's counter-discourses demonstrates how, as Highmore suggests, "politics is a form of experimental pedagogy, of constantly submitting your sensorium to new sensual worlds that sit uncomfortably within your ethos" (p. 135). What Highmore means is that the political process often forces us to confront ideas with which we are uncomfortable. The discursive connections between Rachel Maddow and FW Chairman Dick Armey, as the personifications of two political positions, create a perfect demonstration of how sensual worlds may sit uncomfortably in our ethos and how deceit is part of the experimental pedagogy of this political discussion.

II. Aesthetic-Affective Discomfort

In his book *The Citizen Audience* Rider University Professor of Sociology Richard Butsch (2008) describes two sensual worlds sitting uncomfortably together in the form of theater audiences in mid-19th century America. As working-class attendance at the theater increased more exclusionary theaters were built that were out of reach of those working-class citizens "by virtue of an upper-class dress code" (p. 32). These elitist theaters and the friction created by the Astor Place Riot, a riot outside of the Astor Opera

House,[7] reflected, Butsch argues, "a growing elite intolerance of the lower classes and lower-class resentment of their treatment" (p. 32). This attitude is contrasted with political/cultural norms of the American Revolution, which historian Edward Countryman (1999) argues "gave rioting a new legitimation by identifying it directly with the American cause" (p. 156).

These contrasting perspectives on crowd action find themselves reincarnated in the debate over the tea party. There are arguments about the potential for violence on the part of protestors, arguments about the nature of collective action, arguments about the rights of the crowd to "discipline the stage" (Butsch, p. 29), or in this case, discipline the dais, the platform from which the politician speaks. The different ways of viewing the crowd are best summed up in the early 20th century French sociologist Gustave Le Bon's (1896) argument that "[w]ithout a doubt criminal crowds exist, but virtuous and heroic crowds, and crowds of many other kinds, are also to be met with" (p. xiii). The crowd is constructed as either a force to be feared, like a violent and dumb creature lurching across the nation's landscape, or as the heroic manifestation of the collective action of citizens throwing off the shackles of oppression.

Rachel Maddow, in her coverage of the tea party protests at health care policy town hall meetings, presents the crowd as not only a force to be feared but also as one that should be viewed with skepticism. She is saying that the disruption of a town hall meeting is not simply uncouth, it rises from a place of *staged* anger. If these protestors

[7] The Astor Place Riot was sparked by the perceptions of working class audiences that American actor Edwin Forrest was mistreated when performing in England. As a result of that mistreatment American audiences rioted to shut down the performance of rival English actor William Macready. The riots resulted in death and injury when troops attempted to disperse the rioters (New York Times, 1992).

are not dupes being worked into a frenzy then they are a "rent-a-mob" or a "belligerent crowd of hecklers" who are acting out "scripted protests."

It is also Maddow's discomfort with crowd action, her presentation of the crowd as a mob, which places Gustave Le Bon uncomfortably in her ethos. Le Bon (2002) feared masses that he argued had "nothing less than a determination to utterly destroy society, masses who desired a 'primitive communism'" (p. xi). Le Bon also argued, "Crowds are only powerful for destruction" (p. xiii). He even argued for the possibility of a "contagion" of emotions, the idea that "When an affirmation has been sufficiently repeated" it could create "a current of opinion" leading to a contagion of ideas (p. 78). Le Bon feared a "collective mind" (p. 4), arguing that in the crowd individuals become part of a singularity, that a member of the crowd acts in ways as part of the crowd that she would not if she were alone.

Public relations pioneer Edward Bernays expressed similar ideas about the masses, his belief, as described by Butsch (2008) being that media were "means to manipulate people for profit" (p. 54). These perspectives on the crowd add subtext to Maddow's coverage of the tea party, especially the way tea party activists disrupted town hall meetings, the debate over health care and fear of "big government," and Maddow's coverage of some incidents where activists made threats of violence against certain members of Congress. Most of all, Maddow gestures toward a rebirth of a concern about the "paranoid style in American politics," a phrase coined by the historian Richard Hofstadter (2008) in his analysis of the conservative movement in the mid-20th century. Interestingly, Maddow positions herself alongside what University of Florida professor of law Mark Fenster (1999) calls the "consensus historians," those who shied away from

placing political disputes into the frame of large ideological battles, in contrast to their predecessors who did. These consensus historians problematized "the mass man," his "flight into activism," and his "substituting a real knowledge and practice of politics for the pathological demagoguery of extremist ideology" (p. 5).

The consensus historians, Fenster says, saw American politics as "moderate and pragmatic" (p. 6). The conflicts within politics were not the products of ideological battles but rather "conflicting political parties and interest groups" (p. 6). Maddow's coverage of the tea party bridges the perspectives of the consensus historians and their predecessors who saw ideology as a more important part of the character of American politics. She presents the tea party protests as dangerous and disruptive, implying a lack of knowledge of the *appropriate* way to engage in the political process, while also critiquing the ideology behind the protests as dangerous, creating an intersection between these two types of historian described by Fenster.

While Maddow takes on the tone of consensus historians like Hofstadter, she does still develop a critique that reflects on the importance of ideology in the debate, seeing a group of citizens whose "flight into activism" (i.e. yelling at town hall meetings) is the product of Right-wing, corporatist ideology that sets the stage for a political battle between that ideology and the ideology of moderate consensus on the part of ACA advocates. Maddow's critique employs a tactic similar to what Bratich (2008) describes as a "conspiracy panic," in that it "is directed against a mood, style, mindset, tendency, or climate" (p. 12).

Similar incidents of oppositional co-opting of what might be thought of as political mismatches have occurred in conservative political circles. Bratich (2008)

describes how in the 1990s the militia movement co-opted Left political writing, such as that of Noam Chomsky and Edward Hermann, in its criticism of the news media (p. 126). This is similar to the way various elements of the tea party co-opted popularly accepted Left political figures for the purposes of their political project. For example, probably the most prominent example of what influential media scholar John Fiske (1989) calls incorporation, the adoption of "signs of resistance" in order to "rob them of any oppositional meanings" (p. 15), was done by Glenn Beck in his Rally to Restore Honor in which he employed the imagery and words of Martin Luther King Jr. to support the tea party political project. In the days leading up to and following his rally Beck repeatedly referenced King, even holding the rally in front of the Lincoln Memorial in Washington, D.C., on August 28, 2010, the site of King's famous "I Have a Dream" speech forty-seven years prior.

Dick Armey and Matt Kibbe employ a similar tactic of political discomforts. Across the entirety of political rhetoric surrounding the tea party is a discourse of individual liberty that carries with it certain assumptions about how the reduced role of government creates more individual liberty and the basic goodness of that liberty. What makes Armey and Kibbe's rhetoric interesting is the way it draws on Left-political imagery, sometimes implicitly, sometimes more overtly, as when Kibbe discussed FW's inspiration and its objective to:

> take these heavy ideas [about free market economics] and translate them for mass America. ... We read the same literature Obama did about nonviolent revolutions—Saul Alinsky, Gandhi, Martin Luther King. We studied the idea of the Boston Tea Party as an example of nonviolent

> social change. We learned we needed boots on the ground to sell ideas, not candidates. (Mayer, 2010, para. 54)

Where in this example Kibbe explicitly references political revolutionary figures that are typically associated with the Left, he and Armey, perhaps inadvertently, also strike tones similar to the politically Left voices of Michael Hardt and Antonio Negri.

Armey and Kibbe speak of the decentralized, non-hierarchical, leaderless movement they envision the tea party to be. On the Glenn Beck show *Beck* in July 2010, Kibbe described the tea party movement as "decentralized" with "thousands, maybe hundreds of thousands of leaders across the country."[8] He went on to say of the movement "we come together on the trader principle. … Are we both helping each other get more done than we could have done by ourselves?"[9] Later in that same broadcast Kibbe said the tea party movement was "a big, massive, decentralized -- I call it 'beautiful chaos.' And that's not a problem, that's power." In December 2009 on MSNBC Kibbe referred to the tea party as "a leaderless movement."[10]

These themes of decentralization and leaderless action come through most prominently, though, in an editorial Armey and Kibbe penned for *The Wall Street Journal*. That editorial, entitled "A Tea Party Manifesto," published in August 2010 as the midterm elections were set to shift into high gear, described a political movement that one might think was being "manifestoed" by Left activists more than a retired Republican Texas congressman and a conservative think tank intellectual. Armey and Kibbe (2010) repeat Kibbe's idea about the "trader principle," describing the movement as built upon

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[8] *Beck*, Fox News Channel, 30 July 2010

[9] *Beck*, Fox News Channel, 30 July 2010

[10] *Hardball with Chris Matthews*, MSNBC, 10 December 2009

"mutual consent, to further shared goals of restoring fiscal responsibility and constitutionally limited government" (para. 5). They go on to describe the movement as:

> a virtual marketplace for new ideas, effective innovations and creative tactics. Best practices come from the ground up, around kitchen tables, from Facebook friends, at weekly book clubs, or on Twitter feeds. This is beautiful chaos—or, as the Nobel Prize-winning economist F.A. Hayek put it, "spontaneous order." (para. 6)

They say the tea party is "leaderless" (para. 4) and they argue that, "Decentralization, not top-down hierarchy, is the best way to maximize the contributions of people and their personal knowledge" (para 7).

These statements are interesting because of the way they break into Left political discourses to lift that language and re-appropriate it for other purposes. For example, the comments from Armey and Kibbe's media appearances echo Hardt and Negri's (2004) concept of the multitude:

> Every sovereign power, in other words, necessarily forms a *political body* of which there is a head that commands, limbs that obey, and organs that function together to support the ruler. The concept of the multitude challenges this excepted truth of sovereignty. The multitude, although it remains multiple and internally different, is able to act in common and thus rule itself. Rather than a political body with one that commands and others that obey, the multitude is *living flesh* that rules itself. (p. 100)

More briefly, Hardt and Negri define the multitude as "singularities that act in common. The key to this definition is the fact that there is no conceptual or actual contradiction between singularity and commonality" (p. 105).

Given the tone of Armey and Kibbe's discourse, these descriptions could easily be inserted into their *Wall Street Journal* editorial. What is interesting about their discourse, and what distinguishes it from Hardt and Negri, is the way in which they indirectly employ collectivist undertones while only subtly nodding toward the idea of collectivism itself. This is an aesthetic at work. The form of their movement is presented as functionally the same as Hardt and Negri's multitude, but Armey and Kibbe attempt to avoid any hint of counterculture Leftism. They seem to take great pains, not just in the editorial but throughout all of their media appearances examined in this chapter, to continually speak the language of individuals working together, while making sure to avoid any unambiguous intimations toward "collective" action or identity.

There is a particularly fascinating moment of this choice in political aesthetics when Armey and Kibbe refer to a trio of Republican candidates as "young legislative entrepreneurs" (para. 13). In order to keep consistent with their anti-governmental tone they cannot outright praise legislators. So instead they take a term, "entrepreneur," and "reappropriate," or perhaps "misappropriate," it for different purposes, attempting to alter the aesthetic of the subject of their writing. The term "entrepreneur" carries with it an aesthetic of individualism, hard work, vision and, most important for Armey and Kibbe's purposes, a non-governmental meaning; this is a person who is acting outside of the confines of a restrictive state apparatus to achieve an individual creative potential. Their

strategy is to make the reader, especially a tea party supporter, feel *uncomfortable* with an active government, but remain *comfortable* with particular governmental actors.

A coinciding aesthetic difference between Maddow and Armey and Kibbe emanates from a single word: grassroots. This amounts to a debate about authenticity. What constitutes an authentically "grassroots" political movement? What is just "astroturf" being managed in a "top down" way by corporate interests? The problem, as Bratich (2009a) points out, is that declaring a political movement authentically grassroots is a more difficult prospect than one might imagine. The debate itself conjures an image of a musician accusing a rival band of "selling out" or not being "punk enough." Why listen to the corporate, astroturf music of Green Day when you could listen to the authentic punk sounds of The Germs?[11] What constitutes "authenticity" in these cases? The Germs may have been truly anti-corporate, playing in abandoned churches and whipping their audiences into a frenzy with truly punk expressions of anti-establishment resistances, but even those resistant acts become part of a performance, a spectacle used to emotionally affect an audience.

Whether it is punk rock or politics (or both) authenticity is an important part of judging the character of a movement. In the spring of 2009, shortly after President Obama was inaugurated, Bratich raised questions about the nature of political action vis-à-vis opposition to Obama, arguing, "the language of dissent is already being forged in the kiln of right-wing ideologues" (p. 17). On the other hand, Bratich argued, a similar critique from the political Left of the grassroots *bona fides* of the Obama campaign was

[11] The Germs were part of the Los Angeles punk rock scene in the late 1970s. They were featured in a documentary film about that scene, *The Decline of Western Civilization* (Prettyman, 1981). Green Day formed a decade later in the punk scene in Berkeley, California. The Germs were part of a music scene that was more underground and never achieved commercial success. Green Day on the other hand reached international popularity in the early 1990s with a style that came to be known as pop-punk.

missing. Is there true grassroots political resistance where there is also the capture of those political affects in the form of Obama slogans, t-shirts, and posters re-fixed as fashion and commerce? The critic is left to question whether it is possible to even distinguish what constitutes grassroots or astroturf. Bratich (2009a) argues, "It might be more useful to think of these sorts of campaigns as genetically modified activism, or GMGOs (genetically modified grassroots organizations) which at least begs the question: 'what *isn't* modified at its roots?"" (Bratich, 2009a, p. 17). What is a GMGO? Bratich (2009b) describes them in another article as "Neither wholly emerging from below (grassroots) nor purely invented by external forces (the Astroturfing done by public relations groups), these emergent groups are seeded (and their genetic code altered) to control the direction of the movement" (para. 7).

Armey and Kibbe eschew the GMGO concept in favor of a self-presentation of authenticity. The tea party is in their minds, or at least in their discourse, a leaderless movement. It is organic, not organized. It is self-propelling, not with a head making decisions. It is a flattened organization, not hierarchical. The purpose of Rachel Maddow's critique is to question the legitimacy of that self-presentation, thus giving rise to the discourse of deceit under examination in this chapter. Maddow's coverage is an example of the necessary questioning of any political movement's self-presentation. Such a critique will ask whether the self-presentation is an accurate self-*interpretation*, does the group see itself as it actually is; or perhaps does the group hold itself out to the public in a dishonest way in order to manipulate the general public or smaller subsections of the public (i.e. political activists). That is the entire point of Maddow's critique; to point out what she sees as the illegitimate, false self-representation of the tea party movement. The

goal of this chapter is to look at how Maddow's discourse of deceit describes inauthenticity and deception. The next section of this chapter will look at the coverage of the tea party from *TRMS* and a variety of other relevant sites of political discourse, and how that coverage relates to the self-representation of the tea party.

III. Maddow, Armey, and the Discourse of Inauthenticity

This section of the chapter is about incivility as a product of dishonesty qua inauthenticity. This is a discourse that is challenged by a position that sees incivility as authentic outrage, trying to stretch the bounds of acceptability to enfold incivility within those bounds and turning it into not only an acceptable act of dissent, but genuine uprising of individual liberty throwing off the shackles of an overbearing government and nanny state. The argument of the tea party's media advocates, people such as Armey and Kibbe, becomes a project of de-problematization. It tests the bounds of civility, of proper political behavior, and attempts to bend perceptions of incivility and what actions deserve that label. The counter-discourse is intent upon pushing back against the tea party, re-enclosing those boundaries around something resembling idealized civility and good civic participation. It argues that, in the rise of the tea party, dishonest discussion of the Affordable Care Act during the first term of the Obama Administration resulted in both authentic outrage that was unfortunately based on false premises as well as an inauthentic outrage expressed through corporate front groups such as FreedomWorks.

This section will begin by summarizing the two sides of this discourse of deceit. They are represented in the persons of Rachel Maddow on one side and Dick Armey and Matt Kibbe on the other. This will be followed by a discussion of how the coverage of the tea party included in this analysis can be broken into four basic categories. These

categories are: (1) the idealization of political activism and participation, (2) issues of political knowledge, (3) the presentation of strategy in a political campaign, and (4) the question of authenticity. The sub-sections that follow will go into greater depth examining specific discussions of the tea party on cable news, especially on MSNBC. Before doing so, it is important to briefly reiterate the two competing narratives framing the debate about the tea party and FW.

First, the self-presentation of tea party groups is that they are made up of a network of loosely affiliated grassroots organizations of citizen activists resisting an overbearing federal government. However, as Williamson, Skocpol, and Coggin (2011) point out, the group is not a monolithic, singular mass that accepts and advocates a totally coherent anti-government ideology. Williamson et al. argue:

> The anger of grassroots Tea Partiers about new federal social programs such as the Affordable Care Act coexists with considerable acceptance, even warmth, toward long-standing federal social programs like Social Security and Medicare, to which Tea Partiers feel legitimately entitled. (p. 26)

Some factions of the tea party movement, including many supporters of Rep. Ron Paul who ran for president in 2008 and 2012, advocate a pure libertarianism and would do away with federal programs like Medicare and Social Security. However, Williamson et al. found many other tea partiers expressing comfort with such programs. Alongside these policy differences there are perceptual schisms between tea party organizations, distrust on the part of some directed at others.

For example, Dave Weigel (2009b) reported that two tea party groups, the Tea Party Patriots and the American Liberty Alliance, two national organizations based in Georgia, were skeptical of a third organization, the Tea Party Express (TPE), seeing TPE "as a sham organization, using the political heft of the movement to push a bland, partisan Republican agenda" (para. 5). In October 2009 the Houston Tea Party Society (HTPS) (2009), of Texas, released a statement that it "does not agree with [TPE's] tactics and does not feel that Tea Party Express shares our grassroots opinions. Several groups have even started describing it as 'The Astroturf Express'" (para. 1). So, while the tea party is a heterogeneous political movement, even the discord within the movement points to some form of common self-identity the movement as a whole was aiming toward; one of a grassroots movement, of individualism, and of resistance to government power. What is interesting is that the TPE, which was loosely affiliated with Armey, Kibbe, and FW, found itself accused of astroturfing not only by political opponents on the Left, such as Maddow, but also by other tea party groups who questioned TPE's authenticity. The difference is that Maddow was employing the astroturf narrative to critique the broader conservative political project. HTPS was employing it in order to build what it saw as an authentic conservative movement, not simply a vehicle for building and maintaining Republican Party power. This is an important distinction for some tea partiers, to self-identify as conservative but not necessarily as Republican.

To be fair, the Left's questioning of the authenticity of the tea party protests was not limited to Rachel Maddow. This discourse of deceit made its way into other media sites.[12] The important distinction, however, is that Maddow raised it as a certainty; she

[12] While it was mostly from the political Left, the discourse of deceit about FreedomWorks as astroturfing did go beyond Rachel Maddow. Think Progress, a liberal blog published by the Center for American

made the claim that there was an inauthentic quality to the protests. Conversely, other media outlets raised it as a question, asking whether the protests were inauthentic. There are distinctly different qualities to these two approaches, a difference between saying to a political opponent "Your protests are inauthentic" and then giving that person the chance to reply, as opposed to an at least apparently neutral source asking of a supporter of a movement "Are your protests authentic?" and then giving the respondent the opportunity to make his or her case.

The remainder of this section is broken into four subsections, each outlining the categorization of the discourse surrounding the tea party, looking at Maddow's coverage of the movement and FreedomWorks and contrasting Maddow's coverage with that of other media outlets. The coverage of FW can be broken into four categories: (1) the idealization of political participation, (2) FreedomWorks and political knowledge, (3) FreedomWorks and political strategy, and (4) FreedomWorks and inauthenticity. The anchor for this analysis is Rachel Maddow's critique, looking at how her coverage builds into a coherent singular text. However, after some time other media outlets started to pick up on the tea party "inauthenticity" narrative, although not as overtly as Maddow. Other outlets in this analysis include CNN (which included a special program on the tea party called *Boiling Point*), Fox News, the nightly network newscasts of NBC, CBS and ABC and finally, NPR.

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progress, pushed the astroturf angle on FW (Fang, 2009a; Fang, 2009b). Smaller blogs like Fire Dog Lake posted about the role of money in the tea party movement (Emblem, 2010). The Center for Media and Democracy's PR Watch called FW a "cashroots conspiracy" (Stauber, 2009) and the Service Employees International Union (SEIU, n.d.) posted links to stories about the role of FW in organizing tea party protests.

The Idealization of Political Participation

The first category for the coverage of FW and the tea party is the discourse of idealized political participation. This could also be described as the romanticization of political activism. Less about the discourse of deceit, although there is an element of deceit in this category, this discussion is more about a critique of the crowd, the way the coverage of tea party rallies took on a tone and echoed the ideas of Gustave Le Bon or Edward Bernays, as discussed earlier. In this category the tea party is represented as, in Maddow's words, a "belligerent, organized crowd of hecklers."[13] This coverage is an idealization of political participation because as it critiques the crowd, holding up those "belligerent hecklers" as an example of bad behavior, it does so as a contrast to how the idealized behavior of political participation should look. It romanticizes the ideal by pointing to that which does not meet the standard of that ideal.

What this amounts to is that the coverage is saying not only is there dishonesty in these rallies and town hall meeting responses, which is problematic for political debate and the health of the democratic process, but there is also a problem in the way in which this dishonest debate is happening, the way in which free speech is exercised, through thuggery, intimidation, or what is deemed to be impolite behavior. The storyline created by Maddow is that corporate front groups are inciting activists to use physical and verbal intimidation, directed toward representatives and fellow citizens, to oppose the ACA, that it is centrally organized, happening all over the country, and being falsely made to look organic. According to Maddow, "[t]his type of tactic, this type of intimidation is a deliberate choice. And it appears to be stoked and organized by corporate lobbyists, and it

[13] *The Rachel Maddow Show*, MSNBC, 3 August 2009

is not something that is happening in a vacuum."[14] Note the use of the phrase "appears to be," leaving a sense of openness to the critique. This is similar to embedded metapragmatics (Wortham and Locher, 1999), of strategies for press coverage to imply something without literally saying it is so. If it turns out to not be true, a reporter or, in the case of Maddow, a commentator has the phrase "appears to be" to fall back on and say, "I never said this was literally happening, just that it *appeared to be* happening." The audience is left to assume what it will.

In the same monologue in August 2009 Maddow places the incidents in starker terms, painting a picture of dark and dangerous behavior:

> Corporate lobbyists are organizing far-right hooligan tactics to disrupt civic meetings about health care reform. This is the organized use of intimidation as a political tool in the United States, and I don't mean intimidation euphemistically. I mean literal intimidation. New York Congressman Tim Bishop, who we showed you earlier, he ended up having to be escorted to his car by five police officers for his own safety after his town hall event was over.[15]

This is a picture of dangerous behavior on the part of the protestors opposed to the ACA. It is not simply that people with whom Maddow disagrees are exercising their free speech rights, it is that they are doing it in a way that involves physical intimidation of others who may want to exercise those same rights to voice differing opinions. On top of that, deceit becomes an element in this discussion in that, not only are these people failing to

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[14] *The Rachel Maddow Show*, MSNBC, 3 August 2009

[15] *The Rachel Maddow Show*, MSNBC, 3 August 2009

live up to some ideal about how debate is conducted in the public sphere, they are doing so on the basis of dishonest rhetoric.

Maddow's critique accuses the opposition to the ACA of employing what Wayne Booth (2004) refers to as rhetrickery, or "shoddy rhetoric" (p. x), a term that implies the negative perceptions of the mechanisms of persuasion, that see persuasion as "mere rhetoric" (p. 7), "the symbolic arts of producing misunderstanding … the worst forms [of which] can't disguise the fact that much of what we find repulsive is a form of rhetoric" (p. 9). Maddow goes on to say of the organizing of the tea party protests:

> This is a lobbying firm. This is the establishment. This isn't a lone nutjob passing himself off as a group he doesn't belong to. This is well-paid lobbyists doing this as a strategy. It's the same thing with the deathers -- the scare-your-grandmother myth that the whole point of health care reform is secretly to kill old people. This patently, patently false rumor about health care reform as we've talked about earlier on this show was started by a woman who sits on the board of directors of one of the nation's biggest medical device companies.
>
> Everybody says, "Oh, politics ain`t beanbag," right? Obviously this is not beanbag. But this isn`t hardball either. No offense to Chris.[16] This just isn't even politics. This is orchestrated mob mentality intimidation. This is called hooliganism.[17]

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[16] When Maddow says, "this isn't hardball either. No offense to Chris" she is making a reference to another MSNBC program called *Hardball* that was hosted by Chris Matthews.

[17] *The Rachel Maddow Show*, MSNBC, 3 August 2009

A few points stand out about this passage. First is the use of the word "establishment." There is a separation of realms of political activity inherent in the use of this term.

In common parlance political actors who perceive themselves to be out of power use the term "establishment" to describe political actors they perceive to be in power. In an article on anti-political establishment (APE) parties political science professor Andreas Schedler (1996) says that APE parties "accuse established parties of forming an exclusionary cartel, unresponsive and unaccountable, and they portray public officials as a homogeneous class of lazy, incompetent, self-enriching and power-driven villains" (p. 291). In more neutral language the term "establishment" refers to "those people in whom the legal authorities of the commonwealth are presently vested" (De Jouvenel, 1992, p. 119). Under Maddow's construction one is either a member of the "establishment" (read: the powerful), or one is a member of the "rank and file" of the body politic (read: "real" Americans).

There is also a political aesthetic at work Maddow's discussion on this broadcast. Government power and corporate power are both presented as potentially infringing upon individual liberties, yet a major dividing line in American political discourse is to see one or the other as the dominant threat and as an illegitimate holder of power. The perceived illegitimacy of government power is central to libertarian/conservative discourse. Left/liberal discourse makes the critique of corporate personhood a central concern, especially as it relates to the power of corporate money in political speech. These two positions become an essential part of this discourse surrounding the tea party. The word "establishment," as Maddow uses it, exemplifies this. The political aesthetic is defined by the location one defines as the site of "the establishment." Is it within monied corporate

interests? Is it the government? For Maddow, the answer is the former. For the tea party, it is the latter.

The second issue in this passage is the idea of defining acceptable political activism. What meets the criteria of that idealized political participation? Maddow makes it a point to acknowledge that politics is a contact sport. It is rough and mean at times. These tea party protests, however, she argues, are beyond the pale. Some forms of political ugliness are to be accepted, but what is happening with these disruptions Maddow deems to be physical and verbal intimidation, which is not protected by our notions of free speech. There is political speech and there is hooliganism, and these actions at these town hall meetings, Maddow suggests, are the latter.

This notion of "acceptable" political behavior extends into an interview Maddow conducted with *Washington Post* columnist Eugene Robinson on August 3, 2009. Maddow began the interview by essentially saying "correct me if I'm wrong but this seems extreme." Her strategy in this interview was to begin not instantly dismissing the actions, but instead asking if she was interpreting things correctly. To this first question Robinson replied that she was correct that it is "extreme" and "shocking." Robinson said the protestors at town hall meetings were engaged in "an organized campaign of intimidation, of theater." At this point the discussion takes on a new character, describing the protests as staged like a TV drama with Robinson adding that the scenes were purposefully orchestrated to be more effective (perhaps affective?) on the web and

television.[18] The next day on her show, Maddow continued with this theme by referring to the protests as "made-for-YouTube ambushes."[19]

Inherent in all of this discussion is a starting point, an assumption, that somewhere out there in human existence is an ideal political debate. There is an exercising of political activism that meets this idealized vision of what debate should be and how it should be conducted, where everyone is honest and respectful of one another. The political actions being presented by Maddow and Robinson certainly do not meet this standard for them. This critique of idealization is taken to a new level, however, when the word "extreme" is introduced into the discussion. This moves the behavior from the level of unacceptable to dangerous.[20]

At this point the debate becomes about the second categorical subsection: FreedomWorks as an instrument of political knowledge. This is the idea that will be explored in the next section, how the discussion about FW asks if the group was fomenting violations of norms of political participation, and doing so through misinformation, or simply informing citizens about where and when they could exercise

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[18] *The Rachel Maddow Show*, MSNBC, 3 August 2009

[19] *The Rachel Maddow Show*, MSNBC, 4 August 2009

[20] A perfect example of how some tea party activists presented a counter discourse to such accusations of extremism comes from an October 2010 CNN interview with tea party activist Amy Kremer. During the interview CNN anchor Shannon Travis posed the question of whether tea party candidates such as Joe Miller in Alaska were "extreme." To this Kremer responded, "these liberal Democrats, liberal Republicans can say that these candidates are extreme, but then they're saying the rest of America is extreme. We're not extreme. I mean, this is mainstream America making these decisions and they better wake up and listen" (Lemon and Travis, 2010). Joe Miller was labeled as extreme throughout his 2010 U.S. Senate campaign. During one interview in August 2010 he gave a response similar to Kremer's, arguing that to label the tea party extreme would be to label the founding fathers extreme because the tea party was merely espousing the founders' vision. What makes Miller and Kremer's answers interesting is the way they attempt to naturalize their political position in order to neutralize a characterization of that position as "extreme." They attempt to say this is the position the founders intended, which elevates their interpretation of the U.S. Constitution to something above being an interpretation. Our opponents interpret (*i.e.* get it wrong); we merely read it and see what it naturally, actually means, what the founders intended.

their rights to pressure their congressional representatives in the debate about health care policy.

FreedomWorks and Political Knowledge

Like much of the rest of the rhetoric surrounding the tea party discussed in this chapter, the second category breaks into two fundamental arguments about what is happening with FW. This category is about the description of political knowledge as a thing and the description of FreedomWork's uses of political knowledge as an activating agent. Armey and Kibbe and others supportive of FW and the tea party characterized themselves as a group that was simply raising awareness, informing the electorate and mobilizing them to action to protect their own interests in individual liberty. Critics of the tea party characterized FW as (1) misinforming members of the public and then (2) using that public's misinformed state to foment discontent and create a confused and unstable political environment.

A discussion of this dichotomy best begins with one of the most glaringly unsubtle examples of divergent views of what was happening at town hall meetings in the summer of 2009. In an August 2009 interview with Max Pappas, FreedomWorks Vice President for Public Policy, MSNBC host Ed Schultz begins with a pointed question asking, "are you purposely having people go out and tell lies in front of the cameras to try to derail health care reform?" To this Pappas replies, "No, absolutely not. We've been a grassroots organization for 25 years. And every recess we tell our members where the town halls are and we encourage them to go and participate."[21] There are a few interesting things happening in this opening exchange and throughout the Schultz/Pappas interview.

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[21] *The Ed Show*, MSNBC, 10 August 2009

This discussion between Schultz and Pappas and the differences in their perspectives are the differences between what could be described as "informing" vs. "coaching." The implication in this distinction is that *informing* is a legitimate political activity and *coaching* is in some way an act of deception. Schultz accuses Pappas of misinforming people and coaxing them into disrupting town hall meetings. Pappas counters, claiming FW is just giving citizens maps and schedules to attend town hall meetings and informing them about health care policy issues. At one point in the discussion, Schultz and Pappas actually agree on one level about what is happening, but they disagree on the words needed to describe the actions, which are an important part of how the town hall events are perceived. James Druckman (2010) argues that, although there are varying strengths to political frames and that "Not all frames work" (p. 102), "Most framing studies find that contrasting frames nearly always have a statistically significant impact when compared to one another" (p. 101). That said, Druckman does note that when frames are in competition, presented with one another … they *cancel out* such that the frames do not affect individuals' opinions" (p. 103). This could explain the motivation for someone such as Pappas to appear on a show hosted by someone such as Schultz, who will tear down Pappas's strategies. By merely showing up he wins by not losing. Pappas does not win by persuading viewers to his perspective; he most likely fails to persuade. However, even in failing to persuade he also prevents Schultz from persuading and thus "wins" the debate.

In the point of agreement with Schultz, Pappas employs a strategy of victory through quasi-concession. Schultz accuses FW of giving people "bullet points, with instructions on what to say when they show up at these meetings." Pappas refers to these

"bullet points" and "instructions" as the FW "August recess 'Call to Action.'"[22] Pappas concedes that FW is engaging in the action that Schultz is describing, but not *in the way* Schultz is describing it. The words "bullet points" and "instructions" have a top-down subtext to them. They characterize FW as being an authority, telling activists what they should think, what they should do, and what they should say. The word "instructions" implies a power of the instructor over the instructed. Pappas pushes these words aside, opting for the phrase "call to action," which implies greater agency on the part of the receiver of that call. The receiver has the power to ignore the call. More important, those who heed the call are engaged in something noble. Protesters at town hall meetings are not portrayed as being led, they are acting on information being *given* to them, not *fed* to them. The protestors are not being instructed; they are acting.

Schultz attempted to move the debate back onto his terrain, arguing that FW was "manufacturing" opposition and "coaching," activists on what to say, implying that FW was replacing public uncertainty about health care policy with fabricated worst-case scenarios.[23] He framed tea party activists not as self-motivated but instead as the activated agents of a political movement who are told how to behave, to "disrupt" those with whom they disagree politically. Schultz used two strategies in his critique: (1) FW is presented as spreading misinformation, and (2) FW is using that misinformation to foment dangerous and disruptive behavior. Pappas counters this by simply saying, "We do [this during] every single [Congressional] recess."[24] By admitting that FW does what Schultz claims – urging people to attend meetings, handing out information to persuade

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[22] *The Ed Show*, MSNBC, 10 August 2009

[23] *The Ed Show*, MSNBC, 10 August 2009

[24] *The Ed Show*, MSNBC, 10 August 2009

them to voice certain opinions – Pappas neutralizes the accusation, making it seem socially acceptable, not nefarious. Admitting to a practice normalizes it. It says to a critic, "I do what you claim I do, but it is not the scary thing you make it out to be."

Similarly, in an interview on NPR in August 2009 Dick Armey made the statement that FW was an organization that not only engaged in this practice of getting people to come out to town hall meetings but also had been doing so for a long time:

> When members of Congress called town hall meetings, we encourage our residents in that congressional district to attend the meetings. We also helped them to clarify what are the precise focus of the question you might want to zero in on. And we have always consistently, as a matter of good manners and good strategy, encouraged our folks to always go there, make a good presentation of themselves, well-mannered and courteous. Because, in fact, if you go to a town hall meeting and you make a display of yourself, you're likely to not get called upon. We don't encourage any display of bad manners.[25]

This is a common defense employed by FW, saying, as Max Pappas did in an August 2009 episode of *Hardball with Christ Matthews*, that FW has "been telling people to go to talk to their congressman for 25 years."[26] Armey, in the above quote, also makes sure to say that FW encourages their members to comport themselves with manners. He even places manners in a strategy frame, noting that it is in the best interests of FW and its members to be polite, saying that those who misbehave do not get to participate. This creates an overlap between the strategy frame and the presentation of FW as an agent of

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[25] *Morning Edition*, NPR, 28 August 2009

[26] *Hardball with Chris Matthews*, MSNBC, 6 August 2009

political knowledge. Armey is presenting FW as teaching political strategy, a sort of giving of political knowledge, teaching the activist how to be an activist.

This last point is an interesting contrast with the critique of FW's critics, including, for example, Rachel Maddow describing their actions as the "disrupt the town hall strategy" or a "sucker punch."[27] So while Armey says encouraging good manners is a beneficial strategy for FW and its supporters, critics such as Maddow argue that encouraging bad manners is a useful strategy, to confuse or disrupt debate, because by shutting down debate, opponents of an initiative win by not losing. Either way, there is an attempt to pin responsibility for the "bad" behavior onto a top-down disruptive strategy orchestrated by FW. This raises questions about the legitimacy of a strategy and who is responsible for it. Ultimately, disruption is placed out of bounds; it is presented as an unacceptable act of dissent. This argument also discounts the possibility that disruption might be spontaneous, that crowds can have their own agency and engage in disruption without being coerced to.

Pappas had a similar exchange with Chris Matthews on MSNBC in August 2009 that is worth quoting at length and examining. Of value in this exchange is their discussion of organizing and strategy and defining what constitutes "astroturf." The sharing of political knowledge, as done by FW, is critiqued in subtle ways.

> MATTHEWS: So when you watch television, you see a disruption at a congressional meeting in Long Island, you see one in Philly, you see one down in Texas, you can spot -- you know that's coming ahead of time. You know each -- in other words, you know what's going to happen at each one of these events.

[27] *The Rachel Maddow Show*, MSNBC, 3 August 2009

> PAPPAS: No, we've been telling people to go to talk to their congressman for 25 years. That's how long FreedomWorks has been around.
>
> MATTHEWS: But you're -- but you're basically plotting this stuff.
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> PAPPAS: We're telling our ...
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> MATTHEWS: People aren't spontaneously getting up in the morning and reading the paper and going, I better go to the congressman's meeting. I'm all upset about health care.
>
> PAPPAS: Oh, no. We tell them when the events are. We just usually don't get this many people on our side to show up.
>
> MATTHEWS: OK, so the question -- are you astroturf or are you grass roots?
>
> PAPPAS: Well...
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> MATTHEWS: Astroturf means an organized professional operation which leads to these rallies, rather than something where a bunch of people are reading the paper that morning and they go, God, I better get down to headquarters.[28]

In this exchange there are two conceptualizations of what constitutes truly grassroots political action and what constitutes astroturf. For Matthews a real grassroots political expression would be for someone to see something in the paper and be motivated to act on it; astroturf is when an advocacy group makes someone aware of something and that person acts on it. For Pappas FW's work is genuine political advocacy because they have been doing it for 25 years, suggesting that the length of time a political activity has been happening establishes its legitimacy.

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[28] *Hardball with Chris Matthews*, MSNBC, 6 August 2009

It is interesting to see how Matthews characterizes astroturf, as "an organized professional operation."[29] This would seem to imply that any and all activity that is disseminated by a political organization would come under scrutiny. This is problematic in the sense that organizations across the political spectrum disseminate information to their members. This includes a broad range of issue advocacy groups, the National Rifle Association, the American Civil Liberties Union, both pro-life and pro-choice organizations; groups that are established and long term organizations and groups that come together over one issue and then disband or become less active when the issue falls off the public agenda. With the critique of FW an assortment of political actions should come under scrutiny as "astroturf." For Matthews the more legitimate mass political action would be members of a community simultaneously reading about something in the news and simultaneously, though individually and spontaneously, all deciding to act.

The problem is that this is rarely how political activism happens. In order for political change to take place, there often must be some organizing force, something that creates awareness that the community collectively feels a certain way. This is a difference between individual knowledge and mutual knowledge in Newcomb's (1953) model of communication. If A and B are political actors who are unaware that they share similar feelings of discontent about X, the political authority, if they have only individual knowledge, they may be less likely to act to disrupt that authority. Once they become aware of their shared discontent, transforming that individual knowledge into mutual

[29] *Hardball with Chris Matthews*, MSNBC, 6 August 2009

knowledge, there is an increased likelihood of action.[30] How is this mutual knowledge created? In Chris Matthews's argument there is greater legitimacy in political action rising from individual knowledge, and less legitimacy in political action rising from mutual knowledge that is created by "an organized professional operation."

Matthews creates a false dichotomy between astroturf and true grassroots action. If one concedes that tea party concerns about government power might be warranted, one must then ask: How might a group of tea party activists become organized to act on that concern? It cannot be a two-choice proposition that their actions are either (a) truly grassroots activism spontaneously formed in response to a perceived governmental power grab or (b) the phony astroturf of a corporate front group duping the masses. Upending this dichotomy does not mean that FreedomWorks can accurately be described as grassroots or that there is no element of deception in its self-presentation. It is simply to say that the either-or construction of the question is not useful.

Part of this debate in a broader sense is how political knowledge can be seen in contrasting lights. It is either a tool of individuals looking for self-empowered involvement in the political process or a tool of mis/dis-information used to deceive those individuals, tricking them into a political *feeling* based on inaccuracies that lead to dangerous behavior. Another way to see political knowledge in this discourse is as either top-down or bottom-up. How is FW described? Is it a centralized/hierarchical power structure disseminating false information to a public being duped into voting against its own interests? Or, is FW a decentralized leaderless movement within which information flows freely across a flattened, non-hierarchical political movement? Outside of Maddow,

[30] Steven Pinker (2010) applies Newcomb's model to a political context in a lecture given at the Royal Society for the encouragement of the Arts, Manufacturing and Commerce. The lecture can be found on the RSA website.

Matthews, and Schultz, as discussed above, in the news coverage analyzed for this chapter there is very little questioning of the nature of the movement. In fact, much of the coverage analyzed here presents FW's self representation uncritically.

In a February 2010 interview with then-U.S. Senate candidate Dr. Rand Paul, a Republican from Kentucky, CNN's Kiran Chetry sets up a question by saying she wanted to discuss "the pure politics" of the tea party movement. This seems to acknowledge there are different levels at which political action takes place, or perhaps different kinds of political action. Chetry (2010) goes on to note that Paul's opponent had been endorsed by then-U.S. Senate minority leader Mitch McConnell, who was from Paul's home state of Kentucky, while Paul had received the endorsements of FW and Steve Forbes (described as a "flat tax advocate"). This lining of endorsements leads Chetry to characterize Paul's campaign as "anti-establishment." Chetry's framing of the question again reinforces FW's self-presentation as an outsider organization, as not being part of monied interests. The "pure politics," so to speak, is what the next section is about. Category three in the coverage of FreedomWorks is the coverage of political strategy.

FreedomWorks and Political Strategy

Of the four categories, the third, coverage of FW and political strategy, makes up the smallest amount of coverage. However, it contains one of the most important examples in the coverage surrounding FreedomWorks. This frame takes on two forms, including a discussion of "bad" behavior as a strategy and problems with how to respond to that "bad" behavior. It is also a discussion of how that bad behavior is a product of the orchestration of public relations firms. Finally, that important example that falls under the category of political strategy and inauthenticity is Rachel Maddow and her coverage of

the DLA Piper memo. This was a memo written by a political activist named Bob MacGuffie instructing tea party activists on how to best disrupt Congressional town hall meetings. DLA Piper, a law firm based in Washington, D.C., circulated the memo to tea party activists around the country.

The summer of 2009 saw conservative supporters of the tea party start to push back against criticism of anti-Affordable Care Act protests. In an interview with Keith Olbermann on his MSNBC show, Sen. Bernie Sanders argued that the protestors were "screaming and yelling so we don't have a real discussion of the real issues."[31] He claimed it was part of an effort "trying to confuse people" and "distorting reality."[32] In these characterizations incivility was presented not simply as a behavior to be critiqued. Had that been the goal, Sanders could have said this behavior was "rude" or "un-American" or simply "bad behavior that makes it difficult for everyone to have a turn having his or her voice heard." Instead he framed it as an explicit strategy being employed widely in an attempt to muddy the waters, so opponents of reform would not lose that debate.

An even better example of this discussion about political strategy and dishonesty is Rachel Maddow's coverage of the DLA Piper Memo, also known as the MacGuffie Memo (MacGuffie, 2009). This was the memo written by political activist Bob MacGuffie that critics of the tea party pointed to as a blueprint for how to disrupt town hall meetings about the AFA. Maddow started the August 3rd, 2009 broadcast of her program by describing the health care protests that were happening at town hall meetings that summer by calling the protestors, "a belligerent, organized crowd of hecklers." From

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[31] *Countdown with Keith Olbermann*, MSNBC, 3 August 2009

[32] *Countdown with Keith Olbermann*, MSNBC, 3 August 2009

the start she was establishing that the behavior was neither spontaneous nor individually driven but rather that "There is a script for this stuff that was written before these events happened, and that it appears to be instructions to people to shut down these efforts at civic discourse."[33] The "script" to which Maddow was referring was the DLA Piper Memo.

Maddow (2009) went on to discuss the memo, entitled "Right Principles," and how it instructs protestors to disrupt a representative's presentation by "rock[ing]-the-boat early" (p. 2), "yell[ing] out" (p. 2), and remembering, "The goal is to rattle him" (MacGuffie, 2009, p. 3).[34] Lee Fang (2009c), a researcher for the Center for American Progress and writer for the liberal blog *Think Progress*, first wrote that the memo was distributed on tea party listservs. Fang was the first to claim that MacGuffie, the author of the memo, was affiliated with FW and the Tea Party Patriots organization. This is the origin of the claim that the memo was part of a strategy orchestrated by FW. The discussion of this memo by Fang and others highlighted the language described above to argue that the goal of the memo was not to encourage engagement in a competition of ideas but to share strategies on how to actually avoid any analysis of policy in favor of winning a shouting match.

Where Maddow ran into a problem with this particular artifact was in how she characterized it and who was responsible for it, eliciting criticism from conservative critics. Maddow posed the question, "Who's giving these rent-a-mob instructions like this?" Her answer was that a man named Bob MacGuffie, whom she said was "affiliated

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[33] *The Rachel Maddow Show*, MSNBC, 3 August 2009

[34] *The Rachel Maddow Show*, MSNBC, 3 August 2009

with an organization called FreedomWorks," wrote the memo.[35] In the broadcast preceding Maddow's program Olbermann reported that the memo was "written and distributed by FreedomWorks, the same organization that brought you the fake tea party protests."[36] The memo came to be known as the DLA Piper memo because critics such as Maddow pointed to that law firm's ties to FW through Dick Armey who was working for both the firm and FW.

So, between Maddow, Olbermann, and *Think Progress*, there is an effort to create a network of connections between the unruly protestors, MacGuffie, DLA Piper, and FreedomWorks, to lead the audience to the conclusion that the protesters are not genuinely outraged citizens acting on their own agency. The problem with these arguments is that the memo that is presented as a smoking gun proving a connection between all of these people actually demonstrates a connection that is tenuous at best. As one conservative critic of this narrative described the characterization, it was "a slur, an accusation against everyone who has spoken out at one of these meetings: Your dissent is illegitimate. You are either a mindless puppet or a willing corporate tool" (Spruiell, 2009).[37]

One way that Maddow attempted to frame perceptions of the memo and its implications was through the use of the word "establishment." She described the

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[35] *The Rachel Maddow Show*, MSNBC, 3 August 2009

[36] *Countdown with Keith Olbermann*, MSNBC, 3 August 2009

[37] In this characterization, a response from Stephen Spruiell, a writer for the website of the conservative news weekly *The National Review*, makes his own interesting contribution to this discourses of deceit, finding his own way to call someone a liar without using the word liar. The headline of the article is "See Rachel Calumniate." The definition of "calumniate" from Merriam-Webster (n.d.) is "to utter maliciously false statements, charges, or imputations about." The use of the word softens the critique and reduces any blowback against Spruiell, who can claim that he did not call Maddow a liar; he merely accused her of making false and malicious statements.

organization of town hall protests and the DLA Piper memo's role as a top-down political operation, suggesting a separation of realms of political activity: one is the establishment, which implies that the other is the rank and file. The establishment is seen as inauthentic, the rank and file authentic, except of course, when the latter's members act (knowingly or unknowingly) at the behest of the establishment.

There is a political aesthetic at work in Maddow's critique. Government power and corporate power both potentially infringe on individual liberties, yet a major dividing line in American political discourse is to see one or the other as the dominant threat and as illegitimate. These two positions become an essential part of the discourse surrounding the tea party. In both cases the image of the powerful abusing the powerless resonates with political audiences. What is altered between the two is the source of that abuse; it is either a tyrannical government or wealthy aristocrats. The critique is essentially functionally the same, but the aesthetic packaging of the critique is different. These two aesthetics are at work in the tea party reaction to the ACA and Maddow's criticism of that reaction. The word "establishment" as Maddow uses it exemplifies this. The political aesthetic is defined by the location one defines as the site of "the establishment."

The second issue in Maddow's critique is the idea of asking "What is acceptable political activism?" Maddow makes it a point to acknowledge that politics is a contact sport, it "ain't beanbag," she says, referencing the old political cliché. It is rough and mean at times. These protests, however, she says, are beyond the pale. Politics is ugly, and some forms of political ugliness are to be accepted, but what was happening in the town hall protests Maddow deemed to be physical and verbal intimidation, which is not

protected by our notions of free speech. There is political speech and there is hooliganism, and the actions at town hall meetings, she maintained, were the latter.

There were two interesting responses to Maddow's critique. One is the aforementioned *National Review* article written by Spruiell, which came on August 24, 2009. The other was a similar article by conservative writer Mary Katharine Ham two weeks earlier, on August 5, 2009, for the website of another conservative news weekly, *The Weekly Standard*. This article says the liberal website *Think Progress* "falsely connected MacGuffie to the national conservative group FreedomWorks through the most tenuous of threads" (Ham, 2009, para. 6). Adding to this, Spruiell says Maddow's coverage is an attempt to turn FreedomWorks into a "bogeyman" (para. 2). He quotes Armey as saying, "All of a sudden, not just Rachel Maddow, but commentators all over the place were making outrageous connections between Piper, clients of Piper, and my work at FreedomWorks, even though no connections existed" (para. 3).

In this part of the discourse the attempt to critique Maddow and others sounds a lot like Bratich's (2008) concept of "conspiracy panic." Bratich defines this concept by borrowing from the concept of "moral panic" and the idea that "western society maintains its identity via the management and expulsion of deviance" (p. 8). Conspiracy panics are about the ways in which political officials transform so-called conspiracy theories into "subjugated knowledges" making them problematic (p. 7). Critics like Spruiell and Ham treat the DLA Piper and FW connection like a conspiracy theory; what might be an otherwise reasonable criticism, that a corporation is using its economic power, funneling money through a front group, is portrayed as an irrational fear.

Maddow's critique of FreedomWorks and corporate political corruption is equated to a crackpot website decrying the Illuminati.[38]

Armey attempted another strategy in deflecting the Maddow criticism. Maddow's August 14, 2009, report on the DLA Piper memo was done in response to the fact that Armey had resigned from DLA Piper earlier in the day. Upon resigning Armey issued a statement citing the negative attention on both DLA Piper and FW and his connection to both. The underlying argument in Armey's statement was a personal one, trying to shift the criticism from political grounds to individual grounds. An article about Armey's departure from DLA Piper quotes him as saying:

> It is painful and frustrating to see a good, decent, able and effective partnership of honorable men and women and their clients attacked for things in which they are not involved simply because of their association with me. One would expect a higher degree of competence and professionalism from members of the media than spurious attacks on innocent bystanders. (Mark, 2009, para. 6)

Armey attempted to deactivate Maddow's critique of the flow of capital in political activities, the ways in which money equates to influence, how that influence can be, if not hidden, at least obscured from public awareness. Armey tried to transform Maddow's criticism from a critique of systemic soft secrecy and corruption into a personal attack on "honorable men and women." Armey questioned the very validity of a systemic critique of corporate political machinery on Maddow's part and proceeded to turn his criticism of

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[38] One of the best known "conspiracy theories" is that of the secret society called The Illuminati. Mark Fenster (1999), in his book *Conspiracy Theories*, describes them as a group that is supposed to have "worked throughout history to seize power and/or foment revolutionary discontent among intellectuals and the masses, purportedly through conspiratorial, occult means" (p. 202).

Maddow into a systemic critique of the professional discourses surrounding journalism. Her critique is not a reasonable position, but instead a "spurious attack on innocent bystanders." His criticism of Maddow (and others) and the professional standards of journalism also fits with the larger conservative criticism of the news media as untrustworthy or deceptive (i.e. the perceived liberal bias of news).[39]

While Armey tried to turn the discussion toward the institution of journalism, Maddow, in reporting on Armey's resignation, attempted to paint a picture for her viewers of a networked conservative movement. She posited that this network included a public relations firm called Shirley & Banister,[40] which represents the National Rifle Association (NRA), *Human Events* magazine, a "conservative direct mail guru Richard Viguerie," and the conservative websites Grassfire.org and ResistNet.com. Anyone who is liberal and spends a lot of time thinking about politics, or at least is a fan of Maddow's show, would see this as a hot button list of conservative political "villains." Maddow proceeded to argue, "ResistNet.com is a hub for online organizing for anti-health reform protests. You can find there among other things a video entitled 'Obama Equals Hitler.'" So in a brief passage in her monologue Maddow managed to create an image of a network of conservative institutions, in the end tying them all together with "very extreme anti-Obama rhetoric."[41]

So in this editorial Maddow has established a problematization. She has started her critique by making connections among well-known conservative organizations that

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[39] There are numerous sources looking at the conservative claims of liberal bias in the news media that take various perspectives. They will be discussed in chapter seven.

[40] Shirley & Banister is a conservative PR firm based in Alexandria, VA. On their website they say, "We have a conservative worldview and we only work with individuals, associations, corporations and institutions that share that view" (Shirley & Banister, n.d., para. 5).

[41] *The Rachel Maddow Show*, MSNBC, 14 August 2009

can elicit a visceral reaction from liberal viewers. Maddow proceeded, turning her sites toward a new target, The Bradley Foundation. She goes on to claim that this foundation, which is represented by Shirley & Banister, has given tens of thousands of dollars in grants to FW, and another group called Americans for Prosperity, both of which she says have been, "visibly, observably responsible for organizing these protests at the health care reform events." All of this, the back and forth between Maddow and Armey, comes back to that same shared rhetorical device of the fear of abuses of power with the differing aesthetics of government and corporations as the sites of that abuse.

Maddow's analysis in this episode built on a theme she had been reiterating through her discussion of FW across multiple episodes. She employed a similar message strategy in an earlier analysis in which she says the organizers of the protests, "try to create the impression that their [sic] just regular grassroots Americans without any financial or political interests in the outcome of these policy fights."[42] Maddow described the ties among Dick Armey, FreedomWorks, and DLA Piper, the lobbying firm for which Armey worked. She critiqued monied interests and interlocking corporate directorates and connected those things to deception in the form of inauthenticity in political activism. Of most interest for this dissertation is how she described what constitutes *authentic* political action and what is deceitful. It was about the interests of capital and the way in which those interests are, for her, falsely tied to the interests of the "average" American. Maddow defined authenticity in political action as being about looking at policy choices and deciding which is best for the state; these choices are expressed authentically by individuals under their own motivation, not corporations or individuals being organized by corporations.

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[42] *The Rachel Maddow Show*, MSNBC, 11 August 2009

Maddow went on to affirm her support for the First Amendment rights of these advocacy groups. However, she did so in a backhanded sort of way while arguing it is not the speech itself she questioned, but rather the method of speech. Maddow says of the protestors, "They have every right to go to these events and yell "no" … Nobody is suggesting that they can't participate in this debate in the way that they are. What is dishonest is to do it in a way that disguises who they are … that disguises their financial role in it."[43] At this point in the discussion a new word is introduced into the discourse: disguise. This leads to the fourth and final category, FreedomWorks as purely inauthentic.

FreedomWorks and Inauthenticity

In much of the discussion about the tea party and FreedomWorks, there is some subtle, and sometimes not so subtle, questioning of authenticity. As political actors debate the questions of the first three categories (idealized political participation, political knowledge, and strategy) there is in the background of each category, a hinting at the question of authenticity. This fourth category, FW and inauthenticity, is necessary because there are some instances in which the discourse is overtly about questioning the authenticity of the political participation of tea party activists that were organized by FreedomWorks.

Some commentators, such as Maddow, present overt declarations of inauthenticity. Others, generally on every network other than MSNBC, are subtler in their questioning or their analyses amount to setting up the question for it to be knocked down by a representative of FW. This final subsection of this chapter will bring in more of those sources outside of MSNBC to stand in contrast to the critiques of commentators

[43] *The Rachel Maddow Show*, MSNBC, 11 August 2009

such as Maddow, to underline exactly what she was doing on her program, and to demonstrate the lack of criticism of groups like FW from other news sources.

For example, a search of Fox News transcripts from January 2009 to January 2012 shows that there were very few mentions of FW on the network, and when the group was mentioned, little to no description of what the group actually was or did accompanied it. There was no coverage of the group as the subject of a news story in the way there was at MSNBC. In fact, most of the times the name FreedomWorks was uttered on Fox News were to introduce a guest on a show as a representative of FW. For example, introducing Matt Kibbe or Dick Armey as president or chairman (respectively) of FW. Even this small detail stands in contrast to how CNN or MSNBC would introduce them. The cable news/opinion channels would set them up as representatives of FW and then describe FW as conservative, grassroots, tea party-affiliated or as a political action committee. Fox News would at times simply introduce Kibbe or Armey as being affiliated with FreedomWorks, not saying what FreedomWorks was or what they did. On a few occasions Fox would introduce them with taglines added to FreedomWorks, such as "a grassroots conservative operation."[44] On another occasion Fox referred to FW as part of a collection of "non-partisan grassroots organizations."[45] While the merit of many of the terms used to describe FW could be debated, using "non-partisan" as a descriptor is a bit of a stretch.

Between MSNBC attempting to politically discredit FW and Fox News avoiding any discussion about the nature of the group, CNN took a markedly more neutral tone in its coverage, but still had no critical questioning of FW. Repeatedly FW was referred to

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[44] *Fox Special Report with Bret Baier*, Fox News Channel, 17 August 2009

[45] *The O'Reilly Factor*, Fox News Channel, 16 April 2009

as a "grassroots organization"[46] or one of many "tea party groups"[47] or some variation on that phrase. In one report about a 2010 Baltimore retreat for newly elected Republican members of Congress, CNN Deputy Political Director Paul Steinhauser described FW this way:

> What is FreedomWorks? They're not well known, but they're very important. It's a conservative grass-roots organization. They do a lot of the organization for the Tea Party movement and they also put a lot of money into this election helping Tea Party backed candidates get elected.[48]

This report gave, completely uncritically, the self-presentation of FW as "grassroots," and the rest of the report reinforced this perception of the tea party generally and FW specifically as a sort of conservative counter-public. ABC News, reporting on the same Baltimore meeting a couple of days later, referred to FreedomWorks as "a conservative think-tank."[49]

While there are differences among MSNBC, CNN, and Fox, even within MSNBC there was not a homogenous approach to how FW was described. For example, Maddow took the approach that has been described extensively thus far, a sort of Hofstadter-style critique of what she saw as the *paranoid style* behind the politics and the corporate direction of political feelings. Ed Schultz took what could be described as a more bombastic approach, more commonly using explicit accusation of lies. His approach was similar to that of Olbermann, who described the tea party with phrases such as "phony

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[46] *American Morning*, CNN, 9 November 2009

[47] *American Morning*, CNN, 16 March 2010

[48] *CNN Newsroom*, CNN, 12 November 2010

[49] *Good Morning America*, ABC, 14 November 2010

protests,"[50] which he said the conservative movement was "[spinning] as the rage of average Americans in most of the media,"[51] describing FW as having "helped stir up the ugly displays at town halls around the country, designed to kill health care reform."[52]

Then there is Chris Matthews, who stood out a little from the rest. While he invested somewhat in the narrative of FW as a front group orchestrating protests, he did so in a way that was more questioning than asserting. In one broadcast he asked Max Pappas of the protestors showing up at town hall meetings, "Do they really know, or is it just what you feed them?"[53] Matthews was actually asking if the people truly understood what it was they were opposing or if they were just repeating FW talking points. In another instance he asked *Washington Post* reporter David Weigel about tea party activists who were rebelling against incumbent Republican candidates such as Sen. Bob Bennett (R, UT) and Sen. Olympia Snowe (R, ME). After Bennett lost his Senate seat in the Utah Republican primary, Matthews asked whether the voters' revolt was "top-down or bottom up? Is it the people in the grassroots or is this stirred by the well-financed Club for Growth?"[54] Matthews was critiquing the Club for Growth in the same way FW was critiqued in the other examples discussed in this chapter; the group is a tool used to question whether voters authentically understood what it was they are upset about or if they were simply reacting to the deceitful coercion of powerful activists. The important difference, again, is that Matthews posed it as a question rather than an assertion, as

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[50] *Countdown with Keith Olbermann*, MSNBC, 3 August 2009

[51] *Countdown with Keith Olbermann*, MSNBC, 3 August 2009

[52] *Countdown with Keith Olbermann*, MSNBC, 17 August 2009

[53] *Hardball with Chris Matthews*, MSNBC, 6 August 2009

[54] *Hardball with Chris Matthews*, MSNBC, 12 May 2010

Maddow, Olbermann, and Schultz did. Also interesting with the last example is that, unlike in the broadcasts of the other three MSNBC hosts, Weigel replied to Matthews's set-up by saying, "Oh, no, this is pretty bottom-up. The Club had a role, but, you know, two years ago, Ron Paul supporters were doing the same thing. We just weren't paying attention."[55] Where, for example, Maddow and Eugene Robinson seem to be having a scripted back and forth, a set of questions with predetermined answers, the exchange between Matthews and Weigel has all the hallmarks of an actual critical analysis of what was happening with the tea party.

Peter Overby of NPR did a story in February 2010 for the program *Morning Edition* on money in the tea party movement. However, where Maddow's coverage amounted to a passionate diatribe against what she saw as phony front groups falsely presented as grassroots, Overby, as a reporter rather than a political commentator, took a different approach presenting the presence of money as a legal question. In the story, he covers the legal constraints, or lack thereof, on 501(c)(4) political action committees. Overby included sound bites from two representatives of the tea party PACs, with no voice from critics. He also posed the question, "If corporations were fueling a powerful, new grassroots movement, would it matter to people in the movement?"[56] The wording of this question was different from Maddow's approach because the question on its face accepted the proposition that a movement could be simultaneously corporate-funded and grassroots. Maddow, on the other hand, saw a contradiction between these two constructs.

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[55] *Hardball with Chris Matthews*, MSNBC, 12 May 2010

[56] *Morning Edition*, NPR, 19 February 2010

The most common critique of FreedomWorks, and the most straightforward one to place in this categorical structure, amounted to saying that FW was a corporate-front organization. Essentially the critique claimed that FW used large donations from corporations and trade organizations, funneled through lobbying operations, such as DLA Piper, to mobilize voters against legislation that was in the voters' best interests and against the financial interests of those corporations. There is a long history of such activities, the use of front groups, dating back at least to Edward Bernays, whom some credit with pioneering the use of political front groups.[57] However, Manheim (2011) also credits a similar strategy to a Thomas Edison campaign to undermine his chief rival, Westinghouse. Manheim also notes the common use of this strategy throughout politics and corporate PR. Thus, the techniques Maddow accused FW of employing were not new ones, but late 20th century forms of media and cable news talk shows open up new avenues of discussion and shine a light on these techniques, creating a discourse of deceit that was not present in the times of Edison or Bernays.

IV. Conclusion

Perhaps what is at work in the criticism of the tea party, and the debate between Rachel Maddow and Dick Armey, is a co-misunderstanding of the meaning of what the two political sides believe. It could also be seen as a re-appropriation, although Maddow might say a mis-appropriation, of Antonio Negri's concept of constituent power. Negri (1999) describes constituent power as "a power rising from nowhere [that] organizes the law" (p. 1.2). Constituent power is the power of bodies, of people, of masses. In a 2011 discussion interrogating the authenticity discourse surrounding the tea party movement

[57] Tye (2002) discusses how Bernays used front groups for corporate clients and for political purposes such as pioneering the use of "non-partisan leagues" to promote partisan ends. For example, Bernays formed a "Democrats for Coolidge" group to help reelect Republican President Calvin Coolidge (pp. 77-78).

on one broadcast of NPR's *Talk of the Nation* host Neal Conan and Kate Zernike (2010), author of *Boiling Mad: Inside Tea Party America*, described the tea party in terms similar to Negri's (1999), "pale reproduction of constituent power" (p. 2.3).

What makes a movement a "grassroots" movement? Zernike and Conan make the point in the NPR discussion that money is important or even essential to political action (Conan, 2011). This is a problematic claim to use as a starting point in such a discussion because it is the essentialization of capital in politics. The claim that political action cannot happen without money goes unscrutinized in this conversation, reinforcing the notion of money as speech and, perhaps inadvertently, reinforcing the notion that the political is the domain of wealth and that the influence of money on the political process is simply natural. However, Zernike made the point that the money would be useless without the political energy of the people attending the rallies.

Zernike noted, echoing a point made in the coverage of the Koch brothers, that the tea party movement was attempted and failed in the past. Attempts to employ the tea party as a brand go back to David Koch's vice presidential candidacy for the Libertarian Party in 1980 (Mayer, 2010, para. 29). As Zernike noted, the money and rhetoric of the tea party were not enough, "because there wasn't the frustration – there wasn't the popular resentment, popular frustration out there" (Conan, 2011). Zernike went on to argue that this frustration was "bubbling up" and that groups like FreedomWorks simply tapped into it and started training frustrated citizens in order to bring them into the political process. While some critics might say that FW and similar groups duped portions of the public into supporting their corporate agenda, essentially using their money and influence to trigger those activists, it might also be argued that the frustrations

of those voters, percolating and gradually getting noticed, actually activated the money of tea party organizations such as FW and the Koch brothers.

Then again, perhaps the better way to think about these two aspects of the tea party is as two compounds coming into contact with one another and reciprocally activating the energizing properties within each. Political activation is not uni-directional, with one entity (i.e. money) containing the electricity of political action and introducing that energy into a machine (i.e. the public) in order to make it run. Political energy, desires, activism, should be recognized as akin to what Massumi has called 'the *autonomy* of affect.' Affect has autonomy, Massumi (2002b) argues, by "the degree to which it escapes confinement in the particular body," a body "whose vitality, or potential" always comes into being when it interacts with other bodies (p. 35). By this Massumi means that affect is not controlled by or housed within any single body but is, more properly, in between bodies – in the manner by which bodies are drawn together or drawn apart, the ways that bodies come into contact with one another or avoid such contact. Cultural studies professor Sara Ahmed (2004) provides a discussion of affective economies that is also useful, viewing affect as a circulation of intensities. Political energy can also be viewed through the concept of affect as "affectio," or "the state of a body in as much as it affects or is affected by other bodies" (Seigworth, 2005, p. 161) and affect as "affectus," or "the passages of intensity" (p. 163).

Ahmed (2004) argues, "emotions are not simply 'within' or 'without' but that they create the very effect of the surface or boundaries of bodies and worlds" (p. 117). Taking into account this argument, and Zernike's argument about the "grassroots" status

of FW and the tea party, makes an observation by journalist Dave Weigal on NPR's *Fresh Air*, seem astute:

> [I]f you talk to Dick Armey of FreedomWorks, if you talk to Tim Phillips of Americans for Prosperity, talk to Grover Norquist, they've been trying to make something like this happen for years and years and years and *couldn't get the bodies on the ground* [emphasis added].[58]

How appropriate that the problems of starting the tea party movement should be described in terms of bodies in the world. Armey et al.'s inability to achieve political goals is described in terms of an inability to manage bodies, to insert them into political spaces as agents of change. What was missing? The answer is *feeling*. What was missing was an emotional response (*i.e.* fears about government power) and an object or person (*i.e.* Barack Obama) toward which those *feelings* could be directed.

According to Ahmed, "Fear responds to that which is approaching rather than already here" (p. 125). She places this discussion in terms of interracial fear, but her construction has implications beyond race to fit with the analysis of the relationship between money and political actors. Ahmed describes a scenario in which there is a fear between two races, between white and black bodies; that fear does not reside within either body, but rather between, it "envelops the bodies that feel it, as well as constructs those bodies as enveloped" (p. 126). The same could be said of the fear of government power within the tea party movement. There is a shared fear between government and citizens; for political leaders it is a fear of the masses or public, or perhaps a feeling that, as social science pioneer Harold Laswell (1931) argued, "men are often poor judges of their own interests" (p. 527). For citizens there is a fear that any and all government

[58] *Fresh Air*, NPR, 23 September 2009

action is the beginning of a slippery slope toward tyranny; as Ahmed says, a fear of "that which is approaching." Here it is an idea that government action does not happen, but is rather imagined, articulated, and the fear felt is a reaction to that articulation, not to the thing itself.

During the first Obama Administration FW tapped into those already existing anti-government sentiments and the feelings, people, money, and organizations combined to create that sort of ghost of constituent power, that "pale reproduction" to which Negri (1999) refers, that takes the form of an orderly protest that pays park fees. This is something that goes more to the heart of the problem, the discursive disconnect between Left and Right, the almost insurmountable misunderstanding between the two political polarities in America. In the Obama era it was that the Right saw the tactics of groups like Occupy Wall Street as fundamentally illegitimate because it was not playing within the rule set of the political system. Meanwhile the Left saw the Right as inauthentic because it saw the Right as exploiting those rules, tapping into the flow of capital to fund "phony" protests and "buy" politicians. The Right saw its actions as legitimate and bristled at the accusation of astroturfing because it was working within the bounds of a system, following its logic and creating authentic constituent power by acting, as Negri describes, as "the source of production of constitutional norms" (p. 1.2). All aspects of the tea party, both the Tea Party Express and the Tea Party Patriots, were voluntarily absorbed in the way Negri describes constituent power being "absorbed into the mechanism of representation" (p. 2.3). However, even if the "mechanism of representation" blurred the lines and enfolded all tea party groups together, despite the

differences between them, the actual actions and energies of activists were not always so cooperative. This was demonstrated in how the tea party discussed the electoral process.

For example, during the 2010 primary election season there was a clash between Karl Rove, a high-level Republican political operative, and Delaware tea party activists over that state's Republican primary for U.S. Senate. Small-time activists in Delaware told Rove, an experienced political operative who had successfully managed two campaigns for the U.S. presidency, that they were going to support the candidate that best represented their political beliefs, rather than follow his recommendation to back a more moderate Republican who had a better shot at winning in that more liberal state. The attempt to fold constituent power back into constituted power failed. Christine O'Donnell, the tea party candidate in that race, went on to a spectacular loss in a year that saw many other Republican victories, against a Democrat who was trailing in the polls behind O'Donnell's primary challenger, Mike Castle, whom Rove was urging activists to support. In this conflict between Rove and the Delaware activists we find a fissure, a moment where this particular constituent power, as Negri describes, "bursts apart, breaks, interrupts, unhinges any preexisting equilibrium and any possible continuity" (p. 10.1).

How one perceives the tea party and FreedomWorks vis-à-vis the authenticity question depends upon how one defines the concept of constituent power in its relationship to constituted power. Constituted power is the power of the state; it is the power that "reduces popular sovereignty to parliamentary representation and to the powers of elected officials" (Kalyvas, 2005, p. 229). If constituent power is an expression of popular action of the masses then constituted power is the power that creates norms or simply attempts to control constituent power. However, this relationship between

constituent power and constituted power, Negri argues, is viewed in three conflicting ways (p. 3.4).

From one perspective constituent power is "transcendent," it is outside of the system of constituted power and imposing upon that system (p. 3.4). This would be Negri's position, that "constituent power resists being constitutionalized" (p. 0.1). The second position is that constituent power is "immanent," it is the foundation of the system upon which constituted power is based (p. 3.4). An example of this view can be seen in states where tax increases require approval from voters in the form of a ballot initiative.[59] Third, Negri says some argue constituent power is "integrated into, coextensive, and synchronic with the positive constitutional system," it is part of the system of constituted power, it is internal to it (p. 3.4). This is best exemplified in the First Amendment's "redress of grievances" clause.

The second and third views create a basis for arguing that the tea party is a grassroots movement that is the exercising constituent power. In the second view the constituted powers of a deregulatory governing regime, alongside the powers of corporations and capital created by that regime, are the products of the constituent power expressed by tea party activists. If we accept the third view we understand Dave Weigel's characterization that the tea party was a grassroots movement when it started but that "the grass [was] being trimmed by a very expensive machine." The tea party may come out of the sincere, legitimate, anti-government sentiments of its members but it is also

[59] The Initiatives & Referendum institute at the University of Southern California released a report on voter behavior in tax related ballot initiatives (Piper, n.d.). They describe one such type of ballot initiative as a "super majority/voter approval" initiative (Piper, p. 7). These kinds of ballot measures "limit the ability to raise taxes by requiring that all new taxes or tax increases be approved by either a super majority of the legislature (typically 3/5 or ¾) or a vote of the people" (p. 7). For example, in the state of Colorado in 1992 voters approved a ballot initiative that would require voter approval for tax revenue increases (p. 14). This is a perfect example of constituent power as immanent. For something as fundamental as revenue decisions some states must turn to the voters for approval.

"integrated into, coextensive, and synchronic with" the "expensive machine" of corporate and government power that funds the movement.

If the tea party, in their discourse advocating for their cause, continued (perhaps unintentionally) borrowing from Hardt and Negri they might consider investigating this debate about the three forms of constituent power. Is it transcendent, immanent, or integrated? If Armey and Kibbe, or anyone else from the tea party, can answer this question, or at least make a compelling argument for one of the three forms, they might also answer their critics and effectively counter any future accusations of astroturfing.

Chapter 7 – Why Aren't They All Fact Checkers?: The Role of the Press, its Counter-Discourses, and the Rise of the "Fact Checkers"

I. Introduction

In his book *Don't Shoot the Messenger* Bruce Sanford describes a court case in which an unappealing young man sued a Kentucky newspaper, claiming it had libeled him. The newspaper had described a fight between the young man and a schoolmate as a "savage beating." The problem for the newspaper was the accuracy of that description since the fight involved one punch from the first young man, followed by the second hitting his head on the pavement. The second young man fell into a "fatal coma" and died a year later (Sanford, 1999, pp. 11-12). The newspaper reporting left readers with the impression that the first young man's punch was a direct cause of the second young man's death. As Sanford tells it, the young plaintiff "hardly made an apple-cheeked impression; he was so disagreeable that he made you wish the dead boy had gotten in a few licks before eating concrete" (p. 12). Despite the awful manner in which he apparently comported himself in court during his defamation lawsuit against the newspaper, the jury sided with him. Asked why, one juror said, "Well, we didn't much like that little shithead, but we liked the newspaper even less" (p. 12).

The results stand in stark contrast to what happened in the John Peter Zenger[1] case of 1733. Jury nullification protected Zenger from prosecution by the royal governor of the colony of New York. The Kentucky newspaper was not so lucky. More important, in the Kentucky case that newspaper, not the government, was public enemy No. 1. This

[1] The Zenger case is discussed in greater depth in the legal discussion in Chapter 5 of this dissertation. Zenger was a 16th century printer who was charged with seditious libel for printing a newspaper that was critical of the royal governor of the colony of New York. While Zenger was guilty of seditious libel the jury found him not guilty, engaging in jury nullification, because the criticism was true.

seems to be the case for many Americans in their perceptions of the press. The press-public relationship is in a state of what Cappella and Jamieson (1997) call the "spiral of cynicism." This is the idea that politicians and the press feed public cynicism through strategy frames in news reporting and politicians' focus on strategy over substantive policy discussions.

This spiral of cynicism is further fed, Cappella and Jamieson argue, by journalists' perceptions that by focusing on strategy frames they are "offering the public what it wants" (p. 238), "horse race" coverage rather than policy debates. One of the broader goals of this dissertation is to call into question this sort of market-oriented thinking, which treats news as a business. It is essential to question whether this atmosphere where news is expected to be profitable above all else will be able produce the best possible political discourse, determine truth, and identify deception. This chapter takes up that issue through an examination of the three most widely cited fact checking organizations, which have each become important parts of the political/media landscape. They examine the claims of politicians and their supporters, make declarations of truth and falsity, and even go so far as to accuse political actors of deception. In some cases, they even make explicit accusations that a politician is telling a lie.

These three most-often cited[2] fact checking organizations, FactCheck.org, PolitiFact, and the *Washington Post* Fact Checker, are part of a longer history of political fact checking in news. There is a wide range of other kinds of fact checking organizations

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[2] It is widely accepted that these three organizations are the dominant political fact checkers that receive the most attention in political news circles. In a research paper for the New America Foundation Michele Amazeen (2013) refers to them as "the three 'elite' fact-checking organizations" (p. 5). Marx (2012) writing for the *Columbia Journalism Review* calls them "the most prominent outlets" in the fact checking business and *Washingtonian* magazine calls them "Washington's top three fact checkers" (Jaffe, 2012, para. 1). So among political professionals these three sites are viewed as the best-known sources for fact checking even if some question their neutrality (CMPA, 2013).

but these three are not only the best known they also are different from these other organizations in some very important ways. First, they are not overtly partisan like some fact checkers who would be more accurately described as political operations than neutral observers. Examples of such groups would be the liberal Media Matters for America (MMA) and the conservative Media Research Center (MRC). Another difference is that the "top three" take on singular, specific claims and investigate their veracity. Other organizations such as Center for Public Integrity and Open Secrets distribute research that takes on issues in broader ways rather than analyzing one specific claim at a time. Finally, there are other fact checking sites that do some political analysis as part of a larger fact checking project looking at the culture beyond just politics. These would be sites like Snopes or the History News Network.[3]

Michael Dobbs (2012), a former *Washington Post* reporter writing a report for the New America Foundation, cited the Reagan era as the starting point for contemporary fact checking. The *Post* saw Reagan making numerous factually false statements in press conferences as the impetus for a "truth squadding" (p. 5) operation that, according to *Post* reporter Walter Pincus, was later abandoned because of public reaction that he characterized as saying, "'why don't you leave the man alone, he is trying to be honest, he makes mistakes, so what'" (p. 5). The next step in the evolution, Dobbs argues, came after the 1988 presidential campaign that was perceived to be particularly dishonest. FactCheck.org founder Brooks Jackson also cited this campaign as an inspiration for the founding of his organization (Smith, 2011c, para. 4).

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[3] There are lists of different kinds of fact checking organizations. Nora Miller (2005) created a list of various sites for the journal *ETC: A Review of General Semantics*. Mark Glaser (2008) created a list of both neutral and partisan political fact checkers for the PBS Media Shift program. The National Public Radio program *Marketplace* created a similar list a few years later (Paranada, 2012).

Even as fact checking became part of the process in the presidential campaigns of the 1990s journalists in 2014 look back on the lead up to the Iraq War as what might be called a bump in the road for fact checking (Dobbs, p. 6). Dobbs says that there were a few reporters who were critical of the weapons of mass destruction claims made by the Bush Administration as a rationale for going to war against Saddam Hussein in 2003. However, he says most did nothing to challenge the claims and some, such as Judith Miller of the *New York Times*, "actively helped the administration build the case for toppling Saddam Hussein" (p. 6).

In the decade after the Bush years the *American Journalism Review* (*AJR*) noted an increase in the number of fact checking organizations, going well beyond the big three.

> Not only does it appear that fact-checking operations are here to stay, but they are growing rapidly. Just this year, at least two dozen media organizations or universities launched or joined fact-checking operations. Some are flying solo; some are joining the St. Petersburg Times' PolitiFact network; and others are forming new cooperatives, such as AZ Fact Check … (p. 39)

AJR pointed to the perceived poor response to perceived false claims a group called The Swift Boat Veterans for Truth[4] made against Democratic presidential candidate John Kerry during the 2004 presidential election. This set the stage for "fact checking political debates [as] an idea whose time had arrived by the start of the 2008 presidential

[4] The Swift Boat Veterans for Truth was a group of Vietnam War veterans who were featured in campaign ads claiming that John Kerry had lied about his service in the war. Conservative political activists John O'Neill and Jerome Corsi compiled these claims in a book called *Unfit for Command* (2004).

campaign" (Dobbs, p. 8) and the "fact checking on steroids" that happened during the 2010 midterm elections (Spivak, p. 39).

It is important to also look to the evolution of emerging media as part of the rise of fact checking organizations and their more prominent role in the political process. While acknowledging this it is also important to note that this is an argument that cuts both ways. On one hand there is the optimism of Scott Gant (2007) and his book *We're All Journalists Now* in which he romanticizes the democratizing potential of new media. On the other hand is the counterargument of Andrew Keen (2007) who decries bloggers who are "forming aggregated communities of likeminded amateur journalists" (p. 55).

On the positive side Dobbs (2012) cites competition from blogs as a motivation for starting fact checking organizations. He argues that reporters started to realize that "someone else would do the job for [them] if [they] failed to monitor campaign rhetoric more aggressively" (p. 7). Craig Silverman and Jeff Jarvis, in their book on media mistakes, argue that more than being a motivator for legacy media to start fact checking, emerging media are "[a]t the core of this new upsurge of checking" (p. 294). According to them, "through Internet searches, information databases, and their own individual expertise, members of the public as well as organizations can gather information from a wide variety of sources and easily question what they read and see in the press" (p. 294). So fact checking is inherently a product of the medium.

Dobbs makes a coinciding argument that emerging media made wider fact checking possible and had a democratizing effect on the process essentially allowing for independent groups, organizations, and individuals to do research without a research budget (p. 1). Dobbs, looking to the future roles of digital media and participatory

journalism also argues that, "fact checkers need to ally themselves more closely with readers, a source of invaluable expertise. Future directions for fact-checking include 'crowd sourcing,' 'audience integration,' and the creation of networks of authoritative experts" (p. 1).

Chicago Tribune reporter Rex Huppke occupies the more pessimistic side with Keen. In an interview with the *American Journalism Review* Huppke cites emerging media as a catalyst for fact checking but in a slightly different way. He expressed pessimism about the possibility of fact checking at all because new media such as blogs have no checks and balances in the way legacy media do (Roth, 2012, p. 4). These arguments point to a bigger-picture problem with fact checking. Political critics push back against journalists in general pointing out politicians' false statements calling the act itself a violation of the concept of objectivity, as Dobbs recounts when an irate aid to New York Mayor Rudolph Giuliani yelled at him for pointing out the falsity of one Giuliani's statements (p. 2). Political critics also point to studies that supposedly demonstrate that fact checkers are biased against one political party and favor the other (CMPA, 2013). This is all part of a larger process of politically discrediting the news media in general, and fact checkers in specific, when they criticize politicians, rather than taking on the critical claims of falsity and presenting evidence to support those claims.

While this dissertation will acknowledge in the last chapter the problems of truth declaration as a *government* function and it does not propose the government be given the power to punish lies, it must also be acknowledged that leaving declarations of truth and lies to the "private sector," or to a marketplace of ideas, creates its own set of problems. This includes the problems of objectivity; some critiques of the ability of journalism to

maintain objectivity have helped create a situation where anything and everything is questionable – a problem created when "skepticism gives way to cynicism" (Cappella and Jamieson, p. 239).

For example, the fight over perceived media bias is a key part of the contemporary political discourse that has contributed to the creation of the cynicism described by Cappella and Jamieson. The bias discourse has become so pervasive so as to create a modern-day version of Thomas Jefferson's statement about newspapers, that "Truth itself becomes suspicious by being put into that polluted vehicle" (Jefferson, 1807, para. 4). This is not the healthy skepticism of a thinking public; it is the political cynicism of a reactionary public that sees potential lies and conspiracy in all things.

This chapter will begin with a discussion of Foucault's concept of discursive contradictions, placing that concept in the context of the debate about the role of the press in a political system. This will be followed by a discussion of some of the historical evolution of that discourse, looking at the notion of a watchdog press, where that idea comes from, and how it has evolved. The chapter will then discuss how that discursive evolution has resulted in the fact checking organizations that have become prominent in politics today. Finally, the chapter will discuss two high-profile and controversial incidents surrounding these fact checkers – the adventures in fact checking. The goal of this chapter, through the analysis of the fact checking discourse and these two key examples is to develop a theoretical repositioning of fact checking and fact checkers as part of this dissertation's larger critique of the marketplace of ideas argument.

II. Foucault and Contradictions

There is a particular point in Foucault's chapter on contradictions in the *Archaeology of Knowledge* that stands out in explaining how contradictions work. Foucault (2010) says contradictions are not necessarily the sign of incoherence in a discourse but rather evidence that there is still a greater unity beneath those contradictions and that research should seek out "at a deeper level, a principle of cohesion that organizes the discourse and restores to it its hidden unity" (p. 149). A contradiction, according to Foucault, is "the illusion of a unity that hides itself or is hidden" (p. 149). This leads to that important moment, which it is useful to present here in an extended quote:

> Such a contradiction, far from being an appearance or accident of discourse, far from being that from which it must be freed if its truth is at last to be revealed, constitutes the very law of its existence: it is on the basis of such a contradiction that discourse emerges, and it is in order both to translate it and to overcome it that discourse begins to speak; it is in order to escape that contradiction, whereas contradiction is ceaselessly reborn through discourse, that discourse endlessly pursues itself and endlessly begins again; it is because contradiction is always anterior to the discourse, and because it can never therefore entirely escape it, that discourse changes, undergoes transformation, and escapes of itself from its own continuity. (p. 151)

In other words, the contradictions in a discourse are not signs of its weakness but are instead part of its very existence. "To analyse discourse," Foucault says, "is to hide and

reveal contradictions" (p. 151). To truly understand a discourse is to see the contradictions and to find the hidden unity, the coherence beneath them. It is also to recognize that contradiction is an inherent part of how discourse functions.

There are three different types of discursive contradictions for Foucault. These are the derived, extrinsic, and intrinsic. Foucault explains each in a discussion of biology and natural history; they are applied in this chapter to a discussion of the role of the press in a political system. The derived contradictions originate "in the same discursive formation, at the same point, and in accordance with the same conditions of operation of the enunciative function;" these contradictions "constitute a terminal state" (p. 153). This contradiction type is exemplified by the media bias discourse. Though there are contradictions between the liberal media bias and conservative media bias discourses, which are obvious; they are rooted in the same basic assumptions about the role of the news media. Both discourses assume the press is supposed to be fair, objective, and non-partisan; report honestly; and exist without a political agenda. Both discourses claim that news media instead reflect a bias against them and journalists fall short of those ideals.

Examples of derived contradictions are seen in the ways the liberal MMA and the conservative MRC contradict one another in how they describe bias and deception in the media *vis-à-vis* political ideology. They may be completely incompatible with one another on one level, but they are derived from the American political system, they make many of the same assumptions about the role of a free press in that political system, or at least *claim* that they sincerely believe in those assumptions. Derived contradictions are distinct from extrinsic ones that "reflect the opposition between distinct discursive

formations" (p. 153). Foucault uses the distinction between natural history and biology as an example.

The best example of extrinsic contradictions in press discourses is in the differences between what Fred Siebert, an important figure in the founding of the Institution of Communications Research at the University of Illinois in the 1940s (Rogers, 1994, pp. 451-452), called the "authoritarian" and "libertarian" theories of the press. These theories of the news media's role in a political system are not only contradictory in their basic assumptions about what the news media should do, they are completely incompatible, derived from contradictory root assumptions. Authoritarianism says "man could attain his full potentialities only as a member of society" (Siebert, 1963a, p. 10). There are multiple forms of authoritarianism with different ways of handling journalists, but under such systems the news media are owned, controlled, or licensed by the government; whichever kind of authoritarianism it happens to be, the important point is that it does not have a free press. Conversely, the libertarian philosophy argues, "the prime function of society is to advance the interests of its individual members" (Siebert, 1963b, p. 40). With this at its roots, libertarianism believes in a free, privately owned press, which is able to question and criticize the government. So it is not just that libertarianism and authoritarianism have a few contradictory ideas about the news media; it is that they cannot coexist.

Finally, intrinsic contradictions are "those that are deployed in the discursive formation itself, and which, originating at one point in the system of formations, reveal sub-systems" (Foucault, 2010, p. 153). The differences in such contradictions are not terminal; they instead reveal two propositions that, though contradictory, are derived

from the same place. For example, one could take the more purely libertarian notions of a free press in contradiction with the social responsibility theory of the press. Theodore Peterson (1963), also an important part of the founding of the Illinois Institution of Communications Research (Rogers, 1994, pp. 451-452), argued that even individualistic societies have some elements of collectivism and the "social responsibility theory of the press represents just such an intermingling of ideas" (p. 82). The contradiction between social responsibility and libertarianism is best explained by Peterson's characterization that social responsibility theory argues "the government must not merely allow freedom; it must actively promote it" (p. 95).

Daniel Hallin (2013), a University of California professor with a long history of research on war and journalism, explored such intrinsic contradictions in his discussion of "advocacy journalism" in the Vietnam War era with journalist Peter Arnett. Arnett was a journalist who covered international conflicts for, among other institutions, *National Geographic* and CNN. In their discussions Arnett and Hallin covered contradictions such as the idea that journalists can simultaneously be part of the "establishment" and a watchdog against that establishment (p. 170). There is the contradiction between the "'profane,' commercial side" of news and the "'sacred,' public service side" (p. 171). Finally, there is the contradiction created by the problems that come with private ownership of the news media and the influence of the personal biases of that ownership (p. 171). All of these ideas, no matter how contradictory, are rooted in libertarian notions of a free press unencumbered by government interference.

Hallin describes his interaction with Arnett, who was working for the Associated Press at the time, with a specific interest in the intrinsic contradiction of how the press can be able to question power while also being a part of that power.

> What impressed me most strongly in this interview was the sense of wholeness and seamlessness in Arnett's vision of journalism … the absence of a sense of doubt or contradiction. … Arnett's view reflects very well the consciousness of American journalism at the peak of the country's power and prosperity: this was an era when American journalists felt they had overcome all the basic contradictions which historically have troubled the practice of journalism. (p. 170)

The specific contradiction in question was the handling of the Vietnam War in the American news media. Hallin wondered why journalists did not more strongly oppose the war. To this, Arnett replied that journalists had done more to end the war by simply reporting the facts rather than acting as oppositional activists (p. 170).

Herein lies the unity of the American news media discourse. It does not matter whether the notion of this "just the facts" image of the media is a reality, a delusional self-perception, or a deceptive and false outward self-presentation to the public. Behind all of these intrinsic contradictions is the notion that the mission of the press is to report *the facts*. Such a notion is also behind the derived contradictions surrounding the media bias debates. This idealization of factual reporting is even present in how reporters cover criticism of their industry, best exemplified by Ron Suskind's infamous quote about the "reality based community" during the George W. Bush years.[5]

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[5] The Bush Administration elicited an intensely negative reaction from its political opponents who saw the administration as flawed at best and illegitimate at worst. President Bush came into office in 2000 after a

What the hidden unity behind these contradictions reflects is how members of an institution such as the news media internalize the values that are the basis of that institution. Hallin points to the private ownership problem mentioned earlier in this chapter. According to Hallin, "the shift of the *Los Angeles Times* toward neutrality in the 1960 election and the death of Henry Luce[6] in 1967" (p. 153) signaled the end of "the days when the news media were essentially political tools of their owners" (p. 171). This accompanied journalists more readily accepting the professional norms of objectivity and neutrality and the hierarchy of the newsroom. Hallin argues that this indicates journalists of the 1960s had "internalized the constraints of professionalism" (p. 171). In other words, in the days when newspapers were more commonly the political tools of their

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Supreme Court decision that many perceived to be flawed and biased with the five conservative justices ruling in favor of Bush because he was the conservative candidate (Bugliosi, 2001).[5] Suskind (2004) describes an interaction with an anonymous Bush aide during the height of the Iraq War:

> The aide said that guys like me were 'in what we call the reality-based community,' which he defined as people who 'believe that solutions emerge from your judicious study of discernible reality.' I nodded and murmured something about enlightenment principles and empiricism. He cut me off. 'That's not the way the world really works anymore,' he continued. 'We're an empire now, and when we act, we create our own reality. And while you're studying that reality -- judiciously, as you will -- we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.' (para. 62)

The term "reality based community" reflects a discourse of deceit from the perspective of the aide using it, the perspective of governing in the age of empire, seeing politics not as deceptive but instead as an act of reality creation. This perspective almost denies the very existence of truth and/or Truth. There are only political actors "creating other new realities." It also reflects a discourse of deceit from the liberal critic's perspective describing the Bush Administration as illegitimate and dishonest, especially about matters of foreign policy, and this "reality based community" comment reinforces this critical discourse of deceit surrounding Bush. "They are even worse than we thought," Bush's critics could say.

[6] Henry Luce was the founder of *Time* magazine and an important figure in the history of American journalism (Brinkley, 2010). He was also integral to the Hutchins Commission. In the early 1940s he asked University of Chicago president Robert Hutchins to "undertake a high-profile study investigating the relationship between media institutions (including broadcasting and film as well as newspapers) and social responsibility" (Pickard, 2010, p. 400). This resulted in a report that, much to the chagrin of the news industry at the time (Pickard, p. 404), "concluded that just as media were becoming more integral to modern democratic society, they were also becoming more commercialized and concentrated … The commissioners frequently spoke in terms of 'crisis,' citing vulnerabilities in the commercial media system and resultant threats to democratic governance" (p. 401).

owners, there was a greater combativeness between reporters and those owners. When the industry shifted away from that kind of ownership, and standards of objectivity became the norm, reporters internalized that norm along with respect for the leadership of the newspaper.

Hallin calls this objectivity norm, which reached its height during Watergate, the "high modernism" of journalism, "when the historically troubled role of the journalist seemed fully rationalized" (pp. 171-172). Those moments of high modernism are also characterized by a certain aesthetic that, for example, eschewed "artistic" choices in television production techniques in favor of a one-shot of the anchor that minimized even the most basic camera work such as panning or dissolves. This is what Geoffery Baym (2010) describes as the "high modern news of Watergate" (p. 31).

> The imagery contain[ed] a minimum of camera movement or other production techniques that cinematographers well understand can add meaning to the visual field. Expressly forbidden, as [president of CBS News Richard] Salant decreed, from using the "underscoring and the punctuations which entertainment and fiction may, and do properly use," the high modern news of Watergate strove to create the sense that its viewers were simply seeing the real, and not seeing through a technology or strategy of representation. (p. 30-31)

Watergate presents an important moment in the evolution of the news media and its role in American politics. This Nixon era press/government relationship, though now about forty years in the past, is an essential point to telling the story of the fact checkers and from whence they came.

Martin Nolan (2005), a longtime Washington Bureau reporter for the *Boston Globe*, argues: "Nixon sought to disarm his critics by turning 'the press' into 'the media'" (p. 72). What Nolan means is that the term "press" carried with it an air of respectability, whereas the term "media," as Nixon speechwriter William Safire notes, "had a manipulative, Madison Avenue, all encompassing connotation" (quoted in Nolan, p. 74). Journalists in the press became members of the media. This point of conflict between Nixon and the press gives birth to the contemporary, broader conservative antipathy toward journalism that sees a pervasive liberal bias. It is also one of the key moments in the evolution of the discourse about news media that gives rise to the fact checkers. This evolution is the focus of the next section of this chapter.

III. Why aren't they all fact checkers?

The Fourth Estate. A watchdog on government. The adversarial press. No matter how one characterizes it, the notion of the relationship of the press and the government being one of antagonism has a long history. Some argue that one of the most basic concepts at the heart of American governance; is the idea that the separation of powers creates a check on government so that no one person or branch can overpower the rest and the news media are an additional check on government power, acting as a bulwark against corruption and threats to individual liberty. While there is something romantic about a free press protecting liberty – the lone reporter wearing a trench coat and meeting in a darkened parking garage with a secretive source to obtain information that could bring an abusive government to its knees – it is important to not be swept up in such romantic visions, to recognize that this system is not without its own issues.

Lawyer Evan Richman discussed the problems and shortcomings when independent organizations and news outlets attempt to fact check and hold politicians accountable. Despite the efforts of groups such as the League of Women Voters or a Florida group called the Citizens for Fair Campaign Practices Committee there is still misinformation and disinformation in political campaigns.[7] The news media have had mixed results, Richman (1998) argues, saying, "even frequent reminders of the distortions found in political advertising have minimal impact upon which candidate receives an individual's vote" (p. 685). Richman's claim about the marginal impact of corrections is supported by social science research that has found that corrections can fail in improving voters' knowledge, in part because of the shortcomings on the part of the voters (Nyhan & Reifler, 2010; Vedantam, 2008).

Meanwhile journalists are subject to a variety of pressures. News was once considered a "loss leader" but is now expected to contribute to the profits of media corporations.[8] There is also political rhetoric directed at criticizing perceived biases in

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[7] The League of Women Voters (LWV) was started in 1920 as an organization intended to increase citizen involvement in the political process (LWV, n.d.a.). They list raising citizen awareness of candidates and issues as two of their top priorities (LWV, n.d.b.). While the LWV is an organization that is not affiliated with any government at the national, state, or local level, groups like the Fair Campaign Practices Committee are loosely affiliated with state governments. This particular organization in Florida does not have the power to punish candidates for deceptive practices but it can investigate complaints and make recommendations to the proper governmental authorities. For example, in the 1993 Miami mayoral campaign the committee called on "the Dade County State Attorney's Office to investigate campaign practices in the mayoral race that it finds blatantly and ethnically divisive" (Martin, 1993, para. 5). In a 2000 county commission race in Florida the committee examined complaints about the honesty of a candidate's fliers attacking his opponent (Gross, 2000). In more recent years fair campaign practices committees have been more difficult to maintain. One such committee in Broward, Florida was shut down in 2011. Its committee chair at the time expressed disappointment that the most recent local election had been particularly "nasty" the committee received no public complaints.

[8] There is a perceived historical shift from seeing news as a social responsibility that simply would not be contributing to broadcasters' profits to seeing news as part of the business of a media corporation. Bernard Goldberg (2001), in his book *Bias*, recounts an anecdote about CBS News president Richard Salant lamenting the "bad news" that CBS News had "made money for the first time ever" (p. 98). Goldberg argues, "Salant knew … If news could actually make money, the suits who ran the network would expect just that. Sure they would want quality, in theory. But they wanted ratings and money, in fact" (pp. 98-99).

reporting. As Mark Lloyd (2006) argues, "Despite the recent romanticism about what we call the press, the major sources of our public information are private citizens dependent on the largess of global corporations" (pp. 209-210). Lloyd's sentiments echo those of many media critics and academics who have come before him, including most notably Noam Chomsky and Edward Herman (1988), Edward Herman (1999), Robert McChesney (2000), Ben Bagdikian (2000), and Eric Alterman (2003).

Parallel to increasing corporate power is the evolution of public relations apparatuses from the mid-twentieth through early twenty-first centuries. The presence of this PR machinery is obviously felt in political campaigns. Nyhan and Reifler (2010) argue, "very few factual claims are beyond challenge; if a fact is worth thinking about in making a policy choice, it is probably worth disputing. Rival advocates compete to define the facts, control their presentation, and determine their relevance" (p. 148). While some journalists may get a sense of professional satisfaction from pointing out politicians' factual missteps there are also political pressures on reporters to report the "facts" according to how those advocates define them, to the point where it is almost taboo to dare say that something might actually be factually inaccurate.

Howard K. Smith, a legendary broadcast reporter whose career started with his newspaper reporting during World War II, said in the late 90s that the culture of journalism had changed drastically over the decades of his career.

> There are the new corporate owners with their very different agendas and insistence that news make money. Then there are all the new forms of competition from CNN to the Fox News Channel. It is simply a different world. And, I might add, I think it is a far more difficult job today because, while the emphasis is on ratings and finding new ways to make money and all that, just slip up once in a major way journalistically and see what happens. (Zurawik, 1997, para. 17)

Conversely, University of Maine journalism professor Michael J Socolow (2010) argues that the idea that broadcast news was once unprofitable is a myth that was propagated by broadcasters in order to maintain the perception that news was their way of providing a public service in exchange for the privilege of having broadcasting licenses.

Twenty-five years ago Jack Winsbro made this point in an article for the *Emory Law Journal*. Winsbro (1987) argued that, "Even when the media do cover the issues … they often appear to conceive of their role as a primarily passive one. … the canons of 'objective journalism' seem to discourage any searching, critical examination of what the candidates say" (pp. 892-893). Winsbro points to an example during the 1972 presidential campaign where reporter Cassie Mackin reported that the Nixon campaign had made demonstrably false statements about McGovern's positions. Surprisingly, Winsbro argues, it was not the Nixon campaign that punished Mackin for her reporting. It was her colleagues.[9]

All of the above issues have contributed to the rise of political fact checkers, who are becoming a more prominent part of the political process, in organizations that in the 2012 presidential campaign were making news and becoming part of the campaign narrative in ways that will be explored later in this chapter. An important distinction should be made between the fact checking organizations under examination in this chapter (external fact checkers) and the staff members working at news organizations that are traditionally referred to as fact checkers (internal fact checkers). The internal fact

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[9] The incident to which Winsbro refers comes from journalist Timothy Crouse's classic campaign book *The Boys on the Bus*. Cassie Mackin, a reporter from NBC News, was part of the press pool covering the 1972 presidential campaign between Republican President Richard Nixon and his Democratic Party challenger Sen. George McGovern. Crouse (1973) explains that Mackin reported on the air that Nixon claimed McGovern's budget would "weaken the country" but "never specified how," that Nixon accused McGovern "of wanting to give those on welfare more [money] than those who work, which is not true" and that Nixon said "McGovern is calling for 'confiscation of wealth,' which is not true" (p. 266).

While Winsbro puts the blame for Mackin's punishment for reporting facts on her colleagues at NBC Crouse's portrayal of the events indicate that Nixon's press officer Herb Klein called NBC news before Mackin's on-air report was even finished. After Klein's call Mackin's bosses at NBC called her into the office before she went to the White House for her normal reporting duties and had her spend an entire day "compiling background from Nixon and McGovern speeches to substantiate her report" (p. 266). What is interesting is that Mackin did not accuse Nixon of being deceptive; she only said that Nixon made particular statements and that those statements were untrue. Crouse says that Mackin would not discuss the incident with anyone for the rest of the campaign.

checkers are staff members of media outlets who work to confirm the accuracy of an article before it is published. Journalist Sarah Harrison Smith (2012), in her book *The Fact Checker's Bible*, says that the "first fact checkers were probably those hired in the early 1920s by Briton Hadden and Henry Luce" for *Time* (p. 9). She also argues that while some media outlets have departments devoted solely to fact checking there are many positions such as "[e]ditors, copy editors, writers, and researchers" who all engage in the practice (p. 11).

This is something entirely different from the external fact checkers that will be discussed in this chapter. Calling them the "new checkers" journalist and Poynter Institute adjunct faculty member Craig Silverman (2009) says some fact checkers "try to discover true facts; others use fake facts to push their cause" (p. 293). Silverman sees a decline in the number of internal fact checkers and a coinciding rise in external fact checkers who treat facts like weapons "in the battle of ideas and ideologies" (p. 293). Silverman lumps together into one big "industry of NGOs" groups as disparate as FactCheck.org, the MRC, and MMA (pp. 293-294). This chapter makes a very important distinction that Silverman is blurring. FactCheck.org does not do what MRC and MMA do. MRC and MMA are explicitly politically partisan operations. FactCheck.org's claims to objectivity, or the very notion of objectivity itself, can be disputed but FactCheck.org, Politifact, and the *Washington Post* Fact Checker do not take the nakedly partisan approach of MRC and MMA. The fact checkers under examination in this chapter are non-partisan organizations whose goals are, at least in theory, to verify the truth of claims made by political actors in order to protect the integrity of political debate.

This raises what should be an obvious question. Why is it that the news media felt the need to create separate wings of their operations devoted to fact checking when all journalists should be fact checkers? Whether it is a reporter such as Cassie Mackin in 1972 or NBC News White House correspondent Chuck Todd in 2013, if a politician makes a statement that is verifiably false, and a journalist includes that statement in a report while also being able to confirm it is false, she or he should also report the fact that it is false. Instead there is now a bifurcation between reporting and fact checking, where journalists are expected to be stenographers who just make sure they write down one thing a Democrat says for every one thing a Republican says and vice versa.[10] This turns journalists into intermediaries through which deception flows and leaves the public to read falsehoods in the reporting and then go looking for the fact checking article to see if what they just read was true.

Thus the need for "fact checkers." The politician makes a statement and, while a journalist will report that statement in the coverage, alongside that coverage the fact checker confirms (or disaffirms) the truth of the politician's statement. This section of the chapter will explore some of the factors that contributed to creating the need for this

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[10] For just one example of this argument Rem Rieder, writing for the *American Journalism Review*, argued that, "too many [news] outlets were content to simply report what a public official or candidate said. In cases of controversy, they'd print the assertion or allegation, get a response and leave it at that" (Rieder, 2011, para. 2). This is an example of the journalist as stenographer. This is the argument that this kind of reporting creates a false sense of objectivity. In some cases such stenography journalism can be almost inconsequential coming in the form of the publishing of a single false claim that perhaps goes unnoticed and does not move political debate at all. In other cases the belief in such notions of objectivity can have disastrous consequences. For example, journalism professor Steven Maras (2013) argues that this was a problem during the McCarthy era when Republican Sen. Joseph McCarthy was exaggerating, and often fabricating, a domestic communist threat in the United States. McCarthy, Maras argues, took advantage of standards of objectivity in the press in order to have his claims reported uncritically. Maras cites multiple sources to support this point. A reporter for the Christian Science Monitor claimed that "Reporters wrote Mr. McCarthy's charges as fast as they were made and demanded more" (Strout, 1950, p. 5). Journalist and Harvard professor of government Paul H. Weaver (1974) argued that by "uncritically repeating and dramatically displaying the sensational charges made by a Senator – in keeping with the usages of objective journalism – the press provided Joe McCarthy" with a platform to advance his propaganda (p. 96).

bifurcation, one of which is the rise of the bias discourse. While it is common today for political actors to make accusations of systemic media bias, with entire operations devoted to documenting supposed biases,[11] such accusations of the press being collectively biased against an agenda are nothing new. During the New Deal era President Roosevelt and his supporters believed their agenda "was opposed by the overwhelming majority of the press" with this belief becoming "part of the New Deal conventional wisdom and … its legend" (White, 1979, p. 90). Even before becoming president, when he was governor of New York, FDR's "press strategy included feeding Democratic news to the rural press to offset the dominant Republican bias" (Winfield, 1994, p. 17). This was also part of the inspiration behind his use of the radio, a key medium of communication with his constituents, which made the "Fireside Chats" an important part of the FDR mythology. As governor he used the medium to "circumvent a virtual state Republican monopoly of the press outside New York City" (p. 17).

While FDR and his fellow New Dealers believed the reporters of their time were foursquare against the New Deal, there is evidence that that this was not necessarily the case (White, p. 90). That being said, even if the accusation of news bias is untrue, it can still be a winning political strategy to convince at least a sector of the electorate, mainly one's base of political support, to buy into the narrative that you, the politician, are on a noble mission to improve the country and journalists are a ravenous pack of animals, hungry for a salacious story, playing "gotcha" journalism, and/or a blindly ideological opposition, motivated purely out of spite, trying to obstruct your agenda, an agenda that is necessary for improving or protecting the nation. Simply put, a politician cannot go

[11] There are many organizations devoted to documenting perceived media bias from many political perspectives. Two prototypical examples would be the liberal group Media Matters for America and the conservative Media Research Center.

wrong by casting himself as a lone reformer on a mission facing an intractable, ideological opposition bent on his destruction. This strategy comes up again and again in modern American politics.[12]

The discourse of deceit surrounding news media is an intersection of Eric Hoffer's (1966) "true believer" and Carl Schmitt's (1996) "friend/enemy" political construction. Hoffer's true believer is the member of any mass movement. His study examines especially extreme mass movements, such as Nazism and communism, but can apply to mass movements more generally. A key characteristic is the loss of self in favor of membership in the group and an ardent belief in the group's cause. This goes hand in hand with Schmitt's focus on friend/enemy as the essential distinction of politics. Schmitt compares it to good and evil in morality and to beauty and ugliness in aesthetics. As an essential, dichotomous conceptual distinction that defines what politics is about (p. 26). For Schmitt, in politics one is either a friend or an enemy; there is nothing in between.

The media bias discourse calls on these two ideas. It first requires an allegiance to a particular ideology and/or tribe, such as an adherence to a mass movement or even a small political faction or social movement. It is important to note the distinction between the tribal and ideological allegiances. The tribe calls on loyalty no matter what the principle. For this form of loyalty, a set of principles is only a political tool of persuasion, or is at least only of secondary concern. Those principles are fungible, easily altered, or compromised. What matters most is what is essential to the tribe at any given moment,

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[12] For just a few examples, President Obama, during the 2012 election, said he believed it would be easier to work with Congress after his re-election because the Republican "fever may break" (Dwyer, 2012, para. 6). Hillary Clinton famously referred to a "vast right-wing conspiracy" to thwart her husband's presidential agenda (Maraniss, 1998, para. 1). In a November 1969 speech about plans to end the Vietnam War President Richard Nixon used the phrase "silent majority" to call on support for his policies from Americans who were opposed to a vocal counterculture movement that opposed the war (Nixon Library, n.d.). Conservative Christian leaders of the 1980s and 1990s borrowed this phrase to describe their political leaders as acting on behalf of a "silent majority" that was victim of a tyrannical liberal minority.

not the political principles in which the tribe ostensibly believes. Ideological loyalty creates a true believer who lives for the belief system, who may be willing to sacrifice the tribe, or at least some members, in order to protect a sacred belief system, to "burn down the house in order to save it," so to speak. The ideological loyalist is one who would sooner lose a political battle while holding true to principles rather than win while compromising them. Whether from ideology or tribalism, the media bias discourse can be a useful tool for a mass movement, to convince the members of that movement that the levers of power behind mass communication are turned against them, wholly controlled by some political enemy, helping to maintain the unification and constant suspicion that Hoffer says are important to the movement.

The media bias discourse also recognizes the importance of Schmitt's idea of enemies in politics, which Hoffer (1966) also acknowledges (p. 32). The media bias discourse turns the news media into a political enemy of the party, the movement, or, if the party is the one in power, the government and by extension "the people." What is interesting about this Schmittian political-enemy relationship between the news media and the government is how in some contexts it is seen as entirely appropriate, almost required for the sake of democracy, while in other contexts it is highly problematized. There is an intrinsic contradiction here. The press is supposed to be an adversary of the government. When that adversarial relationship is expressed through the lens of a journalist's perspective, it is fundamental to the maintenance of the American political system. However, the government taking on an adversarial relationship with the news media is seen as a threat to democracy.[13] For example, in the spring of 2013 the Obama

[13] President Nixon turned this adversarial relationship on its head a bit, pushing back against a tendency to view the adversarial tone from the press's perspective. In an interview at the National Broadcasters annual

Administration found itself embroiled in multiple scandals, one of which was the Justice Department spying on journalists in their investigations of national security leaks. Some in the news media started to accuse the administration of "criminalizing journalism"[14] as a result.

All of these perspectives on the press, the media bias discourse, the adversarial relationship, help to develop an intrinsic contradiction. This is that members of the news media say they are, on one hand, independent and apolitical (or at least would not be described as "political" in the way a party or politician would be). At the same time this discourse of independence is contradicted by the very political nature of the adversarial press as a "watchdog" on government, as another element of the checks and balances on power. The news media are independent of and free from government while also using the term "fourth estate," which implies interconnectedness with government. This is an intrinsic contradiction in the free press discourse when examined through the Foucaultian concept of contradiction.

This contradiction, the fact that even as the news media are thought of as independent of government they are also tied to government, forces us to confront the idea that journalists are political actors in their own right. There are two ways to think of the press as political actors, one way has negative connotations, one is positive. The first,

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convention in 1974 Nixon said, "I think the press has a right to criticize the president, and I think the president has a right of self-defense" (Nolan, p. 80).

[14] The Obama Administration's secret obtaining of Associated Press phone records was first reported on May 13, 2013. On May 22 on the MSNBC program *Morning Joe*, NBC White House correspondent Chuck Todd described the administration's actions as an attempt to "criminalize journalism." Fox News chief executive Roger Ailes lifted this characterization in a memo saying, "We reject the government's effort to criminalize the pursuit of investigative journalism" (Haughney, 2013). Similarly, in an editorial the *Washington Post* (2013) said, "the government must have secrets in order to function. But overclassification is so rampant that to criminalize the disclosure of all secret information would come close to paralyzing the flow of information."

which is of little concern to this chapter but must at least be acknowledged, is what could be called the incestuous relationship between reporters and politicians. This is best exemplified by events such as the annual White House Correspondents dinner and the criticism it evokes.[15] The second way to think about this contradiction, which is of great concern to this chapter, is that journalists, despite being thought of as independent of government and above politics, are actually quite political with their own way of exerting power to create social change.

While there is a long history, discussed in this chapter, of avoiding describing journalists as overtly partisan the role of journalism is nevertheless a very political one. This is made clear by Hallin's conversation with Arnett discussed earlier in this chapter. Arnett contends the journalist did more to end the Vietnam War by just reporting the facts, by being neutral, than anti-war activists did. This draws attention, perhaps inadvertently, to the political nature of neutrality, how neutrality and fact checking are *not* apolitical but are rather political in their own way. Though an important part of the American political mythology this idea of journalism as its own sort of political action is not an inherently American one. The British journalist William Stead developed a similar notion of "government by journalism," to which U.S. newspaper publisher William Randolph Hearst's idea of a "journalism of action" "owed a modest debt of inspiration" (Campbell, 2006, p. 80).

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[15] In 1997 the *American Journalism Review* referred to events like the White House Correspondents dinner as reinforcing "the glamorous, incestuous, insular images many Americans have of Washington journalists" (Sheperd, 1997, para. 12). More recently the Washington, D.C. based political publication *Politico*, in a discussion of the hyper-critical takedown of Washington culture that was the book *This Town* (Leibovich, 2013), referred to the dinner as "D.C.'s most incestuous weekend of the year" (Allen & VandeHei, 2013, para. 7).

Writing in the British journal *The Contemporary Review* in 1886 Stead argued, "Every day," the journalist "can administer either a stimulant or a narcotic to the minds of his readers" (p. 662). He said that media were often more powerful than government, writing:

> I have seen Cabinets upset, Ministers driven into retirement, laws repealed, great social reforms initiated, Bills transformed, estimates remodelled, programmes modified, Acts passed, generals nominated, governors appointed, armies sent hither and thither, war proclaimed and war averted, by the agency of newspapers. There were of course other agencies at work; but the dominant impulse, the original initiative, and the directing spirit in all these cases must be sought in the editorial sanctum rather than in Downing Street. (p. 664)

Stead poses something of a variation on the adversarial press. For him, as with Hearst's journalism of action, it is not just that the press should question government power; it should rival government power and be able to force policy changes in its own right.

However we imagine the role of the news media, it is essential to remember that this role is not naturally occurring but rather the product of political ideas, the creation of the competition of political discourses and cultural forces. This is made evident by British Linguistics professor Norman Fairclough's discussion of when a reporter talks to a politician. The underlying context of this scenario is a whole history of political and philosophical assumptions about the role of the press in American society that includes a wide range of political, popular, academic, and historical discourses, including items such as Stead's article. Built upon these multiple discourses about the role of the press is the

assumption that, as Fairclough says, "it is legitimate for the reporter – as one who 'speaks for' the public – to challenge the politician" (p. 309).

The constructedness of this notion is made clear periodically when someone actually questions what has become conventional wisdom. For example on the NPR program *On the Media* in April of 2004, *New Yorker* reporter Ken Aulletta quoted George W. Bush in a discussion with a reporter. Aulleta said in the interview:

> [A] reporter said to him, "Mr. President, is it really true you don't read the press or watch us on television?" And he said "No." And the reporter then said "Well, how do you then know, Mr. President, what the public is thinking?" And Bush, without missing a beat, said "You're making a powerful assumption, young man. You're assuming that you represent the public. I don't accept that." That's his attitude. And when you ask the Bush people to explain that attitude, what they say is "We don't accept that you have a check and balance function. We think that you are in the game of 'Gotcha.'" (On the Media, 2004, para. 2)

This is just one example of Craig Crawford's (2007) argument that "politicians almost instinctively blame the media when things go wrong" (p. 16). It is a common political response to bad press – the answer to all questions directed toward the politician is never that the politician has done something wrong or made a mistake; the answer is that "the media are out to get me."[16] It is also a reminder that, however natural it may seem that the

[16] While managing a state senate campaign in 2006 I had numerous conversations with a reporter who covered almost every event our campaign held. At one event she discussed with me her experience over the years covering political campaigns. She said, and I paraphrase, "every candidate who ever lost a race blamed me for his loss." She went on to explain that she did not mean the candidates all blamed her personally but rather that at the end of every campaign she had covered the losing candidate inevitably found a way to at least partially blame unfair press coverage for the loss.

news media "speak for the people" or are an important check against the abuse of power, these ideas are social and political constructions that can be undone.

Another historical contribution to the evolution of the press is the shift from partisan papers to "objective" reporting in the era of the penny press. The penny press, in its desire to broaden its audience, constructed the notion of objectivity. During the 1800 presidential campaign Thomas Jefferson and John Adams were subjected to the criticism, and sometimes lies, of partisan newspapers. These newspapers were explicitly connected to one political party or another, in this case Adams and the Federalists or Jefferson and the Democratic-Republicans. At one point Federalist newspapers even propagated a rumor that Jefferson had died in the midst of the campaign (Lerche, 1948, p. 489). When the penny press was born, in an attempt to build readership, newspapers started holding themselves out as independent, where partisanship could eliminate potential readers from the paper's audience before those readers even opened the paper, independence could bring in readers (Siebert, 1963b, pp. 60-61). In so doing, as Hellen MacGill Hughes (1940) put it, those newspapers "substituted the market for the mission" (p. 7). Their readers "were more interested in the news than in the editor's interpretation of the news" (p. 7). Hughes quotes James Gordon Bennett in the first issue of the *New York Herald* who wrote of his newspaper, "Our only guide shall be good, sound, practical commonsense … We shall support no party, be the organ of no faction … We shall endeavor to record facts on every public and proper subject stripped of verbiage and coloring with comments" (p. 10).

Journalism historian William David Sloan says the partisan press was dominant "from the 1780s until the mid-1800s, finally giving way to the more popular penny

newspapers" (p. 58). He outlines four approaches to thinking about the partisan press and its place in the history of American journalism and politics. These four approaches are situated in different eras and reflect how views on the partisan press evolved over time. The first historians to examine the era are those Sloan refers to as the 19th century Romantic historians.

One potential problem with the viewpoint of the Romantic historians is that their analysis is not very far removed from the era it describes. Sloan says the Romantics portrayed the editors of the partisan press "as honorable men of high character and motives who fulfilled the American ideal of achievement that could be made in a society of opportunity and individualism" (p. 59). This could be problematic because, as Sloan points out, those historians knew those editors "as personal friends and therefor held them in high regard" (p. 59). For the romantics the era of the partisan press was one of a political divide created by a Hamiltonian-Jeffersonian split at first and later a Whig-Jacksonian split. The Romantics believed in a "relentless stream of progress ordained by natural law" (p. 61) and saw journalism as having a role in that progress.

The Progressive historians had their own political viewpoint on the newspapers of the partisan era. They saw the Jefferson/Jackson side of that partisan divide as the guardians of the interests of "the people" and the Federalist/Hamiltonian/Whig side as the protectors of aristocratic rule. Sloan says:

> Some progressive historians viewed the history of the press as a means of pointing out its contrasts with the press of the 20th century, which they believed was controlled by conservative financial forces and served the interests of the ruling class against the rights of the people. (p. 61)

Sloan says historians of the third group, the Developmental interpretation, viewed the partisan era as a low point in the history of journalism. In contrast to the Progressives Sloan says the Developmental historians, starting in the mid-1800s, viewed the partisan publishers as the tools of their respective political parties not noble warriors battling for political principles (p. 63). According to this analysis the partisan press "met neither the standard of independence from politicians nor the standard of unbiased reporting and temperate editorial comment" (p. 64).

Finally the Cultural school, which "began in the 1920s" (p. 66), took an approach to examining the press that was unique in that they looked at how cultural forces – "economics, politics, technology, culture" – had an impact on the functioning of the press (p. 67). This was distinct from its three predecessors who were interested in how the press impacted those cultural forces rather than the other way around. Sloan says, "these historians suggested that the party press should be evaluated less on its contributions to journalistic development and more on the part it played in American politics" (p. 68). The Cultural school was divided in its assessment of the partisan press, some seeing it as the "dark ages" of the American press (p. 68), while others argued that the partisan press should be evaluated based upon the role it played in its time not according to the contemporary standards of objectivity in which the historians examining it found themselves (p. 68).

In the change from partisan newspaper to the penny press the newspaper had at least ostensible independence from political parties and the politicians they elected. This perceived independence shifted to mistrust. In post-World War I reporting as journalists who reported from the warfront returned home they found their writing had been altered

to reflect the interests of the United States government. George Seldes wrote of this discovery and the feeling that he and other reporters had essentially been used as propaganda writers to maintain support for WWI; this influenced the way he reported the rest of his life. In his book *Freedom of the Press*, Seldes (1935) wrote:

> The journals back home that printed our stories boasted that their correspondents had been at the fighting front. I now realize that we were told nothing but buncombe, that we were shown nothing of the realities of the war, that we were, in short, merely part of the Allied propaganda machine whose purpose was to sustain morale at all costs and help drag unwilling America into the slaughter. … We all more or less lied about the war. (pp. 34-35)[17]

This discussion of the evolution of the press so far has brought together a few factors. There is the historical discourse of government by journalism, an activist journalism, along with the shift from partisan newspapers to a more independent press. There is also the mix of skepticism and cynicism in the relationship between the press and the government. So the modern self-identity of the press as truth-seekers is a mixture of the Jeffersonian notion of the importance of a free press, which is filtered through the adversarial relationship, which is felt today with a residue from the Nixon years, but this Nixon era feeling about the press adds another interesting element to the mix.

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[17] Seldes was not the only person who saw a discrepancy between what was reported about the war in the newspapers and what was actually happening on the frontline. Fordham University professor Robin Andersen (2006) soldiers in the trenches "began to chafe at the 'jauntiness of tone' of reporting that often implied that a battle was a 'jovial picnic' … Thus did the soldier become inspired to expose the propaganda" (p. 14). Andersen also notes that, much like his American counterpart Seldes, British reporter Philip Gibbs would go on to "express regret for his role in misrepresenting the war at the time" (p. 15). Gibbs (1920) wrote a book, *Now it Can Be Told*, which would explain the misrepresentations in Allied propaganda.

The truth-seeking independence of the late 1800s was often mixed with the newspapers being tools of their owners' socioeconomic and political interests. As mentioned above, even the reporters at those papers found themselves at odds with the owners. The independence and truth-telling of those newspapers take a different sort of aesthetic with the "high modernism" of Watergate era journalism and its idealization of journalism being on a par with a scientific pursuit of truth described above. This journalism of Watergate and Vietnam gives rise to a cultural fissure; despite the arguments of Hallin (2013) and Gans (1979), both of whom say that the journalism of this era largely reflected "moderate establishment values" (Schudson, 2008, p. 35), there is a cultural split in American politics around the press.

The cultural divide that is present in American politics in 2014, experienced now as the red state/blue state divide, is rooted in divisions created in this era. The news media play an important part in this divide as one of the essential components of conservative self-perception as a victim of cultural bias, particularly media bias, which is supposedly built up against conservatism. This is not to say that the claim of liberal bias in the media is born *only* out of Watergate, just that the contemporary understanding of it filters previous manifestations of it through the experience of Watergate.

This is also not to say that the claim of liberal bias is completely groundless. Media bias is contested and the critiques about bias are as much a product of political affiliation as the supposed bias they claim exists. Indiana University journalism professor David Weaver, the lead researcher on *The American Journalist in the 21st Century*, found evidence to support the perception that journalists at least lean toward more liberal or Democratic Party politics in their personal beliefs, even if they do not in their reporting.

Weaver et al. (2007) found that from 1992 to 2002 the number of journalists identifying as to the left politically had decreased while the number identifying as to the right had gone up. The number identifying as being "middle of the road" had also increased. However, there were still more journalists identifying as being to the left than being to the right (p. 17). Weaver et al. also make the point that "U.S. journalists, in general, were more liberal politically *than the U.S. public at large* [emphasis added] in 2002, although political attitudes varied considerably among journalists by gender, race, ethnicity, and type of news medium" (p. 28).

Conservative political commentators could point to this study as evidence of the Left/liberal bias they perceive as being present in the news media. While Left political commentators, such as Edward Herman, see corporate control of the media as problematic and evidence of a conservative or corporate bias, political conservatives see the cultural and political attitudes of journalists as the stronger force and as evidence of liberal bias. Weaver et al., however, makes the argument that "there is not a monolithic political mindset among U.S. journalists. This is important to remember, given the perennial charges of political bias in news coverage and the widespread assumption that the political views of individual journalists influence their news coverage" (p. 241).

The liberal bias claim is important to this chapter because it is argued here that this is a key point in why fact checkers even exist. It is part of a reaction to a political goal of creating a general mistrust of public institutions, in tearing down the longstanding, New Deal-era political consensus by tearing down faith in those public

institutions. This means faith in government,[18] faith in labor unions,[19] faith in institutions of higher education,[20] and faith in journalism. So the discourse of deceit surrounding the news media is part of a larger discourse about faith in public institutions. The claim of liberal bias, which is the component that created a crisis of faith in the news media for at least a large and vocal minority of Americans, is one component among many that helped to create an opening for fact checking organizations that would be separate from general news reporting.

Watts et al. (1999) explored three aspects of media bias claims: accusations of bias by political actors, bias related self-coverage in the news media, and whether a liberal bias was actually present in the news of the presidential elections of 1988, 1992, and 1996. They found that not only was there an increase in public perception of liberal bias in news from 1988 to 1996 but there was also an increase in news media self-coverage claiming that such a bias existed. Their analysis of the actual coverage of the presidential candidates found that favorable coverage was split almost perfectly between the two major party candidates in the 1988 and 1996 elections with a significant bias

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[18] Mistrust for government is at the heart of neoliberalism. This is best exemplified in the Ronald Reagan quote from his first inaugural address, "In this present crisis, government is not the solution to our problem; government is the problem" (Reagan, 1981, para. 9).

[19] A 2012 report by the Bureau of Labor Statistics (2013) found that union membership fell from 11.8% to 11.3% from 2011 to 2012. This one-year decline was part of a long-term trend with the decline from 20.1% membership in 1983 (p. 1). In a *New York Times* article reporting on the BLS data William Spriggs, chief economist for the A.F.L.-C.I.O., attributed the declining union membership to attacks on workers' rights to organize arguing, "the Republican Party is really being vindictive against unions, and employers campaign very hard against workers unionizing" (Greenhouse, 2013, para. 17). The declining faith in labor unions must be at least partially attributed to the attacks on them.

[20] The attack on higher education is more a product of the contemporary conservative movement. It is similar in character to the attacks on the news media, using the same language of "bias" and the same vehicles of attacks in the form of books written by political activists such as David Horowitz (2006, 2007). It has resulted in lawsuits claiming biased grading against students (Gravois, 2007) and even legislators using the investigative mechanisms of the state to look for what they perceive to be institutionalized biases against conservative and religious students (Jacobson, 2006).

toward then Gov. Bill Clinton against President George H.W. Bush in the 1992 election. Oddly enough the years with the highest level of claims of liberal bias were 1988 and 1996, the years when it was least present.

Similar to Watts el al. the Pew Research Center for the People & the Press (2011) found an increase in public perceptions of liberal bias in the media in the years from 1985 to 2011. In 1985 53% of respondents said they felt the news media "[t]end to favor one side" in political debates. That number increased to 77% in 2011. Respondents who believed the news media are politically biased increased from 45% to 63% over the same period. So in the 1980s there was some perception of political bias in the news media. Over the timeframe of the late 1980s and into the 1990s and early 2000s, just as the news industry was planning dedicated fact checking operations, public perception of political bias was intensifying. By 2008 the fact checkers became a prominent part of the campaign process.

IV. The Fact Checking Discourse

Rosenstiel and Kovach (2009), in a piece written for the Project for Excellence in Journalism, note that while fact checkers started to become a bigger part of the electoral process during the 2008 campaign, in their current form they have been part of the news media since 1990 (para. 66). In the 2008 campaign "fact checking grew more robust" they argue (para. 69). This growing robustness is the product of a few factors. This section will discuss those factors, looking at the discourse surrounding contemporary fact checking in general and two incidents in particular.

Brooks Jackson, one of the founders of FactCheck.org, says fact checking started "in the wake of the 1988 campaign, when the media — led by the *Washington Post's*

David Broder – questioned their inability to combat what many reporters saw as a misleading attack ad against Massachusetts Gov. Michael Dukakis" (Smith, 2011c, para. 4). Dukakis was the Democratic Party's presidential candidate that year when an outside group supporting the Republicans produced what is now infamously known as the "Willie Horton" television ad.[21] This combined with "a lot of soul searching in the journalistic community about the failure to cover the massive advertising campaigns" (para. 34) and the feeling among Democrats that the campaign had been an ugly one created the perception of a need for some kind of fact checking mechanism. Paul Waldman (2011), writing for the *American Prospect* adds that, "reporters felt that they had been manipulated by George H.W. Bush's campaign into not only passing on a lot of falsehoods, but also letting the campaign be dominated by troubling issues like the Willie Horton case" (para. 4).

This, however, is only part of the story. It is just one more step in the evolution described above. Partially echoing the arguments made by the well known sociologist and author of *Deciding What's News*, Herbert Gans, *Politico* report Ben Smith (2011b) argues the fact checkers' "historical roots" come from "Democratic outrage, heavily laced with a centrist, journalistic impulse" (para. 33). This centrist impulse and the creation of fact checkers eschews the Democratic outrage as one of the factors while making the fact checkers problematic in other ways. First is that, as Greg Marx, a writer for *Columbia Journalism Review* argues, the language of fact checking can stretch the

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[21] Supporters of George H.W. Bush's presidential candidacy produced the Willie Horton ad during the 1988 campaign. The ad recounted how Willie Horton was a Massachusetts man serving a life sentence for murder. He was released from prison on a furlough program when he committed rape and murder. Bush supporters used this ad, which played on racial fears, to portray Bush's Democratic opponent, Massachusetts governor Michael Dukakis as "soft on crime" (New York Times, 1988). *Time* magazine declared this one of the top 10 campaign ads of all time. We can assume the publication gave it that honor because of it being influential and memorable not because of the quality of its message (Time, n.d.).

boundaries of what is actually possible by giving the impression that levels of certainty about truth or falsity are attainable when they actually are not. Marx (2011) argues that this "tendency to stretch that language beyond its limitations undermines the credibility of their project" (para. 6).

Second is that, alongside that language of certainty is a tendency, which stems from the high modern journalism of the Watergate era, to attempt to equate journalism with science. This is a tendency that is also historically present in the discourse of the early attempts to market the press as independent when it "substituted the market for the mission." Marx (2011) argues that fact checkers have "reached for the clear language of truth and falsehood as a moral weapon, a way to invoke ideas of journalists as almost scientific fact-finders" (para. 17). Alec MacGillis (2011), a journalist for the *New Republic*, similarly argues this fact checking discourse "seeks to protect the reporters from charges of bias while giving the work of political judgment and analysis a scientific aura" (para. 2).

This discourse of deceit around fact checkers gives some insight into the ambiguous relationship between journalists and politicians and how, in managing that relationship and attempting to maintain their role in the political process, the news media as an institution has had to behave not as a political observer acting outside of the process and looking in on it in judgment, but rather as an integral part of the process, as a political actor in its own way. American news outlets over time may have become independent of parties in the sense that they are not partisan institutions in the way they were in the age of Jefferson and Adams, but they are not independent of political pressures. If politics is a

vast ocean, journalists imagine they exited partisan ships to fly in the air above everything and observe it all when in reality they simply moved to a new ship.

This all harkens back to Stead's (1886) "Government by Journalism," and Hearst's "journalism of action" (Campbell, 2006, p. 80). Journalists might benefit by calling on these ideas, remembering the historical importance of their role as political activists, and noting that neutrality itself is a political position. The "centrist impulse" might still be maintained; it might also be jettisoned, because despite the inclinations of the establishment press, centrism is not inherently virtuous. The ideals of a pursuit of truth, objectivity, and/or balance have value as ideals, even if they are impossible ideals; and they have value in that one might pursue policies based upon some sense of truth without needing to kowtow to partisan interests. Journalism as an institution can pursue truth and fairness, can be non-partisan, and also recognize the inherently political nature of what journalism does. The institution of journalism would do itself a service by recognizing its political nature and finding better ways to, for example, push back against accusations of bias, to recognize the asymmetrical conflict between politicians and press and act accordingly.

Understanding journalism's role in the political process and its need to fight to maintain it comes back once again to the 1988 presidential campaign. Craig Crawford, in his book *Attack the messenger*, recounts CBS reporter Dan Rather's interview with Republican presidential candidate George H.W. Bush in January of 1988. Then-Vice President Bush was facing questions about the role he played in the Iran/Contra scandal.[22]

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[22] The Iran/Contra affair was one of the more complex scandals in modern American politics. The *Washington Post* (n.d.) presents a simplified version of the events in which the Reagan Administration sold weapons to the Iranian government to aid their war against Iraq. In exchange for the arms sales, which were

When the CBS reporter came to that topic, the interview "disassembled into a verbal shoving match" (Crawford, 2007 p. 9). The story then became about the clash between the candidate and the reporter, not about the vice president's conduct in office. In engaging in the conflict, and focusing public attention on the conduct of the press, Bush had "turned the tables" and "pulled the pedestal away" from the news media, as Crawford (2007) says (p. 11), especially the evening news anchors. This was the beginning of the undoing of the credibility historically associated with Walter Cronkite and replacing it with the assumption of liberal bias and "gotcha" journalism associated with Rather.

Crawford argues, "since the Bush-Rather meltdown, the vilification of the news media by politicians [has] diminished the power of an independent press" (p. 11). More than a desire for fair treatment from reporters, this strategy on the part of politicians is a returning fire in the adversarial relationship. On the Bush/Rather conflict over Iran/Contra, "Bush challenged Rather in a way that undermined the role of a journalist to … ask the questions those leaders prefer not answer." What made this especially problematic is that "once the dust settled on this incident, the American people still had no meaningful answers from a politician who did have some explaining to do" (Crawford, 2007, p. 12). Nolan argues that Nixon treated the "media" as an enemy, the Bush campaign imitated this approach using press antagonism to avoid difficult questions

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illegal, "Iran was to use its influence to help gain the release of Americans held hostage in Lebanon" (para. 1). Finally, the weapons were sold to Iran at inflated prices and the excess money was to be sent to "the Reagan-favored 'contras' fighting the Sandinista government in Nicaragua" (para. 1). In addition to the illegality of selling weapons to Iran this process violated the U.S. policy of not negotiating for hostages and it circumvented Congressional limits on the funding of the contras in Nicaragua. There were questions about how much President Reagan and Vice President Bush knew about the plan. While neither Reagan nor Bush were punished, members of the Reagan Administration, including National Security Adviser John Poindexter and Oliver North, did face charges (para. 4). Rather was questioning Bush about his role in the affair. The independent counsel in the investigation, Lawrence Walsh (1997), later published a detailed description of the scandal.

in 1988 and continued using reporters as foils in 1992 with campaign bumper stickers that read, "annoy the media, re-elect Bush."

This discourse about media bias, and the antagonism that goes along with it, does not end with the creation of fact checking organizations. It continued into the 2012 presidential campaign between incumbent President Barack Obama and his challenger, former Massachusetts Gov. Mitt Romney. While the fact checkers presented themselves as independent observers, referring to themselves as "non-partisan"[23] organizations that "help you find the truth in politics,"[24] there was still a desire to push back against this in a general sense and against specific fact checks those organizations made. This is best exemplified by Romney campaign pollster Neil Newhouse, who said, "Fact checkers come to this with their own sets of thoughts and beliefs, and we're not going to let our campaign be dictated by fact checkers" (Smith, 2012, para. 5). This was said in response to questions, during a panel discussion, about the veracity of a Romney campaign ad about the Obama Administration's changes in welfare policy.

The Romney ad quoted a blog post from the conservative Heritage Foundation with the headline, "Obama guts welfare reform" (Rector & Bradley, 2012) with the Romney ad claiming, "Under Obama's plan, you wouldn't have to work and you wouldn't have to train for a job. They just send you your welfare check" (Kessler, 2012, para. 1). There was significant response from fact checking organizations finding this claim to be false or at least misleading. The three most-often cited fact checkers, Fact Check.org, PolitiFact and the *Washington Post* Fact Checker, all deemed the "welfare gutting" claim to be false (Kiely & Moss, 2012; Kessler, 2012; PolitiFact, 2012). A

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[23] This is from Fact Check.org's "Our Mission" page on their website (FactCheck.org, n.d.).

[24] This is from PolitiFact's "About PolitiFact" page on their website (PolitiFact, n.d.).

couple weeks after these declarations it was reported that Romney was still making the claim despite its status of supposed dubiousness (Shapiro, 2012). The controversy surrounding this situation raises questions about fact checking on a few levels.

First, there is the Newhouse response to the claims. The thrust of his argument is that there are subjective interpretations of facts and "the quote 'fact checkers'" (Gladstone, 2012, para. 5), as former New Hampshire Governor and Romney supporter John Sununu called them dismissively, are not objectively analyzing reality but rather presenting their interpretation of it. This subjectivity argument that was leveled against fact checkers is an extension of the bias discourse. So even as the news media create this bifurcation between reporting and fact checking as an attempt to eschew the bias discourse they are still accused of bias.

Second, there is the deceptive way in which Romney's opponents used the Newhouse quote. When Newhouse said the Romney camp was not going to let its "campaign be dictated by fact checkers," he was not twisting his moustache with an evil grin shouting, "Gov. Romney is going to lie his way to the top and there is nothing these fact checkers can do to stop us!" When the quote is read in its entirety one sees Newhouse was saying the fact checkers have their subjective interpretation of the facts and the Romney campaign was not going to let their subjective interpretation prevent the campaign from saying what it believed to be true. Perhaps Newhouse would have been better off saying, "we're not going to let their interpretation dictate our interpretation of the data we use to run our campaign." This subtle clarification in meaning is possibly the best part of the situation. Newhouse actually said something rather mundane. He said

other people have biases and the Romney campaign was not going to allow those biases to prevent it from making the arguments strategists feel are most effective for winning.

Finally, there is the affective deployment of this quote by the Obama campaign. The Obama campaign tapped into residual feelings about the 1988 Willie Horton ad, still shorthand for an unfair and offensive strategy, and the term “swift boating” from 2004 with its implications that John Kerry lost the race in part because he did not effectively respond to those supposedly dishonest attacks on his military record. An email that referenced the Newhouse quote, first reported by political reporter Ben Smith for the website Buzzfeed on August 28, 2012, was sent from the Obama “Truth Team” to voters on the campaign email list:

> One of Mitt Romney's senior advisers recently told a reporter that they wouldn't let their campaign "be dictated by fact-checkers." That, at least, was a moment of honesty, but it underscores why we can't let up on getting the facts out as Election Day gets closer. (Cutter, 2012, para. 2)

The implication was that Newhouse was saying the Romney campaign was going to distort the facts to win. Oddly enough, even as it gave a false impression of Newhouse’s intent, the “Truth Team” email gave voters suggestions on ways to fact check the Romney campaign, including a link to a site where supporters could report negative attacks from Romney supporters to the Obama campaign.

Obama Senior Advisor David Axelrod also used the Newhouse quote in a fundraising email. On October 8 Axelrod sent the email to the Obama mailing list asking for donations. He said:

> Governor Romney and his allies aren't going to play fair or take it easy on us. Take it from their own adviser: "We're not going to let our campaign be dictated by fact-checkers." (Axelrod, 2012, para. 5)

Just as with the Cutter email, Axelrod decontextualized the quote, using only the second half of Newhouse's statement, and failing to include the first part in which Newhouse says, everyone has "their own sets of thoughts and beliefs." This gives the reader the impression that Newhouse was saying, "we're going to lie." This is used to outrage supporters and encourage donations.

The problem for Axelrod and Cutter, and really anyone who cites a fact check, is that if you live by the sword you may die by the sword. In other words, the fact checkers cut both ways, at least in theory. On one hand Jon Cassidy, writing for the conservative magazine *Human Events*, decried what he saw as the liberal political bias of PolitiFact. Cassidy (2012) argues that PolitiFact was "once widely regarded as a unique, rigorous and reasonably independent investigator of political claims" (para. 4), but that it had started to target conservatives over liberals, revealing a clear bias. Cassidy cites examples of liberal commentators celebrating PolitiFact's work and holding it out as proof that liberals were more honest than conservatives.

Their plaudits are contrasted by responses from liberals in an incident that, like the Newhouse quote, created controversy and led some to question their faith in the fact checker. In December 2011 PolitiFact declared the Democrats' claim that "Republicans voted to end Medicare" to be PolitiFact's "Lie of the Year" (Adair & Holan, 2011). This resulted in a strong, negative backlash from liberal political circles that began to echo the bias claims made by their conservative counterparts. It was the third year in a row

Politifact had declared a health care claim to be lie of the year. In 2010 it was the conservative claim that the Affordable Care Act (ACA) was a "government takeover of health care" (Adair & Holan, 2010). The 2009 lie of the year was the conservative claim that the ACA contained death panels (Holan, 2009).

Since the 2009 and 2010 lies of the year came from conservatives and Republicans, a large part of the liberal/Democratic reaction to the 2011 "winner" was to accuse Politifact of seeking a false balance in order to stave off claims of partisanship and bias. Liberal critics of the 2011 decision said Politifact had, "blown its credibility to tiny bits," (Pierce, 2011, para. 2) making "themselves useless and irrelevant," (Krugman, 2011, para. 5). However, the chief argument leveled against Politifact in the first 24 hours after the decision was the false equivalence argument. This was part of a larger argument about media bias and the quest for (at least the appearance of) objectivity in journalism.

Liberal legal commentator Glen Greenwald, before the announcement of the 2011 lie of the year, was already critiquing this idea of objectivity as part of an establishment bias, making arguments, which echo those above, about the desire for the scientific aura around journalism. Greenwald (2011) says the use of terms such as "technocrats" to describe certain "experts" implies a sort of neutrality in the examination. The prefix "tech" conjures up machinic images, a feeling that the person doing the analyzing is like a computer; one need only input data and the machine (the technocratic expert) will output the objective facts free of bias. A theme in Greenwald's analysis is seen in his use of the term "establishment." He refers to an "establishment bias" and "establishment advocates" and "establishment journalists," terms that carry along another important point in the discourse surrounding fact checkers.

Greenwald argued that one of the problems with fact checkers, what Greenwald characterizes as fact checking's own act of deception, is that they present their sources as ideology-free, objective experts when in reality these sources are invested in one ideological position or another. If nothing else, there is a bias toward "establishment" values, meaning that in choosing these experts "the fact-checkers have set their sights on identifying not only which statements are true, but which are *legitimate*" (Marx, 2012, para. 12). The very act of calling someone an "expert" is a value judgment in and of itself. This need to consult "experts," Lucas Graves (2013) argues, threatens to draw fact checkers "into a highly politicized landscape of analysis and opinion retailed in service of ideological agendas" (p. 16). The implied decisions about legitimacy are also always present since, as Graves also notes, "certain groups and specific experts are seen as 'academically solid' despite their broader ideological orientation" (p. 17).

In defense of Politifact's choice for the 2011 lie of the year, Bill Adair, the creator and editor of PF, discussed the list of candidates for the award, giving reasons for why each was not chosen. This is another factor in how the fact checking process is not necessarily value-free. In his research, Graves gives some useful insight on this point. Using participant observation, Graves went through the fact checking process, and he talked to editors who have done the work. He wrote:

> What one editor described as the "art of finding a checkable fact" involves considerations of newsworthiness, meaning political significance as well as likely utility or interest for the imagined audience; of fairness or balance, whereby fact- checkers endeavor to scrutinize figures from "both sides" of the American political spectrum; and of "checkability." (p. 9)

These findings are present in Adair's (2011) explanation for the 2011 choice in which he cites the fact that other potential "lies of the year" did not have a significant impact on political debate. They looked at Rep. Michelle Bachmann's (R, MN) claim that "the HPV vaccine can cause mental retardation" (para. 5), Sen. John Kyl's (R, AZ) claims about Planned Parenthood spending 90% of its funding on providing abortions, which was followed by his staff telling CNN that the figure was "not intended to be a factual statement" (para. 11), and Mitt Romney's claim that President Obama "apologized for America" (para. 16). Adair said that PF had concluded that all of these statements were falsehoods, but none of them had the impact the Medicare "lie" had on public discussion.

Adair (2011) concludes his explanation saying, "The statements made about [Paul Ryan's] original [Medicare] plan were clearly inaccurate, they were repeated by many Democrats and they perpetuated a 60-year tactic in using false claims to scare seniors" (para. 21). Perhaps this is what it comes down to, the fact that Democrats have had more than half a century of political victories based in part on what many people in politics call a "Mediscare"[25] strategy. This is true. However, scary and false are two different concepts. All of this taken together, the conflation of "scary" and "false" along with the choice of not just a false statement but one that is impactful, makes the 2011 Lie of the Year a useful point of examination for looking at how the fact check is a political act.

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[25] There is no "dictionary definition" of "mediscare" but it is a commonly used political term. A Google search for it will return tens of thousands of results of articles and blog posts. It basically refers to a politician or campaign that attempts to convince older voters that an opponent plans to dismantle or reduce funding to the federal program Medicare. The implication is that this is done to scare older voters away from voting for the opponent for fear of losing Medicare coverage, hence the name "mediscare." The tactic is more commonly associated with Democrats using it against Republicans although it has come from both directions. An accusation that an opponent is running a mediscare campaign generally carries with it some implication of dishonesty. Jamieson and Waldman (2003) describe a good example of this from the 1996 presidential campaign between President Bill Clinton and Republican challenger Sen. Robert Dole during which Clinton claimed "that by proposing a smaller increase in Medicare than Democrats wanted, Republicans were trying to 'cut' the program" (p. 177).

First, the act of fact checking is political in that it alters both the way political discourse functions and the content of that debate. A politician will make a statement, the fact checker declares it true or false; now every time someone repeats that statement there is the potential for the press, opponents, or questioners in an audience to chime in with the fact check. “My opponent and his party want to end Medicare,” the politician says. “Didn’t the fact checkers say that isn’t true,” the audience responds. Now there is an at least supposedly credible source to easily cite, and the politician is pushed back on his heels, in a posture where he is responding rather than asserting. The fact check takes an arrow out of the politician’s quiver. If politicians, or their supporters, continue to make the supposedly false claim, it only serves to make them look unreasonable in the face of overwhelming evidence against them.

Second, the “lie of the year” award takes fact checking to another level. To say, “Paul Ryan’s plan would cut Medicare,” is something to be fact checked. It takes a broader statement, such as “Republicans want to end Medicare,” to become the lie of the year. Adair points out that Democrats have been using this “Mediscare” strategy for decades. This is true; Democrats have effectively won elections by telling senior citizens that Republicans wanted to end Medicare. The problem for Adair is that, while specific claims may be false, the general claim is true; Republicans have historically been opposed in varying degrees to Medicare. The “lie of the year” award makes it more difficult for future Democrats to state that Republicans want to end Medicare, even against candidates about whom the claim is true.

This is how fact checking, from an examination of the smallest sentence to the declaration of lie of the year, is a political act. Fact checking alters the landscape of

political discourse; it changes what is acceptable to say and the acceptable ways in which it can be said. The "lie of the year" not only made it more difficult for Democrats to make this claim, it also made it safer for Republicans to talk about Medicare reform with less fear of a "Mediscare" response. So the politicians of both parties end up debating the fact checkers as much as they are debating one another. Fact checking is a political act, it embeds itself in the political process.

What the 2011 choice, and Adair's defense of it, also did, perhaps inadvertently, was to reinforce the perception that the fact checkers were not only examining claims and coming to conclusions about their veracity but were also coming to conclusions about what kind of claims should be acceptable in American political discourse. George W. Bush's statement questioning the news media's claim to representing the people, the Newhouse quote about fact checkers dictating the campaign, Glen Greenwald's argument about establishment journalism, along with the centrist impulse of journalism, all should serve to remind political actors that, as the *Washington Post* fact checker told Graves, "Facts can be subjective. Depending on your opinion, you look at the facts in a different way" (p. 22).

V. Conclusion

One of the problems with the fact-checking genre is a problem discussed in the typology of deceit in Chapter 4 of this project. Before reporters can begin to engage in the process of checking facts and declaring lies, the very concepts of "facts" and "lies" must be defined. As this project has already discussed, proving that someone is lying can be a difficult task. If a lie is "an intentionally deceptive message in the form of a

statement" (Bok, p. 15), how does one prove intention on the part of the politician who is supposedly lying?

In addition to the problem of proving someone is lying, there is the problem of degrees of truthfulness. How should a journalist handle a statement that is literally true but gives a false impression (number four in the typology)? Ben Smith, in an article for *Politico*, raises this question. Smith (2011c) points out that PolitiFact rates some political statements "mostly true," "half true," or "mostly false," thus "statements that are literally true get ratings other than 'true'" (para. 9).

> One PolitiFact item, for instance, rated Alabama Republican Dale Peterson's technically accurate statement that he "was in the Marine Corps during the Vietnam War" as "mostly false" because he hadn't served in Vietnam.
>
> And [Glen] Kessler [the fact check reporter for the *Washington Post*] awarded the White House "two Pinocchios" for claiming "bipartisan support" for a series of proposals, some of which had as few as two Republican supporters. Literal truth, by these measures, isn't enough. (para. 11-12)

Here Ben Smith is quite right; it is problematic that literal truth could be rated as somehow false. For example, a listener could draw one of two conclusions from a politician who says, "I was in the Marines during the Vietnam War." Either said candidate is attempting to give the false impression that he actually served in Vietnam when the truth may be that he was stationed in Germany at some point during the years in which the Vietnam War was being waged, choosing his words very carefully so as to not

literally say he served in Vietnam when he did not, but also allowing the listener to draw the conclusion that the politician *had* served in Vietnam. On the other hand, the politician could simply be making an innocuous statement about *when* he served with no intention whatsoever to mislead the listener into a false impression about *where* he served.[26]

This is one more reminder of the fact that, despite their claims to apolitical neutrality, fact checkers are always already part of the political process. They are not political in the way that parties are political. The fact checkers are political in the sense that they occupy a position in between positions. Journalists of course have their beliefs, be they liberal or conservative. However, an ideological position is not the same as a partisan position. An ideologue works to advance a belief system; a partisan works to advance a team. The journalist's ideology, at least ostensibly, is the belief in a neutral interpretation of reality intended to help make good decisions to do what is best for a community. This is admittedly the most romantic reading of what journalism is but all political beliefs need a bit of romanticism. This is how journalism's self-description as a neutral arbiter is a political rhetoric.

Wayne Booth (2004), in his examination of the concept of rhetoric defines it as "*the entire range of resources that human beings share for producing effects on one another*" (p. xi). He defines it as both the "symbolic arts of *producing* misunderstanding" and "the art of *removing* misunderstanding" (p. 9). This, it would seem, is a pairing of contradictory notions. One might also argue that rhetoric is simply those communication

[26] A campaign manager I interviewed for an article I wrote for *Campaigns & Elections* talked about the problem of language choice and the fact checkers (Spicer, 2013). Speaking to me on background, that campaign manager said that during a statewide race their campaign had produced a television ad that they felt was perfectly accurate but a fact checker rated "false." The campaign changed literally one word in the ad and the fact checker changed the rating to "true." This small word choice reiterates the fine line between truth and falsity that can be created by semantics and the problems it can create for candidates.

acts that surround misunderstanding, whether they are directed toward increasing or decreasing it. Ben Smith finds the fact checkers in the middle of this entanglement, where true statements can be rated false. The problem is that some true statements are, perhaps not false, but used in misleading ways. This is the problem fact checkers face, not just rating a statement true or false, but also digging deeper to decipher the politician's use of the statement and whether that use is misleading.

This returns us to the intrinsic contradiction at the heart of the free press discourse, which is also present in the fact checking discourse. It is the intrinsic contradiction between the simultaneous discursive apolitical neutrality and political watchdog constructions creating the hidden unity at the heart of the discourse. This is also the inherent contradiction that makes the discourse function as it should. Once again, it all comes back to Arnett's idea that by remaining at least ostensibly neutral journalists reported the facts and were able to bring an end to the Vietnam War. In such a discourse an activist's message is easily dismissed because he is just an activist. It is assumed that the activist is pushing his agenda and that he likely has little regard for facts, especially those facts that are inconvenient to that agenda. The neutral, apolitical actor, on the other hand, is just an observer distributing information. Should the public come to certain conclusions as a result of that information, it is not because the observer was an activist persuading the public to his or her side; it is because facts came to light and a rational public reached correct conclusions as a result.

This reveals the political nature of neutrality. The Left and the Right situate themselves in explicitly political positions. They each use neutrality as a rhetorical tool when necessary to persuade the public to accept a political position. For example, a

member of Congress can point to a Congressional Budget Office (CBO) report as evidence to show that a policy has or has not worked because it is widely accepted by people across the political spectrum that, no matter who is in office, the CBO is a neutral analyst of data. However, these political actors in this instance are not using neutrality as a discursive tool. A rhetorical use of neutrality is a persuasive tool in a single debate; a discursive use of neutrality builds a political structure through which a particular political institution, such as the CBO or the news media, is understood.

If journalism is to contribute something of value to society, not just be a conduit for banal bits of politically manipulated data but to be a force for positive social change, the journalist as an individual and journalism as an institution must think about *how the journalist is a political actor*. Will it be more useful for the journalist to situate herself as an overtly ideological crusader, a sort of Ida Tarbell? Is it better to be a neutral, objective observer who disseminates useful information that helps the public decide how to vote, what policies to support, how to act, and what to think? The creation of the fact checkers, their acts of calling on certain "experts," the continued evolution of the watchdog discourse, and the employment of a discourse of objectivity would all seem to indicate that the neutral observer is the preferred public persona for the journalism industry.

This persona is challenged by the derived contradiction of the media bias discourses of the Left and Right, which seem to see opinion infiltrating every facet of news media coverage of politics, although that infiltration comes from different places, depending on the source of the bias accusation. For the Right there is an obvious bias toward liberal cultural values; for the Left it is corporate capitalism, militarism, and "establishment" values. These accusations create a larger vilification of the press, a

subcategory of the vilification of public institutions, creating the need for this fact checking bifurcation, “a strange sort of division of labor” where the news media seem to say to the reader, “all of these reporters over here will record what's being said by politicians, while this one guy, or one organization, over here with the fact-checker cap on will tell you whether it's true” (MacGillis, para. 2). What makes this doubly problematic is that alongside the vilification of the press is the weakening power of the press and the coinciding increase in power of the campaigns and their surrogates, the public relations apparatuses that continue to very often mislead and manipulate the public, despite the fact checkers’ best efforts.

One study by the Pew Research Center (2012) found that in the 2012 presidential campaign “More of what the public [heard] about candidates … [came] from the campaigns themselves and less from journalists acting as independent reporters or interpreters of who the candidates [were]” (para. 2). The study found that only about 25% of what the public heard about President Obama and former Gov. Romney during the campaign came from reporters. More than half of what the public heard about the candidates came from partisans (para. 3). The study also found that the campaigns and their surrogates used that increased prominence to push more negative messages about their opponents.

These findings, along with research questioning the effectiveness of fact checking, like that done by Nyhan and Reifler (2010), indicates an urgent need for change in how deception in political campaigns is handled not only by journalism but also by the larger political community and the law. This is what will be addressed in the final chapter. If the power of the news media is in decline, and campaigns are increasing

their power, while improving their persuasive tools, what is to be done? The judicial discourse of the marketplace of ideas is contributing to these problems, and it is necessary to begin pushing back against that, to develop a counter-discourse that will allow new, community-oriented solutions to campaign deception. The courts have produced decisions such as *Alvarez* that make it more difficult to punish unambiguous and purposefully false statements. While it is problematic that small-time politicians in local elections are free to lie with impunity the bigger problem is that the combination of *Alvarez* with the Supreme Court's decision in *Citizens United* makes it easier for super PACs to spend billions of dollars bankrolling much larger deceptions. The final chapter of this dissertation proposes a campaign ethics council as one potential solution to begin pushing back against this judicial discourse and the total faith in the marketplace of ideas that protects deceptive practices.

Chapter 8 – When More Speech is Not Enough: An Argument for the Regulation of Political Deception Through a Campaign Ethics Council

I. Introduction: Truth, Lies, and Consequences

This project has demonstrated that not only is there a great deal and wide variety of deception in politics but there also is quite a bit of hand wringing over that deception. Chapter five shows the variety of attempts to use legal means to address the assorted problems of deception in politics. Some of these possible solutions certainly face constitutional problems in light of the U.S. Supreme Court's decision in *U.S. v. Alvarez* (2012). *Alvarez* suggests that courts may make it more difficult than ever to address the problem of deception through any "non-marketplace" mechanisms continuing to hold that the only constitutionally acceptable solution to deception should be truthful speech used to correct political misperceptions and purposeful deception.

One of the fundamental purposes of this project is to reject that position. The argument here is that when there is purposeful political deception, when a political actor knowingly disseminates demonstrably false information, acting with actual malice toward the integrity of the electoral process or with the intention of misleading voters about an issue, there should be negative consequences that will help deter future deceptions. However, those consequences, despite some arguments for expanding the criminalization of lying (Druzin & Li, 2011), should never be handled in a criminal court, in part because of the disastrous results of criminal libel laws, such as the one applied to a newspaper in Kansas called *The New Observer*, where the editors were charged with criminal libel

(Kirtley, 2002).[1] This chapter will argue that deception in political advertising should be handled either in a civil court or through an independent committee, a binding arbiter empowered to handle disagreements over deception in campaigns, that will not be given the authority to enforce criminal sanctions but will rather mediate disagreements and bring about a resolution for the aggrieved party. This process will be described in greater detail later in the chapter.

This chapter proposes a solution to the problem of deception in politics intended to address not only campaign lies but also lies told by those who govern. It is an attempt to begin to correct the culture of politics and to propose a counter-discourse to the dominant one that sees a didactic choice of freedom or not freedom, which imagines freedom as simply the absence of government. The chapter is broken into two sections. The first section discusses legal scholarship that specifically addresses the issue of regulating campaign deception. One of the central questions of such scholarship is the issue of defining the line between individual liberty and the role of government in political life. This question will be addressed in the context of that legal scholarship. The second section is a proposal for a solution to the problem of deception in politics, a solution that brings negative consequences for deception, but does so in a way that is not overly punitive, through the creation of a campaign ethics council. The proposal is an argument for a competing ethos to the marketplace of ideas discourse; it is an argument for an alternative way of thinking about political debate, free speech and deception. It is broken into five sub-sections describing processes for deciding (1) membership on the council, (2) funding

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[1] The *New Observer* is a local, monthly, white supremacist newspaper in Kansas City, Kansas. David Carson and Edward H. Powers Jr., the editors of the paper, published an article claiming that Mayor Carol Marinovich lived outside of the county where she held office, which would be a violation of election laws (Kirtley, para. 1). The report was false and the two editors "were given fines and probation by a Kansas trial court judge after being found guilty of criminal libel" (Dadge, 2004, p. 266).

of the council, (3) the council's powers and responsibilities, and (4) public access to the council. The fifth section will discuss the history of press councils, also sometimes referred to as news councils, and the example they offer for designing a campaign ethics council.

Although this chapter argues for a non-market based solution to political deception and questions the validity of the idea of a self-correcting process behind free speech, it is *not in any way* an argument for the criminalization of any political speech. In fact this chapter argues that every state law mentioned in chapter five that carries the potential penalty of prison or jail time should be amended to remove those consequences. Even a government-sanctioned fine is problematic, although a fine could be acceptable if it is the campaign coffers that are targeted by the fine, not an individual speaker's personal bank account.[2] Political speech, even false political speech, should under no circumstances carry with it the fear of criminal sanctions through a fine or incarceration.

There should, however, be some negative consequences for purposeful deception in the political arena. The solution to deception in politics is not punishment, legal sanction, or the state codifying the defining of truth. Rather, the solution is in affect, in *feeling*. The solution is shame, professional sanction, and the acknowledgment by one's colleagues that one has violated the ethical norms of professional practice in political

[2] Targeting fines toward campaign coffers instead of individuals can create some complications. I can speak to this from personal experience. In 2004 I was managing a state house campaign in Pennsylvania. At one point we filed some finance paperwork a day or two late and had to pay a fine. The law explicitly said the fine had to be paid from the candidate's personal account and campaign money could not be used. I personally find this problematic. I spoke with a friend who is a former campaign consultant working in Washington, D.C. He explained that campaigns are treated similarly to limited liability corporations (LLC). This is where this issue becomes tricky. If a campaign ends with debts unpaid the people who are owed money can only sue the campaign as an organization. The candidate's personal finances are protected. So, for example, if a campaign gets fliers printed, has not yet paid for them, and then loses the race with no money left in the bank, that printer is going to have a hard time getting that bill paid. The government would likely be in the same situation trying to get a fine paid. This is a downside for my argument here but it is preferable to the downside of sending people to prison for making false statements, even purposefully false statements.

activities. Many state bar associations list knowingly lying as an infraction that can be grounds for disbarment. This is not to say that political campaign managers should need a license to practice their trade, but to ask why it is that they do not at least face similar consequences when it can be demonstrated that they purposefully misled that public? Political participants who breach the norms of good behavior should be subject to derision in the eyes of their colleagues and the public and there should be some consequences for purposeful deception. This is essential in order to deter future misbehavior and reign in the problem of political deception. While this project has argued strongly against the U.S. Supreme Court's decision in *Alvarez*, it also recognizes that this decision has set a legal standard for how deception is handled *vis-à-vis* free speech concerns. With this in mind, the proposal outlined here is designed to stay within the legal parameters set by the *Alvarez* court.

This solution is an attempt to split the difference between the marketplace of ideas argument on one side and the categorical or quasi-categorical moralist approach to critiquing deception on the other. The marketplace approach naively imagines a world where, even if there are lies, discussion brings about an organic process for discovering truth. Categorical moralism, on the other hand, is an ineffective critique bordering on useless, perhaps even dangerous. This critique is exemplified by Kant's argument against it being "morally permissible to lie to the murderer about the whereabouts of his intended victim," a position best described, by William Simon (1998), as "a sanity test flunked by Kant" (p. 435). This philosophical position is unable to move beyond saying, "lying is bad or unethical or immoral." It is unable to see there may be instances in which lying may be good, useful, or necessary. Categorical moralism sees only that deception is wrong,

whereas the marketplace seeks to make a bargain with deception, that we might learn to live with it if we can only live without government.

In other words, opposition to such laws is based on a very simple premise summed up by the aforementioned Jeffersonian principle, “I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it” (Jefferson, 1791). In essence, the argument of this opposition amounts to an admission that there are problems that come with the absence of government intervention and there are problems that come with too much government intervention. The opposition simply chooses those problems that come with the former. Lying and deception in campaigns are things the public must live with, this discourse suggests, as the liar enjoys the protection reflected from the protection that virtually all scholars agree is offered to honest discourse. This idea must come under repeated scrutiny, even if there is consensus around it. Scholars of law and politics and political actors must continually reevaluate this position and debate whether this calculation should stand.

Much of the discussion surrounding truth-in-politics laws focuses only on the issue of protecting an individual’s reputation, “the right to protect one’s good name” or, as Supreme Court Justice Potter Stewart wrote, the “basic concept of the essential dignity and worth of every human being” (*Rosenblatt v. Baer*, 1966, p. 92). Here defamation becomes the central concept for defining the law and its application in the context of political speech. This is an important avenue for getting to a solution to the problem of the calculated falsehood in political speech. However, it is not the only route one can take. Williams (2007) argues there are two rationales behind regulating false political speech: the protection of a candidate's reputation and the protection of the integrity of the electoral

process (p. 329). While the former is always a concern, the focus of the argument for this chapter is the latter. This chapter concerns itself above all with the integrity of U.S. elections and the fact that, if politicians and their handlers are legally allowed to lie with impunity, there can be very little integrity in the electoral process. More important, if there is no integrity in how leaders are elected, one must ask, how can there be any legitimacy in their claim to the power to govern?

Another problem critics might see with this proposal stems from *New York Times v. Sullivan* (1964) and the idea that the public should be able to criticize its elected officials freely. This chapter argues that exactly the opposite problem emanates from the absence of truth-in-campaigns laws. Supreme Court decisions that make some truth-in-campaign laws at least potentially unconstitutional make it more difficult to hold elected leaders accountable when they propagate falsehoods. This echoes Kane (1999), who argues that a chilling effect makes it difficult for a political challenger to bring a defamation suit against an incumbent. Essentially it discourages the political participation of non-incumbents if they know the incumbent not only has the advantages of incumbency, including greater access to money and media, but is also able to destroy a challenger's reputation with impunity and little to no legal consequences for lying about the challenger (p. 805).

Is it a truly maintainable system that gives a group of people–whether they are politicians, political operatives, or members of the press–total immunity from any liability for, not only some defamatory statements, but also purposeful falsehoods about issues, and misrepresentations of themselves? This is what the law, not only in light of *Alvarez*, but also *Washington v. 119 Vote NO! Committee*, effectively has done. As Justice Phil

Talmadge said in his concurrence in that Washington State Supreme Court decision, the court became "the first court in the history of the Republic to declare First Amendment protection for calculated lies" (1998, p. 701). More important, while protecting calculated lies in the name of saving individual speech from intrusion by government, the First Amendment perspective espoused in such decisions only turns over even greater power to government to lie and thus suppress the speech of critics.[3]

II. On Freedom, Authority, and Legal Scholarship

Before embarking on this discussion it is essential to define its parameters. The word "liberal" is especially problematic because of its common use and misuse. For example, the contemporary Democratic Party is referred to as the liberal party in American politics. While there is a cultural liberalism in the party's platform (i.e. a belief in gay rights would be a liberal position) the party platform also espouses a belief in the regulation of commerce. Advocating government intervention in economics, as opposed to free market economics, is not traditionally liberal. This discussion, however, uses "liberal" in the way Jacob Torfing (1999) does as the tendency to "privilege *rights* over *obligations*" (p. 263), the belief that freedom is best defined as the absence of constraint. The word could also be described as libertarianism as Fred Siebert (1963) called it in *Four Theories of the Press*. Some, Laura Stein (2006) and David Harvey (2007) for example, call it neoliberalism. Harvey's neoliberalism includes Reagan and Thatcher, who are more commonly referred to as conservatives. For some, "liberal" refers to Barack Obama, for others it is "classic liberalism" that is exemplified by the philosopher John Stuart Mill.

[3] Shepardizing these two cases shows that they have been cited in numerous cases, although *Alvarez* has been cited far more than the *119 Vote No! Committee*. Shepard's Citation Service in LexisNexis shows that as of this writing *119 Vote No! Committee* has been cited 28 times with only one of those cases being critical of the decision. The *Alvarez* decision has in less than two years been cited in 74 cases with only two of them being critical of the decision.

"Liberal" is used here to refer to a belief in negative liberty, the absence of constraint. Defined by Zizek (1994) through the lens of his three-part conceptualization of ideology, "liberalism is a doctrine (developed from Locke to Hayek) materialized in rituals and apparatuses (free press, elections, market, etc.) and active in the 'spontaneous' (self-) experience of subjects as "'free individuals'" (p. 9). This is the definition of liberalism at work in this chapter.

Once liberalism is defined, the next question of importance for this chapter is posed by Torfing (1999), who asks, "is it really possible to create a synthesis of *liberal individualism* and *republican communitarianism*?" (p. 266). He concludes, "common, political obligation is perfectly compatible with individual liberty" (p. 266.). The conclusion of this chapter is not just that individualism and communitarianism are compatible, but that some variation of combining the two is essential to the survival of a political system. This echoes Torfing's argument that "The absence of a common, political obligation fosters a gradual weakening and impoverishment of the political community, which in turn may result in a failure to secure the rights of the citizens and uphold the liberal democratic regime" (p. 265). This position is applied to the problem of political deception to justify the idea that political lies must be punished and deterred and that this can be done without threatening individual liberty.

The liberal judicial discourse that resists any and all regulation of political lies is the product of a line of thought critiqued by Shadia Drury (1996), who connects lies and ideals, ideals being false statements that over-idealize our political reality. As an example, Drury argues, "Madisonian principles defend free speech as a vehicle for civil participation, deliberation, self-actualization, and meaningful dissent. These principles are

totally at odds with the triviality, passivity, pleasure, and self-gratification that drive the electronic entertainment culture" (p. 1227). When it becomes clear that a society is not living up to its ideals such as those Madisonian ideals of free speech, "We begin to feel that we are living a lie" (p. 1228).

An example of a statement of ideals would be trickle down economics. This is the argument that giving tax cuts to wealthy individuals and corporations will allow them to spend that money in ways that will create employment and that money will trickle down to workers and middle-class families. This was an ideal that was widely circulated and accepted by many people during the Reagan years.[4] The moment at which society would begin to interpret this argument as an idealized lie would be if the policy is continually implemented and the income and wealth gaps continued to increase while those working families saw little or none of the economic benefits of the policy. When the ideal espoused and the reality experienced become too disconnected from one another is when the ideal is understood to be a sort of lie in the way Drury describes it. The law is not allowed to distinguish between some truth, a lie, and a statement of ideals just because that statement of ideals does not coincide with a perceived reality and, in so doing, deceives the public. The law is also constrained from punishing factually false statements for the sake of protecting statements of ideals.

By protecting lying and other forms of deception through the First Amendment in the name of promoting individual liberty and providing a bulwark against government

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[4] Trickle down economics is a widely debated and controversial economic theory. While it was popularized in the political debates of the 1980s it actually dates at least as far back as comedian Will Rogers who used the phrase to characterize Herbert Hoover's economic policies (Quiggin, 2012, p. 137). Conservative political commentator Thomas Sowell (2012) defends the effectiveness of the theory in his book, arguing that critics have mischaracterized it. Australian economist John Quiggin (2012) included the idea on his list of "dead ideas that still walk among us" in his book *Zombie Economics*. British discourse theorists Isabela and Norman Fairclough (2013) included trickle-down economics in a discourse analysis of the economic crisis of 2008.

abuse of power, this legal regime also empowers government abuses by giving government the power to lie. It allows both individual elected and appointed officials the freedom to lie and deceive. It also allows the government as an institution to deceive the public. Philosophically speaking, it places freedom and truth (unnecessarily) at loggerheads with one another and in terms of practical political application it strengthens the power of empire to "create its own reality" (Suskind, 2004, para. 62). In professing to protect liberty from the abuses of power, it only strengthens abusive power by protecting its most useful tool: deception.

Slavoj Zizek (2011) argues, "There is in liberalism, from its very inception, a tension between individual freedom and the objective mechanisms which regulate the behavior of a crowd" (p. 36). This is the paradox of the classic liberal notion of freedom as the absence of constraint upon choice. Zizek's analysis places this problem in the context of contemporary politics, where a political Left looks to protect individuals from the excesses of unrestrained market capitalism and a political Right wants that market to go unrestrained while imposing "family values" through various legal and cultural mechanisms (p. 37). In the end, Zizek argues, the freedom of liberalism becomes the greatest tyranny of all, "its modest rejection of utopias ends with the imposition of its own market-liberal utopia" (p. 38). In the case of political speech it is the utopia of the so-called self-correcting marketplace of ideas.

This is part of the thinking behind the call for a campaign ethics council in Part IV of this chapter. Some legal scholars argue that, even if one wants to implement a "truth-in-campaign-ads" law, a political equivalent to the false-advertising laws that restrict product advertising, it would be difficult to get around the dominant First Amendment

jurisprudence.[5] The courts have knocked down such laws in multiple cases (*Minnesota v. Jude* 1996; *Washington v. 119 Vote No! Committee* 1998; *Rickert v. Washington Public Disclosure Committee* 2007) and so punishment through fines or imprisonment are not workable, nor are they desirable, solutions to the problem. What a campaign ethics council would do is recognize, punish, and hopefully deter lying and other forms of deception in political campaigns in a way that provides a forum for what George Orwell (1972) called justice and common decency, a belief that the material existence of citizens, how they come into contact with one another in "family life, the pub, football, and local politics" should be the organizing principle of politics (pp. 176-177).

That First Amendment jurisprudence that disallows most statutory solutions to political lying made its way to the U.S. Supreme Court most recently in *U.S. v. Alvarez* (2012). That decision held that the law must remain value neutral, the public is subjected to the excesses of the unrestrained market for ideas, and market failure is expressed in the form of deception. This, as Stein (2006) argues, is the result of a First Amendment near-absolutism that does not "differentiate between laws that expand or support and those that curtail speech" (p. 7). In other words, the presence of government is not always a force of restriction; it may also protect and enhance freedom. For example, acknowledging the

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[5] In 1976 in the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* the U.S. Supreme Court held that the First Amendment protected commercial speech, for example speech advertising a product, but they made sure to clarify that they were not holding that such speech could "never be regulated in any way" (p. 770). In his analysis of commercial speech and the First Amendment C. Edwin Baker (2009), professor of law and communication at University of Pennsylvania Law School, cites false or misleading advertising, advertising for illegal products or services, and time, place, and manner restrictions as ways in which the Court said commercial speech could be regulated (p. 982). The Court said in *Virginia State Board of Pharmacy* that, "In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction,' *Pittsburgh Press Co.,* v. *Human Relations Comm'n,* 413 U. S., at 385, and other varieties" (p. 771, footnote 24).

protection of truth through the recognition and punishment of deception enhances freedom by protecting citizens from the deception of political leaders.

Legal scholars have proposed a number of solutions to this problem, arguing in favor of some form of regulation of political deception (Harvard Law Review Association, 1957; Winsbro, 1987; Hall, 1991; May, 1992; Richman, 1998; White, 2009). Others have argued against any such statutory solutions (Marshall, 2004; Rodell, 2008; Varat, 2007). Within these discussions freedom, control, responsibility, and truth come into conflict with one another, but what these discussions make clear is that attempts to place them into conflict create a false choice. A political system need not choose between freedom and truth, or between freedom and control, or between freedom and responsibility. These concepts can, and sometimes must, coexist peacefully.

In his examination of lying in political ads, Jack Winsbro says that freedom and restriction *must* coexist. Winsbro (1987) argues that democratic theory assumes voters will make choices based on available information and that if that information is false it will defeat the entire purpose of the process (p. 863). He cites the example of Sen. Robert Taft's re-election bid in 1950 in which he was falsely accused of opposing raising the minimum wage. In this example Taft could have easily corrected the record but instead chose to call his accusers "communists." This is because, as Winsbro argues, correcting the record usually does not help win an election. In most cases the most effective response is for the candidate to return fire or to ignore the charges (Winsbro, p. 890).[6] Political attacks beget political attacks. So, politicians having free reign to lie threatens the

[6] Although there appears to be no published research with quantitative data demonstrating that Winsbro's argument is correct it is widely accepted conventional wisdom. Winsbro cites the example of campaign operative Walter Quigley who believed the only campaign he ever lost was lost because he did not go on the attack against the opponent. This conventional wisdom is best exemplified by the old Washington, D.C. cliché, "if you're explaining, you're losing."

reputations of political participants, the integrity of the system, and conflicts with attempts "to keep the voter's mind free from the polluting effects of false information" (Richman, 1998, p. 679).

While Winsbro acknowledges these needs, he is also pessimistic about the possibility of meeting them because of the First Amendment impeding restrictions on political lying. His best statement of his argument comes in his conclusion where he says that it would be a "cruel irony" if the First Amendment, which had been designed to protect and enhance political speech, ended up being "an absolute bar to the elevation of political discourse" (p. 916). Gerald Ashdown (2012) comes to a similar conclusion, arguing that the Supreme Court applies "with a vengeance" to First Amendment jurisprudence the idea that false campaign speech statutes have a potential chilling effect on valid speech and that any "legal device that discourages [political] engagement threatens to undermine democracy" (p. 1095). Ashdown's argument is echoed by Cleveland Ferguson (1997), who argues that, "legislatures that truly desire to curb negative campaigning must operate within a narrow regulatory environment" (p. 500).

Despite the challenge posed by a high First Amendment hurdle, some legal scholars have proposed possible solutions to the problem of deception in politics. Janet Hall (1991) proposes "a private, non-partisan committee" made up of seven volunteer members who are not affiliated with any political party, which would "circulate a voluntary code to candidates" and "would issue findings of fact, but would have no power of law" (p. 373).

Peter May (1992) proposes "a combination of symbolic and instrumental measures to discourage deceptive negative political broadcast advertising" and, like Hall, calls for a

Code of Fair Campaign Practices "to which candidates may subscribe voluntarily" (p. 206). His proposal includes publicizing of a list of candidates who subscribe to the code (p. 206), and fines enforced by the state for campaigns that employ anonymous attack ads (p. 208). May concludes that some action is necessary because "state and federal regulation has inadequately deterred political candidates from choosing to lie and misrepresent in their political advertisements" (p. 212). This last point reinforces one of the points of the Taft incident described above. Politicians force one another into scenarios where they have to return fire and the political and legal systems have done little to mitigate the ugliness.

This fact, taken with the current Supreme Court and its decision in *Alvarez*, present a political exigency, a moment to reconsider the meaning and value of freedom, to ask *what it means to be free*, if that particular meaning of freedom is useful or desirable and, if so, how to best maintain that notion of freedom in our contemporary political system. A judicial system that is worth anything must ask not only the philosophical meaning of freedom, but also its implications in the actual application of the law. The next section delves into the actual practice of politics proposing what a campaign ethics council might look like and how it might engage in the practice of regulating political deception.

III. Developing a Campaign Ethics Council and Counter Legal Discourse

A workable solution to lying and other forms of deception in political campaigns could begin with a combination of aspects of approaches advocated by courts in *Michigan v. Dewald*, *Pestrak v. Ohio*, and *281 CARE Committee v. Arneson* (2013). *Dewald* presents an argument that is useful for justifying the need for regulation and the basis for a test for defining what constitutes a "regulatable" lie or deceptive practice. *Pestrak*

contributes a model for creating a committee that would implement the regulation and information that could help develop a plan for how a council would employ the "regulatable" lie test. From the *281 Care* decision comes support for the constitutionality of such a council.

The Dewald Four-Part Test

In its decision in *Dewald* (2005) the court presents a four-part test for defining an act as violating Ohio's false pretenses statute.[7] The test asks whether (1) there was a false representation of facts, (2) the defendant had knowledge of the falsity, (3) the defendant used the false representation to deceive someone, and (4) there was a "detrimental reliance by the victim" on that false information (p. 173). The fourth prong of that test is most useful. Did the victim of the fraud rely on the false information to guide his or her actions? Did that reliance on false information end up harming the victim in some way? In *Dewald* the "detrimental reliance" victimization came from the fact that individuals donated to Dewald's political action committee (PAC) under the false pretense that (a) he was affiliated with, in some cases the Bush campaign in other cases the Gore campaign, and that (b) their donations would go directly toward helping one campaign or the other (p. 174). Simply put, Dewald was asking both Bush and Gore supporters for money and giving those supporters the false impression he was affiliated with whichever campaign he was asking the potential donor to support.

Chapter five of this dissertation discussed this notion of detrimental reliance in political communication. The public relies on certain organizations for information about the candidates who are asking to be considered for office. The public relies on reporters,

[7] The false pretenses statute in question here, MCL § 750.218 (False pretenses, 1931), is a statute making it illegal to use false pretenses to defraud another person out of land or money.

who are at least ostensibly objective and sometimes on political commentators on cable news programs that are openly partisan; but chief among the groups upon which the public relies are the campaigns themselves. The reliability of the information disseminated by the campaigns is even more important when considering that a Pew Research Center study (2012b) found that 48% of what the public hears comes from the campaigns, not reporters or other third-party observers (para. 15). So despite attempts on the part of journalism to be a more prominent part of the public's information diet, the campaigns and their machines are becoming more powerful in the management of how information flows to the public.

So it is more important than ever that there be some counter-balance to that power of the campaign PR machines. To develop this counter-balance it is essential to re-imagine what it means to hold power, who holds power, and how power is exercised by one sector of society over another. The judicial discourse surrounding free speech, especially the marketplace of ideas discourse, imposes upon this discussion a dichotomy. It is a discursive construction of public *v.* private or state *v.* individual, which by extension imposes upon the discussion arguments like those made by Justice Kennedy in *Alvarez*, which call upon allusions to Orwell, and imagine a world made up of only two possibilities. One option is pure freedom, where the First Amendment protects deception, which is seen as acceptable because living with the lies is preferable to living with a government that has the power to regulate those lies because the marketplace eventually will work those lies out of the system. The other option is authoritarianism, where the government is controlling minds, defining truth, and eradicating individual liberty. This is a false dichotomy, which defines freedom as only the absence of government intervention.

A theory of free speech that has something to say about deception, that addresses Schauer's lament, is one that must re-imagine freedom beyond the simplistic "absence-of-government" construction. Such a theory must agree with Kennedy's argument in *Alvarez*, however hyperbolic it may be in that context, that authoritarianism is undesirable and add to that assumption the idea that authoritarianism thrives on deception. However, the absence of government is not inherently also the absence of authority-abusing power. The state, the corporation, organized political movements and organizations such as super PACs and special interest groups can all act as sources of authority. The media are sources of authority, although it is important to not be lured into the trap of defining the media as one globular mass that is a source of authority, which might invoke the construction described by William Stead in chapter 6, but rather to see media as many different potential sources of authority.

Along with opposition to abuses of authority, a theory of free speech that has something to say about deception should contain a political argument that invokes "notions of community, civic virtue and active participation, which have been buried by the surge of moral individualism and the advent of the hyper-market society" (Torfing, 1999, p. 262). It is with Torfing's argument about civic virtue and active participation in mind that this chapter proposes a design for a campaign ethics council. The next four subsections of this chapter will explain how that council would work by discussing who could be members on the council and how they would become members, how the council would be funded, the powers and responsibilities of the council, and how citizens would gain access to the council in order to request that an alleged act of deception be explored.

Membership on the Council

A campaign ethics council would function best at a local/county level and at a state level rather than the federal level. There are a few reasons why. First there is Former Speaker of the U.S. House Tip O'Neil's old adage that "all politics is local." The council should address statements made by candidates for statewide offices and it would serve the important function of addressing claims made by local candidates and elected officials at the county level and in the state legislature. The second rationale is that there is a paucity of coverage given to local politics. This is noted in the *281 CARE* (2013) decision discussed in chapter 5 where the court said sometimes coverage of local issues can be almost non-existent (p. 29). A campaign ethics council would be another voice to fill that void. It could also be a catalyst for more news coverage of state and local candidates, officials, and issues.

Third, when national issues are discussed, the campaign ethics council at the state level would best serve its community by focusing on how those issues are filtered through lens of the officials who represent that state. The council should give the voters information on how their senators and representatives vote and the veracity of their statements on those issues. Finally there are logistical issues. Placing the council at the local level makes it easier to manage, gives the council a more manageable workload, and makes it easier for the average citizen to gain access to it. If the council works at the state level it should make every effort to make itself available to all residents.

The members on the council should reflect the ideals of it being a community-oriented organization rather than a top-down government committee. The chair and general committee should include respected members of the community who are agreed

upon by a general consensus of the voters and come from across the ideological spectrum. This could include former elected officials, retired judges, retired campaign professionals, journalists, academics, and business owners, but of the most importance is the inclusion of members of the community who are not part of the political world, for example homemakers and middle-income workers who are not otherwise politically active, do not volunteer for any campaign, and are not official members of any political party. The council should not be limited to members of the political class who would make it insular and react to campaign practices with an insider's mindset, which is likely to be different from the mindset of the average campaign observer. No one who is serving in government or employed in any way as a campaign official, or an active member of a political party, or working as a freelance political consultant in any way, may serve on the committee. All committee members who have a background in campaigns or government must be retired from that line of work.[8]

To give the council the necessary independence from politicians, members should be chosen through a popular, non-partisan election every two years, rather than appointed by an elected official. Political parties would, of course, have the First Amendment right to endorse candidates, but candidates would not be allowed to seek endorsements or any other kind of support, financial or otherwise, from any political party. This means no

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[8] In politics the idea of being "retired" could be tricky to define. There is an old saying that "the only cure for presidential aspirations is embalming fluid." The quote, which has been attributed to Bob Dole, Estes Kefauver, and Morris Udall, means that once the desire to run gets in your blood it is there until you die. One solution to this problem would be to add a provision that says that in order to be considered for service on the campaign ethics council a member must not have run for office, worked on, volunteered for, endorsed, nor donated to a political campaign in the last election cycle and may not do any of the above for at least one election cycle after leaving the ethics council. This law would be similar to so-called "cooling-off" laws, which restrict elected officials and their staff from working as lobbyists after leaving a government job. For example, members of congress and their senior staff have a one-year cooling-off period before being able to lobby Congress (Maskell, 2010, p. 10). For the U.S. Senate it is a two-year period (p. 10). According to the National Conference of State legislatures (2014) there are 31 states with similar laws at the state level (para. 1).

donations from political parties or PACs, and no support from a party campaign apparatus through a party.

To raise public awareness the state would hold public forums in different parts of the state. The number of public forums would depend on the size of the state. The schedule of forums should be set to make the forums as widely available to as many residents as possible. Videos of these forums should be promptly posted to the secretary of state's website or to a county website. The secretary of state's website should also contain a series of three-minute biography videos, one for each council candidate to provide personal and professional background and make their case for why they would like to serve on the council and why their service would be of value. There could also be a series of longer videos in which each candidate is interviewed in greater depth on issues of importance to the state or local community.

Funding the Council

The most ideal way to fund a campaign ethics council would be through tax dollars. However, this method would likely expose formation of the council to greater political opposition because of the generally negative reaction to taxation and government spending in American political culture. So the best proposal for solvency for a campaign ethics council would be to treat it as a non-profit organization that is funded through philanthropy, much like the Virginia Fair Campaign Practices Committee (VFCPC) model described by Hall (1991). As with Hall's model, the cost of running this council would be minimal, involving a small amount of funds to maintain a website. Communication with campaigns would be via email, but there should be some money to pay for printing

materials to communicate with candidates who do not have Internet access, which should be rare.

Since work on the council will be done on a volunteer basis there will be no operating costs to pay for council member or staff salaries. It should be fairly easy to raise this small amount of money through donations. Giving citizens the option to have a portion of their taxes spent on the council could also augment this. Just as there is a box on tax documents giving voters *the option to choose* to have a portion of their taxes go into the public funding of elections, there could be a checkbox for the campaign ethics council. In states where there is no income tax this would not be an option so the state legislature would have to appropriate the small amount of funding necessary from the general state treasury.

The main costs for funding the council would be to pay for members' expenses to attend meetings. If members are volunteering their time to contribute to this process they should not have to pay for travel from their home to a state capital. The council should also have the option to allow for virtual meetings. There might be some resistance to this idea as of this writing in 2014 but virtual meetings via teleconferencing, Google hangouts, and Skype are becoming more and more common. This would be a useful way to cut costs and make participation in the council more efficient and affordable. If, for example, the council were started in Pennsylvania a member living in Erie, Pennsylvania will have an approximately five-hour drive to the state capital of Harrisburg. To save the time and money of transportation that council member could participate via teleconference.

The Powers and Responsibilities of the Council

The decision in *Pestrak v. Ohio* (1991) is a good place to start when explaining the powers and responsibilities of a campaign ethics council. The case gives a good model for designing the council and addressing any concerns about the constitutionality of its functions. In 1984 Walter Pestrak was running for the Democratic Party's nomination for Trumbull County Commissioner in Trumbull, Ohio. He took out a campaign ad in a newspaper claiming his opponent, the Democratic incumbent, had committed "illegal acts" (p. 575). His opponent claimed Pestrak's accusations were false and filed a complaint with the Ohio Elections Commission claiming Pestrak had violated Ohio Rev. Code § 3599.091(B)(10)[9] which made it illegal to:

> Post, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same is false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate. (*Pestrak*, 1991, p. 575)

As Williams (2007) notes, the Ohio Elections Commission had the power to do four things (p. 343). These functions were (1) a fine, (2) a cease-and-desist order, (3) a referral of the violation to a county attorney for criminal prosecution, or (4) a determination and declaration by the court of "the truth of challenged statements" (p. 343). The Ohio Elections Commission exercised the third and fourth options in the *Pestrak* case.

The commission found that Pestrak's statements were false, declared them so, as the fourth function allows, and "recommended criminal prosecution, although no

[9] The *Pestrak* case was decided in 1991. Ohio Rev. Code § 3599.091 and § 3599.092 were amended and renumbered § 3517.21 (Infiltration of a campaign – candidate) and § 3517.22 (Infiltration of a campaign – issues) in 1995. They are listed in Appendix A.

prosecution was brought" (*Pestrak*, 1991, p. 575). The commission's decision was released one day before the election, and Pestrak lost. He sued the commission for damaging his campaign, claiming that the Ohio statute was unconstitutional on its face because, he contended, "its basic purpose [was] to distinguish among types of political speech based on their content" (p. 577). The Sixth Circuit Court of Appeals agreed in part, and disagreed in part, with Pestrak's argument.

The Sixth Circuit found the Ohio Elections Commission's first two enforcement options unconstitutional for two reasons. Both of the reasons for its decision, the court said, "flow from the fact that the law permits an administrative agency, rather than a court, to make binding determinations regarding the legality of certain forms of speech" (p. 578). First, the court held that this commission was not subject to the same limits on power as a court. Specifically, punishment of public figures relating to the First Amendment requires "clear and convincing evidence" and the commission, while recognizing that standard, was not necessarily subject to it and could change its policy at any time (p. 578). Second, very simply, was the fact that the U.S. Supreme Court has recognized cease-and-desist orders as unconstitutional prior restraints of speech (p. 578).

The Sixth Circuit found the commission's third and fourth options to be constitutional. On the third option, the power to recommend prosecution for the commission of a crime, the court found:

> To the extent it does nothing more than recommend, then its actions, per se, have no official weight and cannot be the cause of a deprivation of constitutional rights. In just the same sense, a newspaper, Congressman, or private citizen urging a prosecutor to bring a certain prosecution is not

> performing an official act, any more than are various officials who may "refer matters to the Justice Department" for a decision on prosecution. (p. 578)

This point underlines why a campaign ethics council would work as a supplement to, not a substitute for, organizations such as Fact Check.org. While fact-checking organizations could perform a very similar function, gathering evidence about a claim and then declaring it either true or false (or partially true as some of these groups do), there is something fundamentally different about an ethics commission, which does not report to an elected official like a governor but is funded from some government revenues, declaring something to be a false statement.

This is a fundamental misunderstanding of one of the points made in the *Alvarez* decision. The U.S. Supreme Court (2012) and the Ninth Circuit (2010) both explicitly called Xavier Alvarez a liar in their respective decisions. Justice Kennedy noted in the plurality decision that, once Alvarez's lie was pointed out, he became subject to public scorn about it online, and this should be enough to make a law unnecessary (p. 2549). There are two problems with Kennedy's reasoning and why it is not enough to just have bloggers call politicians liars and then move on, pretending the marketplace has worked itself out.

What this argument fails to recognize is that people are called liars online every day. It would take a split second with Google to find a message board where a group is commenting on a news story, transforming into a digital version of the children from *Lord of the Flies*, and collectively converging upon a politician they have declared to be a liar. It should go without saying, but unfortunately it does need to be said, that just because a

message board has declared something a "lie" does not make it so and, if readers are the rational beings the marketplace of ideas assumes them to be, they will be smart enough to know this and will likely not be swayed by what they may see, in cases other than Alvarez's, as a digital angry mob.

In Justice Kennedy's argument, there is an absence of awareness of his position in the world. He and his eight colleagues sit in unique seats, positions held by only 112 individuals in American history, positions that not only carry the power of the law but also the respect of the public such that when the Court speaks, there is a higher level of credibility in its words. This is to say that when the United States Supreme Court calls you a liar, it means something. When the Ninth Circuit calls you a liar, it means something. These two statements are in no way the same as when a blogger calls you a liar. This is the reason there is value in some kind of official declaration and sanction for political deception. It is also why such official actions should be handled with care and limited in their power. This is not to argue that a campaign ethics council would have a voice as powerful as the U.S. Supreme Court's. However, as an official entity it would carry greater power than campaign boosters and reporters.

One way an ethics council's voice would carry some weight that can be addressed through the lens of *Pestrak* is in its ability to refer criminal activity in a political campaign to the proper authorities. The current Ohio statutes, Ohio Rev. Code § 3517.21 and § 3517.22, which are updated versions of the statutes addressed in *Pestrak*, contain some sections that, post-*Alvarez*, might not pass constitutional scrutiny. For example under § 3517.21 B(10) it is a crime to, knowingly or with reckless disregard for the truth, make false statements about a candidate. Given the decisions made not only in *Alvarez* but also

in *Minnesota v. Jude*, *Washington v. 119 Vote No! Committee*, and *Rickert v. Washington* the fourth function of the commission in *Pestrak* becomes problematic *vis-à-vis* section B(10) of the statute. Unless the statement being referred for criminal investigation is defamatory, there is little chance the fourth function would withstand constitutional scrutiny if applied to section B(10). Following the *New York Times* standard, even if the statements are defamatory, the referral of the commission will be constitutionally problematic.

On the other hand § 3517.21 A(1) and § 3517.22 A(1) make it illegal to infiltrate a candidate's campaign or an issue advocacy campaign, respectively, in order to impede the progress of that campaign. The criminalization of infiltrating a campaign would be constitutionally acceptable as being equivalent to the decision made in *Food Lion v. Capital Cities/ABC* (1999). In *Food Lion* two ABC reporters took jobs at a Food Lion grocery store under false pretenses in order to document the store's unsanitary handling of meat and used the footage, obtained through hidden camera, in a news exposé. The Fourth Circuit Court of Appeals found that, although ABC and Food Lion were not in direct competition with one another, "the reporters' conduct was sufficient to breach the duty of loyalty and trigger tort liability" (*Food Lion*, 1999, p. 516). This is because the *interests* of ABC News, to expose Food Lion's alleged bad business practices, were "diametrically opposed" to the grocery store's interests (p. 516). The logic behind the *Food Lion* decision could easily be applied to counter a First Amendment challenge to § 3517.21 A(1) and § 3517.22 A(1).

Someone who takes a job with a campaign he or she opposes, for the explicit purpose of impeding the progress of that campaign has committed an act of fraud, and

breached a duty of loyalty and these concerns are disconnected from First Amendment issues. The Fourth Circuit held that the First Amendment protected ABC from liability for publication damages. However, it also cited the U.S. Supreme Court's argument that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news" (*Cohen v. Cowles*, 1991, p. 669). So, following the logic of *Food Lion*, the First Amendment might protect an infiltrator from liability for speaking about the things he or she learned through his or her fraudulent behavior, but it does not protect from liability for the fraud itself.

Addressing a third section of the Ohio statute demonstrates why a campaign ethics council is necessary. Section B(1) of § 3517.21 makes it illegal for a candidate to make a false statement of incumbency; in other words, if a candidate is running for an office she does not hold, it is illegal for her to claim to be the incumbent. This would seem to be a perfectly acceptable statute. It is narrowly tailored (i.e. it proscribes a very specific speech act) and there is a clear governmental interest (i.e. punishing a candidate for knowingly misleading the voters). After the Court's decision in *Alvarez*, however, the acceptability of this statute becomes questionable. The courts might look at this and say that it is within the candidate's First Amendment rights to lie about their position. If a politician is legally allowed to take credit for unearned military honors, why not protect the right to falsely claim incumbency? Besides, according to Justice Kennedy, this false claim can be discussed and thwarted online.

This is why *Alvarez* is such a problematic decision and why it is essential to have some official recognition of deception in politics such as a campaign ethics council. It is

not enough to post online that a candidate is lying. For all the reasons stated above, it is not enough, but it is also a bad argument because it makes the poor assumption that all voters have equal access to online fact-checking websites or discussion forums. The United States does not have universal access to computers and those who do have access to computers do not necessarily have equal access to education and information sources that will tell them that a candidate is misrepresenting their resume. Most important, a false claim of incumbency is an easily propagated lie and it is important that the facts be straight on this particular claim. A false statement of incumbency is the equivalent of lying on a resume about one's level of experience when applying for a job.

For the above reasons a campaign ethics council should follow the model set out in the *Pestrak* decision. It should have the power to do fact-finding research in the same way a government agency does. It should also be able to issue statements about the findings of its research in order to better inform the public. The committee could also serve the function of being an alternative to the judiciary, giving candidates a forum in which they can air their grievances without resorting to litigation. If a campaign ethics council could put out a press release declaring one candidate's statement about another to be false this could be enough to avoid a full blown defamation lawsuit as when former Rep. Steven Driehaus, an Ohio Democrat, sued a political action committee for making allegedly false statements about his voting record (*Susan B. Anthony List v. Driehaus*, 2013). The public declaration could give the potential plaintiff a sense of satisfaction that her name has been cleared and keep the lawsuit out of the courts. Also, if the council declares a statement to not be defamatory then proceeding with a lawsuit will prove difficult and will thus be discouraged.

A campaign ethics council should also have the power to create and circulate a clean campaign pledge. Hall (1991) makes this part of her proposal, arguing that a public pledge-signing would encourage a cleaner campaign (pp. 355-356). It would also not violate the First Amendment because it would be an opt-in mechanism. Candidates certainly have the option to not sign the pledge, but they would likely be inclined to sign it because it looks bad for a candidate to publicly refuse such a pledge, implying they at least want the *option* of an un-clean campaign. The pledge would not be coercive but it seems likely that it would discourage dishonest attacks between opponents.

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

Access to the Council

Following the press council example proposed by Painter and Hodges (2010), which will be discussed in greater detail in the next section of this chapter, a campaign council should allow for a broad base of access. There should be a formal and open process for bringing complaints to the council that should especially encourage complaints from any voter. This is not to say that any and all complaints brought to a campaign ethics council should be fully pursued. Sometimes an investigation is enough to potentially harm

an individual's reputation. This is demonstrated in *Brown v. Florida* (2007) in which Greg Brown, a public official, became the target of false ethics complaints filed by supporters of his political opponent. The Florida First District Court of Appeals held that the First Amendment did not protect a right to file such false ethics complaints because this form of speech forces its target to engage and respond to the speech within the confines of the court system whereas false accusations in the news media can be responded to with counter claims or simply ignored (p. 560). The First Amendment does not give one the right to use the court system as a political weapon. It would also not give one the right to use a campaign ethics council in the same way.

When a complaint is filed, the council could meet to discuss the accusations without pursuing a full investigation should they find the accusations to be baseless. Again, the *Dewald* standard would be useful to follow for making such decisions: was it a false statement of fact, did the accused make the statement *knowing* it was false, did the accused use the false statement to purposefully deceive someone, and was there a detrimental reliance on the part of the receiver(s) of the message? A campaign ethics council would apply *Dewald's* four-prong test, along with the *New York Times* actual malice standard, in pursuing *Pestrak's* third and fourth functions, to act on the results of the test, and have a broad base of public access.

The *Pestrak* court voiced concern about a lack of restraint on the power of an elections commission. While the proposal in this article does not include the power to impose a fine or a cease and desist order it is nevertheless useful to place some restraints on the campaign council's power in order to avoid overreach on the part of the council and/or the use of the council as a weapon as illustrated by *Brown v. Florida*. Here the

decision in *281 CARE Committee v. Arneson* (2013) is a useful model to follow. In that case the 281 CARE Committee challenged the constitutionality of Minn. Stat. § 211B.06, a statute making it illegal to make false statements in political messages. The District Court of Minnesota held that the statute was constitutional and noted a few safeguards against the use of the statute as a political weapon.

First, complainants filing under § 211B.06 must file their complaint under oath; thus filing a false complaint and using the council as a weapon against political enemies would be an act of perjury (*281 CARE*, p. 24). The council reviews all complaints before holding a probable cause hearing. The complainant will have the burden of proof in all cases and must file the complaint, pass the review of the elections commission and successfully defend the complaint in a probable cause hearing before the election's commission even begins to hold hearings about the veracity of the claim and whether to take action on it. Additionally, if the complainant is unsuccessful, the defendant has the right to seek attorney's fees from the complainant (p. 25). So there are a number of safeguards to deter abuse of the system in Minnesota. All of those safeguards would be applied and used as a model to place the same restraints on a campaign ethics council. The characteristics described in this section would make a campaign ethics council useful for fulfilling the community oriented mindset described by Torfing without creating a chilling effect on First Amendment rights.

The Press Council as Model

One way to fulfill that community-oriented ethos espoused by Torfing would be to turn to the example of press councils. There is a long history behind them and, while they have not always succeeded in improving journalism, they provide a useful model for

creating a campaign ethics council. Conceding that they are not perfect solutions it should also be noted that the problems surrounding press councils are not necessarily problems in the structure or implementation of the institutions as much as they are problems with the political environments surrounding them and the ways in which people respond to and use them. These problems are not fatal flaws that should lead to the abandonment of these ideas altogether. They are indications of broader structural problems with the political culture that also must be addressed.

Press councils act as intermediaries between the news media and groups or individuals who may have complaints about the performance of the field of journalism.[10] Craig Silverman (2012) succinctly describes the function of news councils in an article for the Poynter Institute:

> News councils, also referred to as press councils, are self-regulatory bodies that aim to provide a forum for members of the public to raise concerns and

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[10] This should be distinguished from the role played by an ombudsman. Purdue University journalism professor Neil Nemeth (2000) says, in his investigation of one of the early modern ombudsmen at the *Louisville (Kentucky) Courier-Journal*, that there was some ambiguity about the role of the position but there was a basic understanding that "the ombudsman would investigate complaints about the newspaper's performance" (p. 57).

The debate about the role of the ombudsman, as Nemeth describes it, illustrates the usefulness of press councils. For one thing, in his analysis of the *Courier-Journal*, there was internal debate at the newspaper about the ombudsman's role that created ambiguity for how that person would do his or her job. This debate went beyond just that one newspaper. Ben Bagdikian, who would go on to the write canonical book *The Media Monopoly*, served as the second ombudsman for the *Washington Post*. He left that position "over a conflict with management over where his loyalties lay–with the organization or with the public" (Nemeth, p. 57).

An ombudsman is an employee of a single newspaper and can only address problems in the work of that newspaper. A press council, while it *could* address a single institution's errors or wrongdoings, is also there to address systemic problems in the work of journalism. An ombudsman, as the Bagdikian example illustrates, is an employee of a single media outlet who only addresses complaints against that outlet. The ombudsman is also subject to internal pressures of that institution, as the Bagdikian example also illustrates, in a way that press councils are not. This makes it difficult for the ombudsman to represent the public's interests and maintain a job at a media outlet while being perceived as disloyal to that outlet. With the public on one side and the employer on the other the ombudsman can often be pulled in two directions in a way a press council will not be.

> complaints about press coverage and media conduct. They provide a place for citizens and organizations to turn in order to get a fair hearing, without having to hire a lawyer and seek satisfaction in the justice system. (para. 5)

The value of press councils is that they are independent organizations that give the public a greater voice in complaints against the news media. They also, despite arguments to the contrary that will be addressed here shortly, are a force for reducing government interference with journalism by helping complainants and the news media resolve disagreements without resorting to the court system.

University of Wisconsin-Milwaukee journalism professor David Pritchard (2000) says the first press council "was established in 1916 in Sweden" but that the best-known press council was the British Press Council that was formed in 1953 (p. 91). John Maxwell Hamilton (1996), a journalist with a long career in reporting and academia, says in his book *Hold the Press* that American proposals for news councils "surfaced as early as the 1930s" and then again with the Hutchins Commission in the 1940s (p. 133). The one major national news council in the United States came about in 1973 but only lasted for a little more than a decade.

Appropriately enough, reinforcing Nolan's arguments discussed earlier in this dissertation about the source of the modern animosity between reporters and politicians, the National News Council (NNC) "began during the Nixon-era attacks on the media and gave the public a way to complain about press performance" (Huntzicker, 1999, p. 165). The NNC had difficulty accomplishing its mission in large part because "many major news outlets, including [television] networks, failed to cooperate" (p. 165). In the end the NNC "decided to dissolve itself in February 1984, because of lack of funds and lack of

media support" (p. 165). This failure points to the precise reason why news councils, and campaign ethics councils, are necessary.

The NNC provided a valuable resource even if it had no authority to punish misdeeds by members of the press. As Hamilton describes it, the council would receive public complaints about some problem with a news story. For example, a candidate for judge in Allegheny County, Pennsylvania was the subject of a news story questioning her fitness for being a judge because of some of her business connections. The NNC received a complaint that the story was unfair (Hamilton, p. 134). The NNC would take such complaints and issue a decision on them, giving background information on the incident, their interpretation of the events, the council's vote on its decision, and a report on dissenting opinions within the council.

News outlets could take action to correct their mistakes based upon the NNC's decision or they could just ignore them. This is simultaneously a strength and a weakness for proposing such an organization. To give a news council too much power to punish news outlets would be to invite authoritarianism. At the same time the NNC had no authority to do anything to compel a news outlet to make a correction or apologize for an erroneous report. Such a report might have little or no public impact because it might not even receive media coverage. If journalists are unwilling to cooperate with such an operation they are also unlikely to give it airtime, ink, or (web) page space.

The NNC was the only national attempt to create a news council. Other ventures have been started, with varying degrees of success, at state and local levels. The only news council still in existence as of this writing is the Washington (state) News Council.

Their "about us" page on their website perfectly sums up many of the arguments about news councils:

> The Washington News Council is an independent, nonprofit, statewide organization whose members share a common belief that fair, accurate and balanced news media are vital to our democracy. We have been called an "Outside Ombudsman" or even "Better Business Bureau" for the news media in Washington state. We believe that a free press helps keep America strong, but with First Amendment rights come great responsibilities. We hold the news media publicly accountable for their performance, just as the media hold other institutions in our society publicly accountable. (Washington News Council, 2014, para. 1)

In one paragraph the council addresses so many issues surrounding news councils. They point to their independence. They make a distinction between a news council and an ombudsman. They even note their role as a watchdog over the watchdogs.

That last point is something that Hamilton (1996) says is a problem, arguing that journalists "take great pride in their role as watchdogs … Yet, when it comes time to consider how *they* should be watched, they protest" (p. 133). Such protests are best exemplified by *New York Times* owner Arthur Sulzberger's response to the NNC, which also illustrates that there were fears that such a council was a precursor to government intervention:

> When the News Council was announced in 1973, *New York Times* publisher Arthur O. Sulzberger sent his staff a memo outlining the *Times'* opposition to the new venture. Much of the memo's rationale could be

> viewed as editorial independence–participation would amount to "an unjustified confession that our own shortcomings are such that we need monitoring by a press council … we do not wish anyone to impose standards on us." (Kaplar, 1995, p. 55)

Richard Kaplar, vice president of The Media Institute, says Sulzberger's perception was that even the smallest concession to press councils could lead to greater public perception that the news media were in need of such oversight and thus potentially even public support for government interfering with journalism (p. 55).

The argument that press councils fail, and should thus be abandoned, because of such resistance can easily be set aside. Just because the members of a profession resist constraints on the excesses of their field does not mean efforts to reign in those excesses should be deserted. All industries resist regulation; this does not mean that regulation is unnecessary or a pointless endeavor. Political professionals will lodge similar arguments against any and all restrictions of campaigns with arguments for First Amendment protection of even the worst kinds of political speech. Politicians and campaign professionals will undoubtedly resist any form of oversight, perhaps even more vehemently than members of the news media. Again, their resistance is not a good enough reason to give up on the effort to engage in that oversight.

In fact, such resistance is all the more reason to push for more oversight whether it is in news reporting or campaign ethics. Echoing Kenney and Ozkan's (2011) call for "an autonomous ethics examiner" for the press, campaign ethics councils could correct and create consequences for acts of political deception. Kenney and Ozkan argue that the Internet could help with publicity for such councils. They also make the case that such a

council would “encourage a civil public conversation,” which would apply in the case of a campaign ethics council as well (p. 50).

Kenney and Ozkan also propose the ethics examiner not as an institution directed toward addressing the minutiae of details, incorrect statements here and there, but rather toward the bigger picture of civic engagement and civility, taking on “more substantive investigative projects into systemic problems and concerns” (p. 51). Again, this proposal is a useful model for a campaign ethics council. What are the systemic problems of campaign disinformation and misinformation? A campaign ethics council would investigate and make proposals for addressing problems such as the increasing flow of money into campaign coffers and how that money supports campaign dishonesty through deceptive practices of secrecy, hiding the sources of donations through laws excluding 501(c)(4) groups from campaign finance disclosure requirements. The council could also address defamatory statements made between the campaigns. Finally, even while avoiding the minutia of incorrect details, an ethics council could address systemic deceptions, a campaign that repeatedly engages in deceptive practices or continues to propagate deceptive statements even after those statements have been demonstrated to be false. Addressing these problems would bring about full disclosure surrounding campaign donations, foster a community conversation about political falsehoods and create an official sanction that would deter future dishonesty in campaigns.

Painter and Hodges (2010) discuss the usefulness of press councils in other nations such as India and present a model that is useful for the adaptation of a press council model onto the political campaign process. They describe press councils as having four important characteristics. First, they are “chaired by highly prestigious citizens” (p. 265). Second, “a

system of funding has been worked out that assures solvency" (p. 265). Third, "the council is empowered by law to monitor both alleged misbehavior by news organizations and unjust conduct by the government itself" (p. 266). Finally, "complaints may come to the Council from a wide base" including citizens, politicians, government, and media outlets (p. 266). All of these characteristics could be applied to a campaign ethics council.

News councils and campaign ethics councils could serve similar functions in their respective fields. They also face similar problems. It is probably not just a coincidence that one of the last press councils in the country, The Minnesota News Council, announced that it was shutting down in January 2012 and in February 2012 the Fair Campaign Practices Committee (FCPC) in Broward County, Florida announced that it was closing. Also probably not a coincidence is the fact that both organizations cited a lack of public participation as a big reason for discontinuing operations. Oddly enough Roy Rogers, the chairman of the Broward FCPC said that the committee's lack of complaints was not a product of a lack of things to complain about. He argued that misbehavior was rampant in a local campaign the preceding year. "This last, vicious campaign – when we should have been having complaints and hearings – we never received a complaint," Rogers said. "It was about as negative as you get" (Man, 2011, para. 12). Similarly, in an article on the University of Minnesota website, it was noted that complaints registered with the Minnesota Press Council went from 142 in 2003 to 25 in 2010 (Cannon, 2011, para. 10).

Problems with funding and a lack of public issues are not the only criticisms that can be directed toward news councils and campaign ethics councils. University of Wisconsin-Milwaukee journalism professor David Pritchard found evidence that press

councils might have difficulty remaining apolitical in their decision making process. Pritchard (2000) looked at the decisions made by the Quebec Press Council in 1980 when there was a controversial ballot question asking if Quebec should secede from Canada.

Some critics may question the ability of such a council to not be political. This is a weak argument. If such a council is inherently lacking in the ability to be fair in its judgments, then why should Americans trust any level of the judicial system? If it is assumed that a judge or justice can be fair minded in hearing a case, why could one not assume the same from such a campaign ethics council? Faith in the judicial system, and the political system in general, is based at least in part upon such faith. In *Tomei v. Finley* (1981) the U.S. District Court in Illinois stated, "Every judge perforce comes to the bench armed (or burdened) with his or her background and perspective" (p. 697). This is even truer, District Judge Milton Shadur wrote, when jurists hear First Amendment arguments, which elicit a "Pavlovian response" from judges (p. 697). Nevertheless, Shadur wrote, in the *Tomei* case Finley's attempt to protect his dishonest speech by clouding the court's judgment failed.

Implicit in the *Tomei* court's decision is the idea that courts have a tendency to err on the side of free speech to a fault and that, although judges are not always able to set aside the feeling of needing to protect speech at all costs, there are times when some other social need can outweigh that desire. In the case of *Tomei* the Democratic Party of Lyons Township, Illinois was using the acronym "REP" on its campaign literature. The "REP" stood for "Representation for Every Person," although it was intended to mislead voters into thinking it stood for "Republican," thus inducing Republican voters to accidentally vote for Democrats. In this case there was a clearly deceptive practice, engaged in with

clear intent to mislead the public, which the court held was not protected speech despite the First Amendment-based protests from the speaker. A campaign ethics council, whoever sits on it, would have to make similar judgments about the social costs of speech. If a judge has the mental capacity to make such decisions fairly a council should be able to do so as well.

A judge has the power to weigh the social costs of the court's actions and how it can affect changes in citizen's lives simply through speech. For example the U.S. Supreme Court calling Xavier Alvarez a liar has greater power than the same statement from a blogger. All of this would be true of a campaign ethics council as well; it would have great power and great responsibility. Because of this power the government, or a campaign ethics council that would be loosely affiliated with the government, when it speaks, should be measured in its speech and aware of the consequences of that speech. As for the constitutional concerns surrounding that speech, the Sixth Circuit in *Pestrak* found that the fourth function of the Ohio Elections Commission did not violate the U.S. Constitution, referring to it as a "truth declaring" function (p. 579). The court actually found this function of the commission was, first, just one more example of some branch of the government engaging in research and making a declaration as to the truth of one claim or another. Governmental agencies at every level, local, state, and federal, spend money to research an issue, gather information about it, put that information into some form for public consumption, and then disseminate that information. This speech act by the government does not have a chilling effect on the speech of others.

This last point brings up a second interesting argument the court makes about the commission's fourth function. This is that the government's speech in this case is actually

just one more contribution to the marketplace of ideas. The Sixth Circuit argues, a declaration from the commission falls under the argument that, "the usual cure for false speech is more speech" (p. 579). In the end, the Sixth Circuit ultimately found that only the fine and cease-and-desist order functions of the commission were unconstitutional. It found that the Ohio statute was not unconstitutional on its face (p. 577) and the commission did not violate Pestrak's constitutional rights (p. 580).

So the *Pestrak* decision presents a good model for how to form a campaign ethics council and delineate its responsibilities. It should not have the power to hand out fines to offending speakers. It should not have the power to issue cease-and-desist orders to prevent speech. It should, however, following *Pestrak*, have the power to declare a statement false in the same way government agencies engage in fact-finding all the time. It should also have the power to refer any criminal activities to the proper prosecutorial government body.

It might be asked, if a campaign ethics council would not have the authority to impose punishments on campaigns then what is the point of having one? The answer to this question has the dual purpose of addressing an important difference between a campaign ethics council and a press council. As noted earlier in this section, a press council could issue a decision and be completely ignored by the news media. That is in fact what often happened and one of the reasons that contributed to the failures of news councils. A campaign ethics council would not likely have the same problem. A campaign ethics council decision declaring a politician's statement to be false or dishonest would likely experience the exact opposite response from the press. It is just the kind of thing that will get media attention.

Wortham and Locher's (1999) research on embedded metapragmatics, discussed earlier in this dissertation, demonstrates how reporters use such statements to describe a politician's dishonesty. They do not call a politician's statements false or dishonest because they do not want to be accused of bias or partisanship. So instead they quote someone else making an accusation of dishonesty. As Wortham and Locher point out they usually turn to the opposing candidate, a campaign official, or a surrogate to write about the supposed falsity or dishonesty of a politician's comments. A campaign ethics council would be one more voice that reporters could point to as evidence in such disagreements; it would add another voice to the mix and thus increase the power of free political speech. The voice added would raise the quality of the political discourse because it would be a neutral voice pointing out the falsity of a politician's statement rather than two opposing candidates beating one another over the head with negative ads.

The effectiveness of such a council is evident in the case of the Broward FCPC. In a local news article about the committee it was noted that "While [the FCPC] didn't have the legal authority to do anything to anyone, a finding that a candidate acted improperly produced negative publicity for those who committed campaign misdeeds" (Man, 2011, para. 6). This is one of the rationales behind creating a council that would not have the power of legal sanctions but would have a more authoritative voice in a political debate. The point is not the punishment of the law but rather the punishment of social norms, of pointing out that a breach has occurred, that a social norm of decency has been violated. Paul LaPage, who was the Republican governor of Maine in 2014, put forth a similar argument when he proposed that the Maine Commission on Governmental Ethics and Election Practices should "investigate campaign claims following a complaint by a

candidate for governor or state Legislature" (Durkin, 2014, para. 2). One of the sponsor's of the bill, Republican State Sen. Douglas Thomas, asked, "Should there be no restraint, no limit or no consequence for lying?" (para. 4). He went on to argue, "[t]here should be a mechanism to at least shame those who are behind some of the more outrageous statements" (para. 4).

Such an accusation from a campaign ethics council carries with it a meaning and a power that is somehow different from a similar accusation coming from opposition candidates or the news media. Yet, the solution to campaign dishonesty is not a campaign ethics council alone. This is an argument that the solution also cannot be left to the news media or campaigns alone. Another element added to the mix would better assist the public in recognizing shenanigans and counteracting them. This is to echo Ralph Lowenstein's idea of the triangulation of power. Lowenstein (1973), who was the dean of Journalism and Communication at the University of Florida, argued, "We must picture in our mind's eye powerful national media on one side, powerful centralized government on the other side, and now a powerful national press council in the middle" (p. 88). Even this tri-polarity might not be enough. In developing a theory of free speech that has something to say about deception we must imagine in our mind's eye government, international corporations, political campaigns and their candidates, political action committees, special interest organizations, all the various media institutions, all as sources of power and all vying for greater power, and a powerful campaign ethics council in the middle. Tri-polarity is too simple of a construction in a world of poly-polarity.

Each of these institutions in the poly-polar political process plays its part. While journalism has an important function it has become more easily dismissed as partisan and

biased. This is partly the fault of media institutions such as cable news outlets that purposefully brand their stations as nakedly partisan. It is also part of a long history of politicians playing a cynical game to sew distrust of the news in the public mind as part of the adversarial relationship between reporters and politicians. This is one of the arguments made in the fact check chapter of this dissertation. This history that has for decades been fostering distrust for the news media has clouded political debates making it hard for reporters to play that fact-checking role with credibility. A campaign ethics council would supplement that role of the press, add to it, and add to free speech, not take away from the role of the press or that of free speech.

IV. Conclusion

The rationale for the creation of a campaign ethics council is not rooted in a belief that political deception is somehow more prevalent today than it has been in the past. The evolution of communication technology, as University of Wisconsin-Madison communication scholar Richard Perloff (2010) points out, certainly means that persuasion, and deception, happen at a faster pace (p. 5) and that the speed of transmission, compounded by subtlety and complexity in messaging (pp. 9-10), not to mention the complex issues faced in a global economy, make it difficult to critically analyze deception. Technological changes, however, are not an important part of the impetus for this chapter or this dissertation in general.

What *is* the central concern for this argument is the need to foster a critical counter-discourse to the liberalism critiqued by Stein (2006), Zizek (2011), and Sokolowski (2007). This version of liberalism advances a simplified understanding of freedom as the absence of governmental constraint. This is the liberalism that is dominant

in much of contemporary political debate that has produced the problematic decision in *Alvarez*. A political system is strengthened by the presence of common decency, and decisions such as *Alvarez* undermine that. As a result the political culture not only allows for, but also now officially protects, deception because it makes the (poor) assumption that deception can be countered by fact checking alone or the mere presence of some voices of disagreement.

This is a simplistic notion of freedom as the absence of government that is propelled by a lack of concern for consequences. Under this ideal of freedom the presence of government, the presence of constraint, is seen as always being worse than any of the consequences of the actions made possible by this version of freedom. If citizens are deceived through the political process that is simply something we must live with for the sake of protecting this oversimplified version of freedom.

This version of freedom also, to draw on Asen's (2009) arguments, is "a decontextualized and dehistoricized perspective that fails to account for the ways in which relations of power and symbolic and material resources influence the production, circulation, and reception of discourse in the public sphere" (p. 265). In the context of the discourse surrounding FreedomWorks (FW) and Rachel Maddow the defense of FW as just another voice in the marketplace is at best naïve. It pretends that FW, a multimillion-dollar corporate entity with many very wealthy donors, has the same voice as any other group of citizens organizing to support a candidate or policy. FW certainly has more power than most citizens; FW has greater access to the channels of mass communication, and more money to spend on distributing their messages. When there are no limits on

what groups like FW can say and do there is not an increase in freedom for all, there is simply an increase in freedom for FW.

The amplification of FW's voice, their increased freedom, is a decrease in the amount of freedom in America more broadly, and a decrease in the number of voices speaking, because that amplification drowns out others and tramples on their right to free speech. The naïve argument about the marketplace will say, "the absence of government is the presence of freedom and this creates more speech." This is simply not the case. Freedom as the absence of government leads to bigger voices trampling on smaller ones, a reduction in participation, and ultimately a reduction of freedom. By throwing the *Alvarez* decision into the mix the problem is exacerbated by throwing First Amendment protection around any kinds of deception in which such groups might want to engage. Most likely applicable here would be deception as the secrecy of concealing the sources of funding for political messaging.

This is a version of freedom where, as Williams (2007) argues, "anyone can say anything" with no consequences (p. 327). Williams makes the argument that has been made in court cases, cited in this dissertation, by U.S. Supreme Court Justice Samuel Alito,[11] Judge Jay Bybee[12] on the U.S. Ninth Circuit Court of Appeals, and Justice Phil Talmadge[13] on the Washington State Supreme Court. Unfortunately all three of these arguments came in the form of dissenting voices in cases where their respective courts ruled in favor of First Amendment protection for political deception.

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[11] As argued in his dissent in the U.S. Supreme Court's decision in *U.S. v. Avlarez*.

[12] As argued in his dissent in the Ninth Circuit's *Alvarez* decision.

[13] As argued in his dissent in the Washington State Supreme Court's decision in *Washington v. 119 Vote No! Committee*.

The *Tomei* decision speaks to this. The dominant judicial discourse about political deception and free speech through many decisions is to allow the speaker to deceive under the protection of the First Amendment. *Tomei*, Williams, Alito, Bybee, and Talmadge present just a few examples of arguments attempting to counter that. Even the *Alvarez* case finds the courts admitting in no uncertain terms that Alvarez was a liar. He stated calculated falsehoods with full intention of misleading his listeners. Yet the courts shrug their shoulders at the problem and wrap it in the cloth of the First Amendment.

This concept of freedom as only the absence of constraint is socially detrimental as it undermines any legal arguments, philosophical inquiry, social science, and policy making interested in advancing a sense of social responsibility or public interest. For example, Phillip Napoli (2008) sees two paradoxes in media policymaking directed toward protecting the notion of a public interest. The first is that the courts and Congress require evidence to justify media regulation while simultaneously placing constraints on an agency's ability to gather the data necessary to find and present such evidence (p. 805). The second is that this "trend toward evidence-driven policymaking ... conflicts with an increasingly politicized policy environment" (p. 808). These two paradoxes are combined with a "strong deregulatory bent" (p. 811) that is part of the political culture, making it difficult to advance any kind of public interest, media regulatory policies because such policies are instantly dismissed as government intrusion.

For Stein (2006) this is a problem of neoliberalism. She argues that media policy has been, since the 1970s, "shifting steadily toward neoliberal understandings of speech rights" (p. 13). This means it becomes increasingly difficult to have any regulation of speech because the courts have come to see a self-correcting marketplace of ideas as the

best model for explaining how political speech works. In other words, regulation is unnecessary and burdensome because the market will work itself out, bad speech (i.e. deception) will be corrected by good speech (i.e. fact checking). Stein argues because of "the importance of media to democratic societies, this assumption must not go unquestioned" (p. 13). Her argument about regulating the media industry should be extended to the problem of political deception because the marketplace assumption has been extended to this problem, as evidenced by *U.S. v. Alvarez*.

A campaign ethics council is a practical and valuable solution here for two reasons. First, as it is envisioned in this chapter, there is minimal danger in it overstepping legal boundaries and infringing on individual rights as defined by the current legal regime of neoliberalism. It accommodates this legal regime in order to alter and upend it. Second, it creates a *public* space in which corrections can be made and there can be an official recognition that a political statement is false, a recognition that carries more weight than an opposing candidate or member of the news media pointing out the falsity of a statement. Most of all, this acts as a kind of pushback against the pervasive First Amendment absolutism, or quasi-absolutism, and marketplace of ideas constructions that falsely claim that the cure for all bad speech is always only good speech.

Finally, there is the need to assure electoral integrity. Free speech is not always best served by the absence of government. Free speech also cannot serve the public interest when misinformation goes unchecked because that misinformation "plays a deleterious role. If the voters are being deceived into voting for someone who fraudulently induced them to elect him, the purpose behind the First Amendment is undermined" (Richman, 1998, p. 705). This should be the greatest concern. A free speech tradition that

has nothing to say about misinformation, lies, deceit, half-truths, propaganda, prevarication, obfuscation, and credibility gaps, by extension, has nothing to say about the integrity of American politics and governance. By sheltering deception behind free speech in the name of free speech the judicial discourse of *Alvarez* only undermines that which it claims to protect.

Just to be absolutely clear, this dissertation is not an argument for problematizing free speech. It is not an argument for censorship. It is not an argument for government control of media. There are two key arguments being made by this project as a whole. First is that there is a little too much faith placed in the idea of a self-correcting marketplace of ideas vis-à-vis false speech and deception. Second is that First Amendment jurisprudence, exemplified by *U.S. v. Alvarez*, has created a legal environment where it is difficult to hold political deceivers accountable for their deceptions. In fact, political deception quite often pays off handsomely in the form of the political dividends of acquired power.

All of this does not even begin to bring into the picture the problems of a rapidly changing media environment that allows for easier dissemination of false information. It also does not address money's influence on the process and the creation of super PACs, a problem exacerbated by the U.S. Supreme Court's decisions in *Citizens United v. FEC* (2010) and *McCutcheon v. FEC* (2014). These last two issues are so complex as to merit dissertation length analyses on their own. They would not be well served by even a brief analysis in this project but should not pass unacknowledged and should be pursued in future research on political deception.

This dissertation is also an argument against the notion that competition is inherently virtuous and always produces the best results. This is a philosophical position that is ubiquitous in American politics and culture. It drives economic philosophy and policy. It permeates the political rhetoric of "small government." It rears its head in the realm of free speech theory, echoing the economic philosophy that calls for deregulation and free markets. Such calls ignore the important problem that the marketplace is not always self-correcting and when it does self-correct it is often only after lies and falsehoods have burrowed into the minds of the citizenry, taking hold and refusing to relinquish their grasp.

In the months while this dissertation was in the revision stage a few high profile acts of political deception took place at the local, state, national, and even international levels. These actions were particularly offensive and drew the attention of the national news media. They are precisely the kinds of problematic behaviors that call into question the ability of the marketplace of ideas to prevent deception. Faith in that marketplace is doubly drawn into question by the shamelessness of the perpetrators.

In Houston, Texas a man named Dave Wilson was a 2013 candidate for a seat on the board of the Houston Community College System. During his campaign, which took place in an off-year election for a low-profile position, Wilson distributed campaign literature featuring a photograph of a smiling, African-American family and the text, "Please vote for our friend and neighbor Dave Wilson" (Bouie, 2013, para. 3). This, on its face, is not problematic except for the fact that Wilson was a white, conservative Republican running in a heavily African-American, Democratic area and his campaign literature gave voters the false impression that he was African-American.

Wilson's literature also said he was endorsed by Ron Wilson. A long-serving African-American state legislator from Houston is named Ron Wilson. However, if the reader looked closely enough they would have found that the small print on the literature explained that the Ron Wilson referred to there was not the state legislator but rather the candidate's cousin. When asked about his deceptive messaging Wilson told KHOU News in Houston that, "[e]very time a politician talks, he's out there deceiving voters" (Miller, 2013, para. 6).

At the national level the Republican Party in 2014 was accused of attempting to mislead voters into donating money to the GOP instead of to the Democratic Party candidates they intended to support. Multiple websites, images of which are shown in appendices E through J, contain pictures of smiling candidates alongside the text "Alex Sink for Congress" in big bold letters (Leary, 2014). The Sink site also had URLs such as http://contribute.sinkforcongress2014.com/ which would lead a viewer to believe it is a pro-Sink website. Multiple other examples of what are called microsites, single page websites with minimal information that are soliciting donations, contained similar URLs and banner headlines.

Sink was a Florida Democrat running for Congress in 2014 in a special election to replace a congressman who had passed away. She was just one target of websites like this apparently designed to give anyone who did not examine the fine print the impression that they were donating their money to a Democratic candidate when in fact they were donating to the campaign to defeat that candidate (Goldmacher, 2013). In a *National Journal* article about the sites Paul S. Ryan, a lawyer for the Campaign Legal Center, argued that because of the deceptive headlines and URLs for the websites, the Republican

Party could be violating FEC rules that say "political committees cannot use a candidate's name in a 'special project,' such as a microsite, unless it 'clearly and unambiguously shows opposition to the named candidate'" (Goldmacher, 2013, para. 11). As of April 2014 when this is being written these sites are still live and still soliciting donations in the same deceptive manner.

At the international level in early April 2014 it was revealed by the Associated Press that the U.S. government had created a Twitter style social network site in Cuba. It was targeted toward Cuban youth in an attempt to foment dissent in the small island nation. The AP report said that the tens of thousands of users of the site were not aware of the fact that it was created by the U.S. government, "nor that American contractors were gathering personal data about them, in the hope that the information might be used someday for political purposes" (Butler, Gillum, & Arce, 2014, para. 5). Even in the explanation the government gave for the creation of this site there was questionable information. White House Press Secretary Jay Carney said in one statement that they had disclosed the plan to Congress "but hours later the narrative had shifted to say that the administration had offered to discuss funding for it" with the appropriate Congressional committees (Butler, et al., para. 10).

While these three examples received some news coverage such coverage did not seem to have much impact. Dave Wilson won his race while almost shamelessly admitting that he was attempting to mislead voters about his race. The Republican Party's misleading websites continue soliciting donations. The U.S. government will likely have little or no consequences for their secret use of social media to interfere with the internal politics of another nation. It should also be reiterated on that last story that private

contractors were collecting data about Cuban users of the website without telling them they were doing so.

This dissertation is not attempt to make the naïve argument that these practices could every truly be stopped. Deception as a political tool has been part of the process reaching at least back to Plato. It was part of the first U.S. Presidential campaign between John Adams and Thomas Jefferson. It was part of the debate around fact checkers in the 2012 Presidential campaign between President Barack Obama and Gov. Mitt Romney. It will unfortunately most likely be a part of the political process well into the future. This does not mean that the political culture must simply live with it, tolerate it, and most important, protect it as free speech.

It could be said that the First Amendment is the opening statement of the American legal system. It is the first point in the guiding legal document upon which all laws are based. It is the freedom that protects all other freedoms. This is why it is so offensive that it could be abused, that individuals and groups could take that sacred ideal and desecrate it with deception. While "freedom for the thought that we hate" may at times be necessary, when taken to its absolute end it treads upon freedom for what is good and true. As Sissela Bok (1999) argues, "no moral choices are more common or more troubling than those which have to do with deception in its many guises" (p. xxxi). The moral choice posed by this dissertation is whether the American political and legal systems will protect the sacred from the profane. Shall we elevate the profane by wrapping it in a sacred cloth? Do we shrug our shoulders and accept the existence of political deception as a fait accompli? Or do we refuse to tarnish the sacred First Amendment in the name of protecting it?

Appendix A – Campaign statutes by state

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
1	Alabama	Alabama Fair Campaign Practices Act (Fraudulent misrepresentation)	§ 17-5-16	misrepresentation of affilliation - makes it illegal to misrepresent oneself as being affiliated with a campaign with the intention of damaging that campaign	fine of no more than $2,000 and/or county jail for no more than one year
2	Alaska	False statements in telephone polling and calls to convince	§ 15.13.095	knowingly making a false statement about a candidate, or with reckless disregard	money damages, punitive damages
3	Alaska	Campaign misconduct in the second degree	§ 15.56.014(3)	making false statements about a candidate that would cause a "breach of the peace" or lead "a reasonable person" to question the honesty or integrity of a candidate	Class B misdemeanor - fine of no more than $2,000 and/or "imprisonment of not more than 90 days"
4	Arizona	Deceptive mailings; civil penalty	§ 16-925	mailing false information about an election using documents forged to look like they were sent from a governmental body in Arizona	civil penalty, fine of $500 or twice the cost of the mailing (whichever is higher)
5	California	California Elections Code	§ 18350	falsely presenting candidate as an incumbent	“Any violation of this section may be enjoined in a civil action brought by any candidate for the public office involved.”
6	California	California Elections Code	§ 18351	lying related to Elect. Code sections 11327, 13307 - lying on a public candidate statement or sample recall ballot sent by the state to voters	fine of no more than $1,000

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
7	Colorado	False or reckless statements relating to candidates or questions submitted to electors	§ 1-13-109 Sect 1(a)	knowingly false statements meant to affect voters' decisions in the election of a candidate or voting on a ballot question	Class 1 Misdimeanor - up to 18 months in jail
7A	Colorado	False or reckless statements relating to candidates or questions submitted to electors	§ 1-13-109 Sect 2(a)	reckless false statements distributed to voters intended to affect the vote on a candidate or ballot question	Class 2 Misdimeanor - up to 12 months in prison
8	Florida	False or malicious charges against, or false statements about, opposing candidates	§ 104.271	candidate making false statemements, with actual malice, about an opposing candidate	3rd degree felony - no more than five years in prison; fine of no more than $5,000
9	Kansas	False impersonation as party officer	§ 25-2424	falsely presenting one's self as the member of a political organization in order to influence a voter	Class A misdemeanor - county jail of no more than a year, and/or fine of no more than $2,500
10	Louisiana	Political material; ethics; prohibitions	§ 18:1463 B(1)	attaching incorrect ballot numbers to candidates	affected candidate is entitled to a temporary or permanent injunction; if a permanent injunction is granted the defendant can be charged with the plaintiff's legal fees; fine of no more than $2,000; "imprisoned (with or without hard labor) for no more tha
10A	Louisiana	Political material; ethics; prohibitions	§ 18:1463 B(2)	falsely alleges endorsement or support for a candidate by a person or group;	affected candidate is entitled to a temporary or permanent injunction; if a permanent injunction is granted the defendant can be charged with the plaintiff's legal fees; fine of no more than $2,000; "imprisoned (with or without hard labor) for no more tha

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
10B	Louisiana	Political material; ethics; prohibitions	§ 18:1463 C(1)	making a statement you know or could be reasonably expected to know is false	affected candidate is entitled to a temporary or permanent injunction; if a permanent injunction is granted the defendant can be charged with the plaintiff's legal fees; fine of no more than $2,000; "imprisoned (with or without hard labor) for no more tha
10C	Louisiana	Political material; ethics; prohibitions	§ 18:1463 C(4)(a)	misrepresenting acting on behalf a candidate	affected candidate is entitled to a temporary or permanent injunction; if a permanent injunction is granted the defendant can be charged with the plaintiff's legal fees; fine of no more than $2,000; "imprisoned (with or without hard labor) for no more tha
11	Massachusetts	False statements relating to candidates or questions submitted to voters	M.G.L.A. 56 § 42	false statement that "tends to aid or injure" a candidate	fine of no more than $1,000 or prison of no more than six months
12	Michigan	False designation of incumbency	§ 168.944	falsely presenting a candidate as the incumbent when he or she is not	fine of no more than $500 and/or imprisonment in county jail of no more than 90 days
13	Minnesota	False Political and Campaign Material	§ 211B.06	prepare, disseminate or broadcast false political ads or campaign materials about a candidate or effects of a ballot question	fine of no more than $3,000 or jail for no more than 90 days
14	Mississippi	Prohibitions against charges with respect to integrity of candidate	§ 23-15-875	making false statements or accusations about a candidate; specifically aimed at "honesty, integrity and moral character" of candidates in private life	fine of no more than $1,000 and prison sentence of no more than one year in jail

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
15	Missouri	Class one election offenses	§ 115.631	disseminating false information causing someone to cast a faulty ballot, disenfranchising a voter	felony - imprisonment of no more than 5 years, and/or a fine of between $2,500-$10,000
16	New Mexico	Falsifying election documents	§ 1-20-9(A)	disseminating false information about the conduct of an election	fourth degree felony - 18 months imprisonment, fine of up to $5,000
17	North Carolina	Certain acts declared misdemeanors	§ 163-274 a(8)	circulating derogatory reports knowing they are false or with reckless disregard	Class 2 misdemeanor - no more than 60 days in jail and a $1,000 fine
18	North Dakota	Publication of false information in political advertisements	§ 16.1-10-04	false information in a political advertisement or news release, statemetns that are "deceptive or misleading"	Class A misdemeanor - no more than one year in prison and no more than $2,000 in fines
19	Ohio	Infiltration of campaign - election of candidate	§ 3517.21	(A)(1) gaining employment on a campaign with intent to impede that campaign;	prison of no more than six months and/or fine of no more than $5,000
19A	Ohio	false statements in campaign materials - election of candidate	§ 3517.21	(B)(1) falsely imply incumbency;	prison of no more than six months and/or fine of no more than $5,000
19B	Ohio	false statements in campaign materials - election of candidate	§ 3517.21	false statement of: (B)(2) schooling or training of a candidate, (3) prof. license, (4, 5) criminal conviction, (6) mental disorder, (7) military discipline, (8) falsely identify the source of a statement, (9) false statement of voting record of a candidate, (10) general false statements about a candidate, made knowingly or with reckless disregard, intended to influence the outcome of an election	prison of no more than six months and/or fine of no more than $5,000

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
20	Ohio	Infiltration of campaign - issues	§ 3517.22	(A)(1) inflitrate an advocacy campaign in order to impede it	prison of no more than six months and/or fine of no more than $5,000
20A	Ohio	Infiltration of campaign - false statements in campaign materials - issues	§ 3517.22	(B)(1) falsley indentify the source of a statement, (2) circulate false information knowingly or with reckless disregard	prison of no more than six months and/or fine of no more than $5,000
21	Oregon	False publication relating to candidate or measure	§ 260.532	"contains a false statement of material fact relating to any candidate, political committee or measure"	this law is more of a civil penalty - awards economic and non-economic damages "as defined in ORS 31.710, or $2,500, whichever is greater"; it also includes a retraction requirement; may require the losing party to pay the prevailing party's attorney fees
22	Oregon	Use of term "incumbent"	§ 260.550	falsely presenting candidate as an incumbent	1st violatiion - $100 fine; 2nd violation - $200; 3rd violation or more $250
23	Oregon	Prohibitions relating to circulation, filing or certification of intiative, referendum or recall petition	§ 260.555	(1) presenting false information about a ballot initiative or recall petition when attempting to obtain signatures in support of it; (2-5) signing a petition under false pretenses	Class C felony - no more than five years in prison, civil penalty not exceeding $10,000
24	South Dakota	Publication of false or erroneous information on constitutional amendment or submitted question as misdemeanor	§ 12-13-16	giving misinformation about or printing a misstated version of a "constitutional amendment, question, law or measure"	Class 2 misdemeanor - 30 days in county jail and/or $500 fine

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
25	Tennessee	Knowingly publishing false campaign literature	§ 2-19-142	distributing campaign literature, that you know is false, in opposition to a candidate	Class C misdemeanor - no more than 30 days in jail and/or a fine of no more than $50; may also include paying the opposing party's attorney fees according to AG opinion (Cooper, 2009)
26	Utah	False statements in relation to candidates forbidden	§ 20A-11-1103	any false statement intended to influence the election of a candidate or outcome of a ballot question	fine of no more than $750
27	Washington	Political advertising or electioneering communication - Libel or defamation per se	§ 42.17A.335	1(a) defamation of a candidate	misdemeanor - no more than 90 days in county jail and/or no more than a fine of $1,000 (RCW 9.92.030)
27A	Washington	Political advertising or electioneering communication - Libel or defamation per se	§ 42.17A.335	1(b) false implication of incumbency	misdemeanor - no more than 90 days in county jail and/or no more than a fine of $1,000 (RCW 9.92.030)
27B	Washington	Political advertising or electioneering communication - Libel or defamation per se	§ 42.17A.335	1(c) falsely stating an endorsement of a candidate	misdemeanor - no more than 90 days in county jail and/or no more than a fine of $1,000 (RCW 9.92.030)
28	West Virginia	Specific acts forbidden	§ 3-8-11	publication of false statements "in regard to any candidate" that is intended to affect the election of that candidate	fine of no more than $10,000 and/or jail for no more than one year
29	Wisconsin	False representations affecting elections	§ 12.05	"false representations pertaining to a candidate or referendum"	fine of no more than $1,000 and/or prison for no more than 6 months

Number	State	Leg. Title	Statute #	Actions Addresssed	Punishment
30	Wyoming	Falsifying election documents	§ 22-26-107(a)(i), (ii), (iii)	(i) false voting instructions, (ii) creating a copy of a ballot containing false information, (iii) altering some election document (i.e. a nominating petition after it has been signed by a voter)	no more than five years imprisonment and/or a fine of no more than $10,000
31	Wyoming	misrepresentation of petition	§ 22-24-125(c)	deceiving someone in order to induce them to sign an "initiative or referendum petition"	imprisoned for no more than 1 year and/or a fine of no more than $1,000

Appendix B – Three primary categories for statutes; election conduct, affiliation, and campaign message

Category	States and Statute #
Election Conduct Statutes	Arizona § 16-925, California § 18351, Louisiana § 18:1463 B(1), Missouri § 115.631, New Mexico § 1-20-9(A), Wyoming § 22-26-107(a)(i), (ii), (iii)
Affiliation Statutes	Alabama § 17-5-16, Kansas § 25-2424, Louisiana § 18:1463 C(4)(a), Ohio § 3517.21 (A)(1), Ohio § 3517.22 (A)(1)
Campaign Message Statutes	Alaska § 15.13.095, Alaska § 15.56.014(3), California § 18350, Colorado § 1-13-109 Sect 1(a), Colorado § 1-13-109 Sect 2(a), Florida § 104.271, Louisiana § 18:1463 B(2), Louisiana § 18:1463 C(1), Massachusetts M.G.L.A. 56 § 42, Michigan § 168.944, Minnesota § 211B.06, Mississippi § 23-15-875, North Carolina § 163-274 a(8), North Dakota § 16. 1-10-04, Ohio § 3517.21 (B)(1), Ohio § 3517.21 (B)(2), Ohio § 3517.22 (B)(1), Oregon § 260.532, Oregon § 260.555, Oregon § 260.550, South Dakota § 12-13-16, Tennessee § 2-19-142, Utah § 20A-11-1103, Washington § 42.17A.335 1(a), Washington § 42.17A.335 1(b), Washington § 42.17A.335 1(c) , West Virginia § 3-8-11, Wisconsin § 12.05, Wyoming § 22-24-125(c)

Appendix C – Four subcategories of campaign message statutes; false info about candidates, false info about issues, single statute combining candidates and issues, false incumbency

Category	States and Statute #
False info about a candidate	Alaska § 15.13.095, Alaska § 15.56.014(3,) Florida § 104.271, Louisiana § 18:1463 B(2), Mississippi § 23-15-875, North Carolina § 163-274 a(8), Ohio § 3517.21 (B)(2), Tennessee § 2-19-142, Utah § 20A-11-1103, Washington § 42.17A.335 1(a), Washington § 42.17A.335 1(c), West Virginia § 3-8-11
False info about an issue	Ohio § 3517.22 (B)(1), South Dakota § 12-13-16, Wyoming § 22-24-125(c)
False info about candidates and issues	Colorado § 1-13-109 Sect 1(a), Colorado § 1-13-109 Sect 2(a), Louisiana § 18:1463 C(1), Massachusetts M.G.L.A. 56 § 42, Minnesota § 211B.06, North Dakota § 16. 1-10-04, Oregon § 260.532, Oregon § 260.555, Wisconsin § 12.05
False incumbency	California § 18350, Michigan § 168.944, Ohio § 3517.21 (B)(1), Oregon § 260.550, Washington § 42.17A.335 1(b)

Appendix D – Programs included in the analysis of media coverage of FreedomWorks; listed by network from MSNBC, CNN, Fox News Channel, ABC, CBS, NBC, and NPR

Network	Program Titles
MSNBC - FreedomWorks was mentioned in 104 transcripts on eight programs	Countdown
	Hardball
	MSNBC Live with Cenk Uygur
	MSNBC Special: Election Coverage
	MSNBC Special: Interview with Matt Kibbe
	The Ed Show with Ed Schultz
	The Last Word with Lawrence O'Donnell
	The Rachel Maddow Show

Network	Program Titles
CNN - FreedomWorks was mentioned in 100 transcripts on 13 programs	American Morning
	Anderson Cooper 360 Degrees
	Campbell Brown
	CNN Live Event/Special: Boiling Point: Inside the tea party
	CNN Newsroom
	CNN Reliable Sources
	CNN Sunday Morning
	In the Arena
	John King, USA
	Larry King Live
	Rick's List
	State of the Union with Candy Crowley
	The Situation Room
Fox News Channel - FreedomWorks was mentioned in thirty transcripts on ten programs	Beck
	Fox Hannity: Great Americans 2010
	Fox on the Record with Greta Van Susteren
	Fox Special Report with Bret Baier
	Live even: Interview with Dick Cheney
	Live event: Interview with Matt Kibbe
	Live event: Interview with Sen. David Vitter
	Live event: What is the tea party movement?
	The O'Reilly Factor
	Your World with Neil Cavuto
ABC - FreedomWorks was mentioned in seven transcripts on five programs	Good Morning America
	This Week
	World News Saturday
	World News Sunday
	World News with Charles Gibson
CBS - FreedomWorks was mentioned in three transcripts on three programs	CBS Evening News
	CBS Morning News
	The Early Show

Network	Program Titles
NBC - FreedomWorks was mentioned in ten transcripts on three programs	Meet the Press
	NBC Nightly News
	Saturday Today
NPR - FreedomWorks was mentioned in 21 transcripts on eight programs	All Things Considered
	Fresh Air
	Morning Edition
	Talk of the Nation
	Tell Me More
	Weekend All Things Considered
	Weekend Edition Saturday
	Weekend Edition Sunday

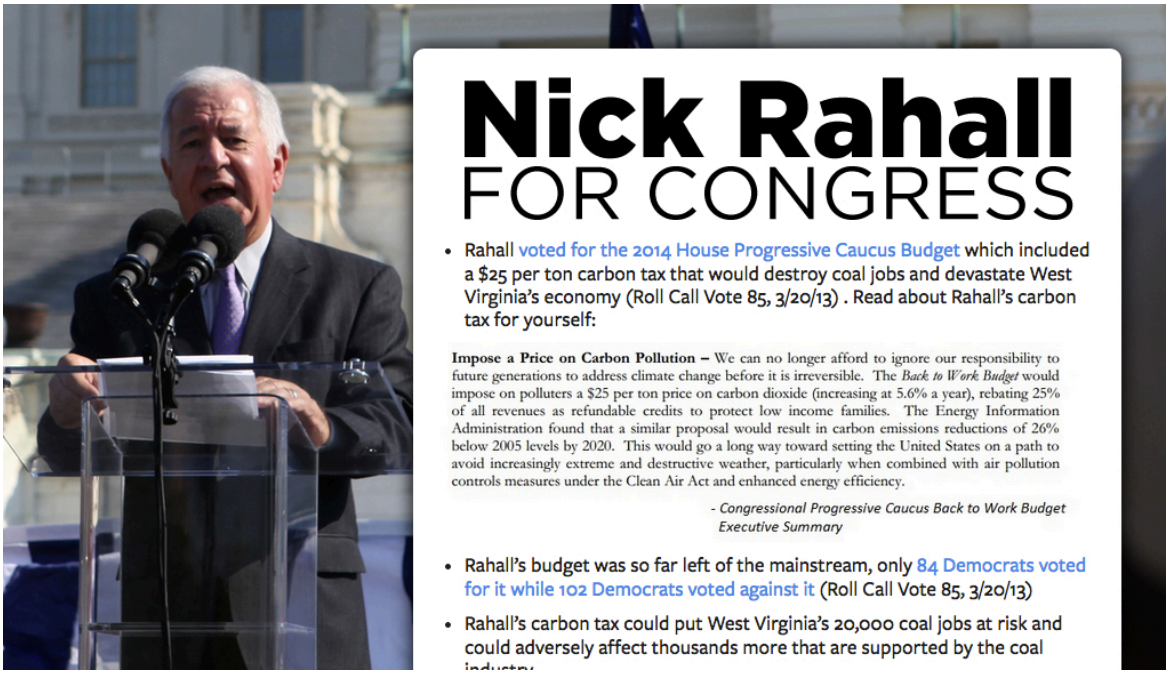
Appendix E – This is a screenshot of the Republican microsite raising money to defeat Democrat Kyrsten Sinema. This is the top of the website that gives the impression it is intended to raise money for Sinema.

Appendix F –This is the bottom of the Sinema website asking for voter contact information.

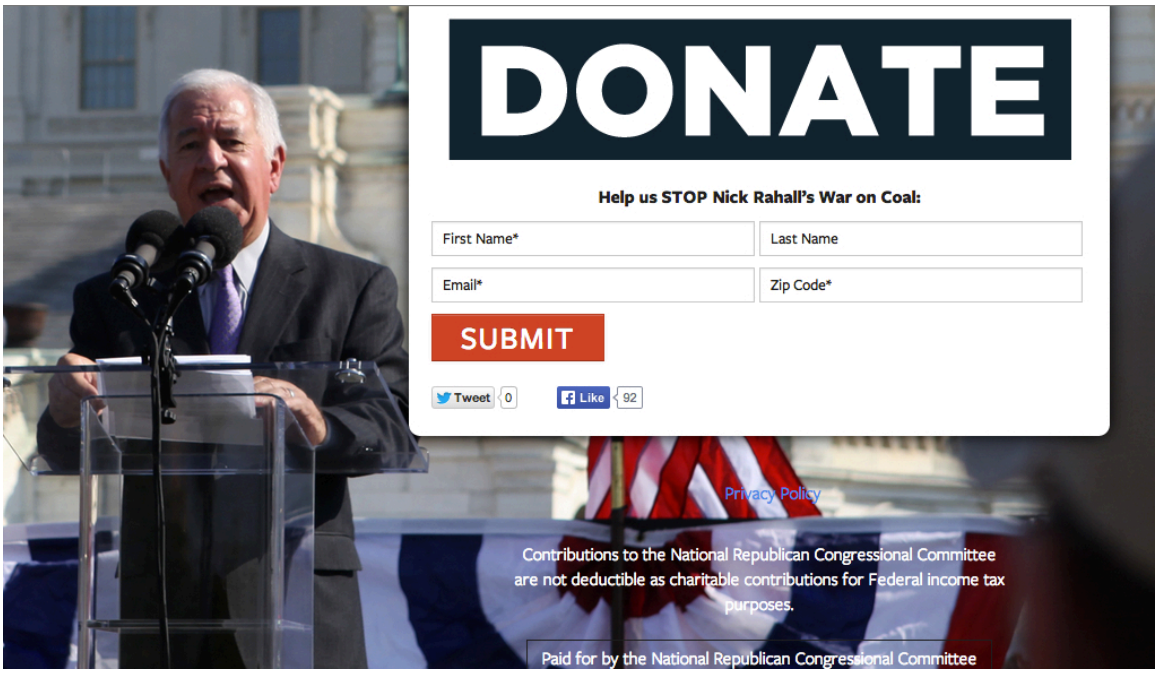
Appendix G – This is a screenshot of the Republican microsite raising money to defeat Democrat Domenic Recchia. This is the top of the website that gives the impression it is intended to raise money for Recchia.

Appendix H –This is the bottom of the Recchia website asking for voter contact information.

Appendix I – This is a screenshot of the Republican microsite raising money to defeat Democrat Nick Rahall. This is the top of the website that gives the impression it is intended to raise money for Rahall.



Appendix J –This is the bottom of the Rahall website asking for voter contact information.



References[1]

281 CARE Committee v. Arneson, 11-535 Petition for Writ of Certiorari (2011).

281 CARE Committee v. Arneson, 638 F.3d 621 (2011).

281 CARE Committee v. Arneson, Civil No. 08-5215 ADM/FLN (2013).

Abbott v. Gordon, 957 A.2d 1 (2008).

Abrams v. United States, 250 U.S. 616 (1919).

Adair, B. (2011, December 20). How we chose the 2011 Lie of the Year. PolitiFact. Retrieved from http://www.politifact.com/truth-o-meter/article/2011/dec/20/how-we-chose-lie-year/

Adair, B. & Holan, A. (2010, December 16). PolitiFact's Lie of the Year: 'A government takeover of health care.' PolitiFact. Retrieved from http://www.politifact.com/truth-o-meter/article/2010/dec/16/lie-year-government-takeover-health-care/

Adair, B. & Holan, A. (2011, December 20). Lie of the Year 2011: 'Republicans voted to end Medicare.' PolitiFact. Retrieved from http://www.politifact.com/truth-o-meter/article/2011/dec/20/lie-year-democrats-claims-republicans-voted-end-me/

Adler, J. (1997). Lying, deceiving, or falsely implicating. *The Journal of Philosophy*, 94(9), pp. 435-452.

Ahmed, S. (2004). Affective economies. *Social Text 79*, 22(2), 117-139.

Allen, M. & VandeHei, J. (2013). 'This Town': A Washington takedown. *Politico*. Retrieved from http://dyn.politico.com/printstory.cfm?uuid=336D1F65-9797-4CE5-9951-E4ECBF288C2A

Altenhofen, B. (2010). Solace in symbols: Discovering cultural meanings in popular propaganda. *ETC: A Review of General Semantics*, April 2010, pp. 156-163.

Alterman, E. (2000). *Sound and fury: The making of the punditocracy*. Ithaca, NY: Cornell University Press.

[1] For referencing online sources, such as Politico, the APA Publication Manual calls for references to use domain names only as in http://politico.com, not the full URL linking directly to the specific article being cited. I feel it will be more valuable for my readers to have full URLs, thus I will include them in my references. I have also created a page with links to all of my sources. Readers can find this list at https://delicious.com/rob.spcr/dissertation.

Alterman, E. (2003). *What liberal media? The truth about bias and the news*. New York: Basic Books.

Amar, V. & Brownstein, A. (2013). The voracious First Amendment: Alvarez and Knox in the context of 2012 and beyond. *Loyola Law Review*, 46(2), pp. 491-540.

Amazeen, M. (2013, October). Making a difference? A critical assessment of fact-checking in 2012. Retrieved from New America Foundation website: http://www.newamerica.net/sites/newamerica.net/files/policydocs/AmazeenNAFreport.pdf

Anderson, D. (2002). *The Columbia guide to the Vietnam War*. New York: Columbia University Press.

Andersen, R. (2006). *A century of media, a century of war*. New York: Peter Land Publishing.

Arendt, H. (1972). Lying in politics. In *Crises of the republic* (pp. 3-47). New York: Mariner Books.

Armey, D. & Kibbe, M. (2010, August 17). A tea party manifesto. *The Wall Street Journal*. Retrieved from http://online.wsj.com/news/articles/SB10001424052748704407804575425061553154540

Asen, R. (2009). Ideology, materiality, and counterpublicity: William E. Simon and the rise of a conservative counterintelligentsia. *Quarterly Journal of Speech*, 95(3), pp. 263-288.

Ashdown, G. (2012) Distorting democracy: Campaign lies in the 21st century. *William and Mary Bill of Rights Journal*, 20(4), 1085-1113.

Associated Press. (2002, October 23). Senate challenger resumes campaign. *The Spokesman-Review*, p. B4.

Associated Press. (2005, December 2). Santorum campaign denies connection to group. *Fox News*. Retrieved from http://www.foxnews.com/story/2005/12/02/santorum-campaign-denies-connection-to-group/

Axelrod, D. (2012, October 8). I'll be blunt (Mass message sent to recipients who signed up for the Obama campaign's email list).

Bachrach, P. (1980). *The theory of democratic elitism: A critique*. Lanham, MD: University Press of America.

Badeaux v. Southwest Computer Bureau, 929 So.2d 1211 (2006).

Bagdikian, B. (2000). *The media monopoly* (6th edition). Boston: Beacon Press.

Bailey, F.G. (1991). *The prevalence of deceit*. Ithaca, NY: Cornell University Press.

Baker, E. (2009). The First Amendment and commercial speech. *Indiana Law Journal*, 84(3), pp. 981-998.

Barnes, J.A. (1994). *A pack of lies: Towards a sociology of lying*. Cambridge: Cambridge University Press.

Barnum, J. (2013). Encouraging Congress to encourage speech: Reflections on *United States v. Alvarez*. *Albany Law Review*, 76(1), pp. 527-559.

Barrett, M. (1991). *The politics of truth: From Marx to Foucault*. Stanford, CA: Stanford University Press.

Barron, J. (1967). Access to the press: A new First Amendment right. *Harvard Law Review*, 80(8), pp. 1641-1678.

Bash, D. (2006, February 13). Cheney accidentally shoots fellow hunter. *CNN*. Retrieved from http://www.cnn.com/2006/POLITICS/02/12/cheney/

Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

Baudrillard, J. (2000). The masses: The implosion of the social in media. In P. Marris & S. Thornham (Eds.), *Media Studies: A Reader* (pp. 99-108). New York: New York University Press.

Baym, G. (2010). *From Cronkite to Colbert: The evolution of broadcast news*. Boulder, CO: Paradigm Publishers.

BE&K Construction Co. v. N.L.R.B. 536 U.S. 516 (2002).

Beahrs, J. (1996). Ritual deception: A window to the hidden determinants of human politics. *Politics and the Life Sciences*, 15(1), 3-12.

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).

Begala, P. (2011, November 4). So what if Perry tipped the press? *The Daily Beast*. Retrieved from http://www.thedailybeast.com/articles/2011/11/04/paul-begala-herman-cain-s-mark-block-a-wuss-for-accusing-perry.html

Benen, S. (2011, April 9). 'Not intended to be a factual statement' [Blog post]. *Washington Monthly*. Retrieved from http://www.washingtonmonthly.com/archives/individual/2011_04/028869.php

Benjamin, W. (1968). The work of art in the age of mechanical reproduction. In *Iluminations*, pp. 217-252. New York: Schocken Books.

Bennet, J. (1998, January 27). The President under fire: The overview; Clinton emphatically denies an affair with ex-intern: Lawyers say he is distracted by events. *The New York Times*. Retrieved from http://www.nytimes.com/1998/01/27/us/president-under-fire-overview-clinton-emphatically-denies-affair-with-ex-intern.html

Benoit, W. (2003). Campaign 2000: A functional analysis of presidential campaign discourse. Lanham, MD: Rowman & Littlefield.

Berardi, F. (2007). Schizo-economy. *SubStance*, 36(1), pp. 76-85.

Berardi, F. (2008). Postmediatic affect. In *Félix Guattari: Thought, friendship, and visionary cartography*, pp. 29-35. New York: Palgrave Macmillan.

Berke, R. (2000, October 4). The 2000 campaign: The overview; Bush and Gore stake out differences in first debate. *The New York Times*. Retrieved from http://www.nytimes.com/2000/10/04/us/2000-campaign-overview-bush-gore-stake-differences-first-debate.html

Bernays, E. (2004). *Propaganda*. New York: IG Publishing.

Bill Johnson's Restaurants Inc. v. N.L.R.B. 461 U.S. 731 (1983).

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

Blitzer, W. (1999, March 9). Vice President Al Gore talks about his presidential vision. *CNN*. Retrieved from http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/president.2000/transcript.gore/

Blum, S. (2005). Five approaches to explaining "truth" and "deception" in human communication. *Journal of Anthropological Research*, 61(3), pp. 289-315.

Bok, S. (1999). *Lying: Moral choice in public and private life*. New York: Vintage.

Booth, W. (2009). *The rhetoric of rhetoric: The quest for effective communication*. Hoboken, NJ: John Wiley & Sons.

Bouie, J. (2013, November 11). White man wins local election after running as a black man. *The Daily Beast*. Retrieved from http://www.thedailybeast.com/articles/2013/11/11/white-republican-wins-election-after-running-as-a-black-man.html

Bowers, P. J. (2004). Democratic space: Mass media connections to public forum law. *Free Speech Yearbook,* 41, pp. 55-71.

Brants, K., de Vreese, C., Moller, J., & Van Praag, P. (2010). The real spiral of cynicism? Symbiosis and mistrust between politicians and journalists. *The International Journal of Press/Politics*, 15(1), pp. 25-40.

Bratich, J. (2003). Making politics reasonable: Rationality and ideology in the problematization of paranoia. In J. Bratich, J. Packer, & C. McCarthy (Eds.), *Foucault, cultural studies, and governmentality* (pp. 67-100). Albany, NY: State University of New York Press.

Bratich, J. (2004). Regime-of-truth change. *Cultural Studies <--->Critical Methodologies*, 4(2), pp. 237-241.

Bratich, J. (2006). Public secrecy and immanent security. *Cultural Studies*, 20(4-5), 493-511.

Bratich, J. (2008). *Conspiracy panics: Political rationality and popular culture*. Albany, NY: State University of New York Press.

Bratich, J. (2009a). Subjectivity Rosa: Undercurrent affairs. *Fifth Estate*, 44(1), pp. 16-18.

Bratich, J. (2009b). Fog machine. *Counter Punch*. Retrieved from http://www.counterpunch.org/

Bratich, J. (2013, April 12). Millions of Americans believe conspiracy theories exist. *in media res*. Retrieved from http://mediacommons.futureofthebook.org/imr/2013/04/12/millions-americans-believe-conspiracy-theories-exist

Brietzke, P. (1997). How and why the marketplace of ideas fails. *Valparaiso University Law Review*, 31(3), pp. 951-969.

Brinkley, A. (2010). *The publisher: Henry Luce and his American century*. New York: Alfred A. Knopf.

Brown v. Florida, 969 So.2d 553 (2007).

Budoff, C. (2005, August 14). GOP accuses newspaper of boosting Casey with ad blitz. *Philadelphia Inquirer*, p. B08.

Bunch, W. (2010). *Tear down this myth: The right-wing distortion of the Reagan legacy*. New York: Free Press.

Bureau of Labor Statistics. (2013, January 23). Union members – 2012 [press release]. Retrieved from http://www.bls.gov/news.release/archives/union2_01232013.htm

Burke, E. (1834). *The works of the Right Hon. Edmund Burke: With a biographical and critical introduction, and portrait after Sir Joshua Reynolds, Volume 1*. London: Holdsworth and Ball.

Burson v. Freeman, 540 U.S. 191 (1992).

Bush, G. (2004). Speeches from the 2004 Republican National Convention: George W. Bush. Presidential Rhetoric. Retrieved from http://www.presidentialrhetoric.com/campaign/rncspeeches/bush.html

Butler, D., Gillum, J., & Arce, A. (2014, April 4). White House defends 'Cuban Twitter' to stir unrest. Associated Press. Retrieved from http://hosted.ap.org/dynamic/stories/U/US_SECRET_CUBAN_TWITTER_ABRIDGED?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-04-03-03-43-35

Butsch, R. (2008). *The citizen audience: Crowds, publics and individuals*. New York: Routledge.

California Election Code § 13108 (n.d.).

California Election Code § 13307 (n.d.).

California Election Code § 18350 (n.d.).

California Election Code § 18351 (n.d.).

Campbell, K. & Jamieson, K. (1990). *Deeds done in words: Presidential rhetoric and the genres of governance*. Chicago: University of Chicago Press.

Campbell, W. J. (2006). *The year that defined American journalism: 1897 and the clash of paradigms*. New York: Routledge.

Cannon, C., Dubose, L., & Reid, J. (2003). *Boy genius: The architect of George W. Bush's remarkable political triumphs*. New York: Public Affairs.

Cannon, L. (1969). *Ronnie and Jesse: A political odyssey*. Garden City, NY: Doubleday.

Canon, S. (2011). Minnesota News Council closes after 41 years. *Bulletin*, 16(2). Retrieved from http://www.silha.umn.edu/news/MinnesotaNewsCouncilCloses.html

Cappella, F. & Jamieson, K. (1997). *Spiral of cynicism: The press and the public good.* New York: Oxford University Press, USA.

Carey v. Brown, 447 U.S. 455 (1980).

Carmola, K. (2003). Noble lying: Justice and intergenerational tension in Plato's "Republic." *Political Theory*, 31(1), pp. 39-62.

Carpentier, N. & De Cleen, B. (2007). Bringing discourse theory into media studies: The applicability of discourse theoretical analysis (DTA) for the study of media practices and discourses. *Journal of Language and Politics*, 6(2), pp. 265-293.

Carpentier, N. (2010). Deploying discourse theory: An introduction to discourse theory and discourse theoretical analysis. In Carpentier, N., et al. (Eds.), *Media and Communication Studies Intersections and Interventions*, pp. 251-265. Tartu, Estonia: Tartu University Press.

Cassidy, J. (2012, August 30). PolitiFact bias: Does the GOP tell nine times more lies than left? Really? *Human Events*. Retrieved from http://humanevents.com/2012/08/30/politifact-bias-does-the-gop-tell-nine-times-more-lies-than-left-really/

Castleman, D. (2004). Has the law made liars of us all? *Wake Forest University Legal Studies*, Paper No. 04-11.

Cave, D. (2004, December 26). Flip-flopper. *The New York Times*. Retrieved from http://www.nytimes.com/2004/12/26/weekinreview/26flip.html

Center for Responsive Politics, The. (n.d.). Our mission: Inform, empower & advocate. Center for Responsive Politics. Retrieved from https://www.opensecrets.org/about/

Chafee Z. (1969). *Free Speech in the United States.* New York: Atheneum.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Chetry, K. (Host). (2010, February 5). *American Morning* [Television broadcast]. Atlanta: CNN.

Chomsky, N. & Herman, E. (1988). *Manufacturing consent: The political economy of the mass media*. New York: Random House.

Chron.com staff. (2013, April 5). 20 conspiracy theories you should know. *Houston Chronicle*. Retrieved from http://www.chron.com/news/nation-world/gallery/20-conspiracy-theories-you-should-know-59625.php

Citizens United v. Federal Election Commission, 558 U.S. 1 (2010).

Civil remedies and sanctions, Washington § 42.17A.750 (2013).

CMPA. (2013, May 28). Study: Media fact-checker says Republicans lie more. The Center for Media and Public Affairs Retrieved from http://www.cmpa.com/study-media-fact-checker-says-republicans-lie-more/

CNN. (2002, February 20). New Pentagon office to spearhead information war. *CNN*. Retrieved from http://edition.cnn.com/2002/US/02/19/gen.strategic.influence/index.html?_s=PM:US

Cohen v. Cowles, 501 U.S. 663 (1991).

Colbert, S. (2006, May 3). Stephen Colbert's remarks to the President. *AlterNet*. Retrieved from http://www.alternet.org/story/35797/stephen_colbert's_remarks_to_the_president

Collins, R. (2013). Exceptional freedom — The Roberts Court, the First Amendment, and the new absolutism. *Albany Law Review*, 76(1), pp. 409-466.

Commission on Presidential Debates. (1992, October 19). October 19, 1992 debate transcript. CPD. Retrieved from http://www.debates.org/index.php?page=october-19-1992-debate-transcript

Common Cause. (n.d.a.). Deceptive practices 2.0: Legal and policy responses.

Common Cause. (n.d.b.). Voting in 2008: Ten swing states. A report from the Common Cause Education Fund.

Conan, N. (Host). (2011, September 12). Tea party prepares for televised GOP debate. *Talk of the Nation* [Radio broadcast]. Washington, D.C.: National Public Radio.

Conason, J. (2004). *Big lies: The right-wing propaganda machine and how it distorts the truth*. New York: Macmillan.

Conn, L. (1994). Mississippi mudslinging: The search for truth in political advertising. *Mississippi Law Journal* 63(2), pp. 507-535.

Cooper, R. (2009). Fair campaign practices act, Tenn. Att'y Gen op. no. 09-112.

Corn, D (2013, January 7). The "smoking gun" memo that triggered the FreedomWorks feud. *Mother Jones*. Retrieved from http://www.motherjones.com/politics/2013/01/dick-armey-freedomworks-kibbe-book-contract-smoking-gun

Cornell University Legal Information Institute. (n.d.). *Judicial review*. Retrieved from http://www.law.cornell.edu/wex/judicial_review

Cornell University Legal Information Institute. (n.d.a.). *Intermediate scrutiny*. Retrieved from http://www.law.cornell.edu/wex/intermediate_scrutiny

Cornell University Legal Information Institute. (n.d.b). *Strict scrutiny*. Retrieved from http://www.law.cornell.edu/wex/strict_scrutiny

Coulter, A. (2003). *Slander: Liberal lies about the American right*. New York: Three Rivers Press.

Countryman, E. (1999). Moral economy, political economy and the American bourgeois revolution. In A. Randall & A. Charlesworth (Eds.), *Moral economy and popular protest: Crowds, conflict and authority* (pp. 147-165). New York: St. Martin's Press.

CNBC. (2009). Santelli's Tea Party. *CNBC*. Retrieved from http://video.cnbc.com/gallery/?video=1039849853

Craig, E. (1998). *Routledge encyclopedia of philosophy: Volume 7*. New York: Routledge.

Crawford, C. (2007). *Attack the messenger: How politicians turn you against the media*. Lanham, MD: Rowman & Littlefield.

Critical Mass Wiki. (n.d.). List of rides. Retrieved from http://criticalmass.wikia.com/wiki/List_of_rides

Crouse, T. (1973). *The boys on the bus*. New York: Random House.

Cutter, S. (2012, September 15). Just tuning in (Mass message sent to recipients who signed up for the Obama campaign's email list).

D'Souza, D. (2002). Ronald Reagan: How an ordinary man became an extraordinary leader. New York: Free Press.

Dadge, D. (2004). *Casualty of war: The Bush Administration's assault on a free press*. Amherst, NY: Prometheus Books.

Dailey, P. (Producer) (1980). Nancy Reagan [Television Ad]. The Museum of the Moving Image. Retrieved from http://www.livingroomcandidate.org/commercials/1980/nancy-reagan

Dao, J. & Schmitt, E. (2002, February 19). Pentagon readies efforts to sway sentiment abroad. *The New York Times*. Retrieved from http://www.nytimes.com/2002/02/19/world/nation-challenged-hearts-minds-pentagon-readies-efforts-sway-sentiment-abroad.html

Davey, M. & Zeleny, J. (2012, June 5). Walker survives Wisconsin recall vote. *The New York Times*. Retrieved from http://www.nytimes.com/2012/06/06/us/politics/walker-survives-wisconsin-recall-effort.html?_r=0

De Jouvenel, B. (1992). *The nature of politics: Selected essays of Bertrand De Jouvenel*. New Brunswick, NJ: Transaction Publishers.

De Vreese, C. (2005). The spiral of cynicism reconsidered. *European Journal of Communication*, 20(3), pp. 283-301.

Deceptive mailings, Arizona § 16-925 (1998).

Dobbs, M. (2012, February). The rise of political fact-checking: How Reagan inspired a journalistic movement: A reporter's eye view. New America Foundation. Retrieved from http://newamerica.net/sites/newamerica.net/files/policydocs/The_Rise_of_Political_Fact-checking.pdf.pdf

Doe v. Cahill, 884 A.2d 451 (2005).

Druckman, J. (2010). Competing frames in a political campaign. In B. Schaffner & P. Sellers (Eds.), *Winning with words: The origins & impact of political framing* (pp. 101-120). New York: Routledge.

Drury, S. (1996). Noble lies and the First Amendment: A symposium on the death of discourse: Act II: Lying and politics. *University of Cincinnati Law Review*, 64, pp. 1227-1235.

Drury, S. (1999). *Leo Strauss and the American right*. New York: St. Martin's Press.

Druzin, B & Li, J. (2011). The criminalization of lying: Under what circumstances, if any, should lies be made criminal? *The Journal of Criminal Law and Criminology*, 101(2), pp. 529-573.

Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).

Durkin, A. (2014, March 26). Maine governor's proposal aimed at preventing false claims in campaign meets resistance. *The Republic*. Retrieved from http://www.therepublic.com/w/ME--Elections-False-Statements

Dwyer, D. (2012, June 1). Obama says GOP 'fever' on taxes may break in a second term. ABC News. Retrieved from http://abcnews.go.com/blogs/politics/2012/06/obama-says-gop-fever-on-taxes-may-break-in-a-second-term/

Eaton, S. (2014, January 22). Should politicians have the right to lie? U.S. Supreme Court could decide in Ohio case. *Cleveland Plain Dealer*. Retrieved from http://www.cleveland.com/open/index.ssf/2014/01/us_supreme_court_case_from_ohi.html

Ekman, P. (1985). *Telling lies: Clues to deceit in the marketplace, politics, and marriage*. New York: Norton & Company.

Edelman, M. (1995). *From Art to Politics: How Artistic Creations Shape Political Conceptions*. Chicago: University of Chicago Press.

Election authorities and conduct of elections, Missouri § 115.631 (2012).

Eliasoph, N. (1998). *Avoiding politics: How Americans produce apathy in everyday life*. Cambridge: Cambridge University Press.

Emblem, T. (2010, September 21). Follow the astro-turf money trail to the tea party. *Firedoglake*. Retrieved from http://my.firedoglake.com/tracyemblem/2010/09/21/follow-the-astro-turf-money-trail-to-the-tea-party/

Entman, R. & Wildman, S. (1992). Reconciling economic and non-economic perspectives on media policy: Transcending the "marketplace of ideas." *Journal of Communication*, 42(1), pp. 5-19.

Etter, W. (n.d.). Wooden teeth myth. The Digital Encyclopedia of George Washington. Retrieved from http://www.mountvernon.org/educational-resources/encyclopedia/wooden-teeth-myth

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989).

Ewen, S. (1996). *PR! A social history of spin*. New York: Basic Books.

Executive Order No. 11652, 37 F.R. 5209 (1972).

FactCheck.org. (n.d.). Our mission. Retrieved from http://www.factcheck.org/about/our-mission/

Fairclough, N. (2000). Critical analysis of media discourse. In P. Marris & S. Thornham (Eds.), *Media studies: A reader* (pp. 308-325). New York: New York University Press.

Fairhclough, I. & Fairclough, N. (2012). *Political discourse analysis: A method for advanced students*. London: Routledge.

Fallows, J. (1996). *Breaking the news: How the media undermine American democracy*. New York: Pantheon Books.

False designation of incumbency, Michigan § 168.944 (1997).

False impersonation as party officer, Kansas § 25-2424 (1974).

False or malicious charges against, or false statements about, opposing candidates, Florida § 112.317 (2012).

False Political and Campaign Material, Minnesota § 211.B06 (1998).

False pretenses with intent to defraud, Michigan § 750.218 (1931).

False Statements in Telephone Polling, Alaska § 15.13.095 (n.d.).

Falsifying election documents, Wyoming § 22-26-107 (n.d.).

Falwell v. Flynt, 797 F.2d 1270 (1986).

Fang, L. (2009a, April 9). Spontaneous uprising? Corporate lobbyists helping to orchestrate radical anti-Obama tea party protests. *Think Progress*. Retrieved from http://thinkprogress.org/politics/2009/04/09/37433/lobbyists-planning-teaparties/

Fang, L. (2009b, April 14). FreedomWorks orchestrate 'grassroots' movements to serve Dick Armey's corporate clients. *Think Progress*. Retrieved from http://thinkprogress.org/politics/2009/04/14/37536/lobbying-clients-teaparties/

Fang, L (2009c, July 31). Right-wing harassment strategy against Dems detailed in memo: 'Yell,' 'Stand up and shout out,' 'Rattle him.' Retrieved from http://thinkprogress.org/politics/2009/07/31/53761/recess-harassment-memo/

Farhi, P. (2003, April). Everybody wins. *American Journalism Review*. Retrieved from http://ajrarchive.org/article.asp?id=2875

Fenster, M. (1999). *Conspiracy theories: Secrecy and power in American culture*. Minneapolis, MN: University of Minnesota Press.

Ferguson, C. (1997). The politics of ethics and elections: Can negative campaign advertising be regulated in Florida? *Florida State University Law Review* 24(2), pp. 464-504.

Financial crisis and the role of federal regulators, The: Hearing before the Committee on Oversight and Government Reform, House of Representatives, 110th Cong. 11 (2002) (testimony of Alan Greenspan).

Finnegan, M. (2003, October 8). Gov. Davis Is recalled; Schwarzenegger wins. *Los Angeles Times*. Retrieved from http://articles.latimes.com/2003/oct/08/local/me-recall8

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

Fiske, J. (1989). *The John Fiske collection: Understand popular culture*. New York: Routledge.

Flaherty, B. (2011). Election 2010: The loophole created by 11 C.F.R. § 104.20(C)(9) and *Citizens United* and the ineffectiveness of the campaign-finance-law framework in Iowa. *Iowa Law Review*, 97(1), pp. 239-274.

Food Lion v. Capitol Cities/ABC, 194 F. 3d 505 (1999).

Forgette, R. & Morris, J. (2006). High-conflict television news and public opinion. *Political Research Quarterly*, 59(3), pp. 447-456.

Foucault, M. (2010). *The archaeology of knowledge: And the discourse on language*. New York: Vintage Books.

Franken, A. (2003). *Lies and the lying liars who tell them: A fair and balanced look at the right*. New York: Dutton.

FreedomWorks. (n.d.). About FreedomWorks. Retrieved from http://www.freedomworks.org/

FreedomWorks. (2004). Citizens for a Sound Economy (CSE) and Empower America Merge to Form FreedomWorks [press release]. Retrieved from http://web.archive.org/web/20040725031033/http://www.freedomworks.org/release.php.

Frontline. (2004). Interview Frank Luntz. Retrieved 8 December 2010 from http://www.pbs.org

Gans, H. (1979). *Deciding what's news: A study of CBS Evening News, NBC Nightly News, Newsweek, and Time*. Evanston, IL: Northwestern University Press.

Gant, S. (2007). *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age*. New York: Free Press.

Garrison v. Louisiana, 379 U.S. 64 (1964).

Gertz v. Welch, 418 U.S. 323 (1974).

Gibbs, P. (1920). *Now it can be told*. New York: Harper Brothers & Publishers.

Gibson, D. (1985). A typology of informal communication controls. *Communication Quarterly*, 33(2), pp. 126-136.

Gibson, J. (host). (2004, October 1). Interview with Eric Cantor and Charlie Rangel. *The Big Story with John Gibson*. New York: Fox News channel.

Gladstone, B. (2012, August 31). We're not going to let our campaign be dictated by fact-checkers! *On the Media*. Retrieved from http://www.onthemedia.org/story/234365-were-not-going-let-our-campaign-be-dictated-fact-checkers/

Glaser, M. (2008, September 24). Political fact-check sites proliferate, but can they break through the muck? *MediaShift*. Retrieved from http://www.pbs.org/mediashift/2008/09/political-fact-check-sites-proliferate-but-can-they-break-through-the-muck268/

Goddard, T. (n.d.a.). Politics ain't beanbag. *Taegan Goddard's Political Dictionary*. Retrieved from http://politicaldictionary.com/words/politics-aint-beanbag/

Goddard, T. (n.d.b.). Astroturfing. *Taegan Goddard's Political Dictionary*. Retrieved from http://politicaldictionary.com/words/astroturf/

Goldberg, B. (2001). *Bias: A CBS insider exposes how the media distort the news.* Washington, D.C.: Regnery Publishing.

Goldberg, B. (2009). *A slobbering love affair: The true (and pathetic) story of the torrid romance between Barack Obama and the mainstream media*. Washington, D.C.: Regnery Publishing.

Goldmacher, S. (2013, December 12). Republican look-alike sites mocking Democrats may violate rules. *National Journal*. Retrieved from http://www.nationaljournal.com/politics/republican-look-alike-sites-mocking-democrats-may-violate-rules-20131212

Goldman, L. (2008). False campaign advertising and the "actual malice" standard. *Tulane Law Review*, 82(3), pp. 889-928.

Goldwater, B. (1998). Goldwater's 1964 acceptance speech. Retrieved from http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm

Goodman, E. (2004, September 7). Leadership rules, despite missed goals. *The Ledger*, p. A18.

Gransberry, J. (2002, October 9). Taylor quits senate race in Montana. *Billings Gazette*. Retrieved from http://billingsgazette.com/news/local/taylor-quits-senate-race-in-montana/article_a018c52e-fa3d-52ac-bcc6-ecfbaeb66468.html

Graves, L. (2013). Checking Glenn Beck: Objectivity and materiality in fact-checking work. Unpublished paper presented at the International Communication Association conference, London, UK.

Gravois, J. (2007, May 11). Judge throws out claim of liberal bias at Temple U. *Chronicle of Higher Education*. Retrieved from http://chroniclecareers.com/article/Judge-Throws-Out-Claim-of/12762/

Greenbelt v. Bresler, 398 U.S. 6 (1970).

Greenhouse, S. (2013, January 23). Share of the work force in a union falls to a 97-year low, 11.3%. *The New York Times*. Retrieved from http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html

Greenwald, G. (2011, December 5). PolitiFact and the scam of neutral expertise. *Salon*. Retrieved from http://www.salon.com/2011/12/05/politifact_and_the_scam_of_neutral_expertise/

Gregory, D. (2004, October 28). President Bush asks Democrats for their votes [Television broadcast]. *NBC Nightly News*. New York: National Broadcasting Company.

Gross, E. (2000, November 4). Commission hopeful criticizes opponent's flier. *St. Petersburg Times*. Retrieved from http://www.sptimes.com/News/110400/news_pf/SouthPinellas/Commission_hopeful_cr.shtml

Grow, K. (2014, January 22). Courtney Love cries in court over mishandling of Kurt Cobain's memory. *Rolling Stone*. Retrieved from http://www.rollingstone.com/music/news/courtney-love-cries-in-court-over-mishandling-of-kurt-cobains-memory-20140122

Hall, J. (1990). When political campaigns turn to slime: Establishing a Virginia Fair Campaign Practices Committee. *Journal of Law and Politics*, 7(2), pp. 353-377.

Hallin, D. (2013). *We keep America on top of the world: Television journalism and the public sphere*. New York: Routledge.

Ham, M. (2009, August 5). Think Progress, MSNBC 'manufacture' a story with putative smoking gun 'mob' memo. *The Weekly Standard*. Retrieved from

http://www.weeklystandard.com/weblogs/TWSFP/2009/08/think_progress_msnbc_manufactu.asp

Hamilton, J. (1996). *Hold the press: The inside story on newspapers*. Baton Rouge, LA: Louisiana State University Press.

Hannity, S. & Colmes, A. (hosts). (2004, October 5). Discussion with DNC advisor Howart Wolfson. *Hannity and Colmes* [Television broadcast]. New York: Fox News Channel.

Hardt, A. & Negri, M. (2004). *Multitude: War and democracy in the age of empire*. New York: Penguin Press.

Harvard Law Review Association. (1957). Avoidance of an election or referendum when the electorate has been misled." *Harvard Law Review*, 70(6), pp. 1077-1094.

Harvard Law Review. (2013). First Amendment – Deceptive expression – Fourth Circuit holds that statutes prohibiting the unauthorized wearing of a military uniform or military medals do not violate that First Amendment. *Harvard Law Review*, 126(7), pp. 2113-2120.

Harvey, D. (2005). *A brief history of neoliberalism*. Oxford: Oxford University Press.

Harsin, J. (2006). The rumour bomb: Theorising the convergence of new and old trends in mediated US politics. *Southern Review*, 39(1), pp. 84-110.

Hasen, R. (2013). A constitutional right to lie in campaigns and elections? *Montana Law Review*, 74(1), pp. 53-77.

Haughney, C. (2013, May 24). Press sees chilling effect in Justice Dept. inquiries. *New York Times*. Retrieved from http://www.nytimes.com/2013/05/25/us/politics/reporters-see-chilling-effect-from-justice-dept-inquiries.html

Hemmings, C. (2005). Invoking affect: Cultural theory and the ontological turn. *Cultural Studies*, 19(5), pp. 548-567.

Herbert v. Lando, 441 U.S. 153 (1979).

Herman, E. (1999). *The myth of the liberal media*. New York: Peter Lang.

Hernandez, R. (2011, June 16). Weiner resigns in chaotic final scene. *New York Times*. Retrieved from http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html

Highmore, B. (2011). Bitter after taste: Affect, food, and social aesthetics. In M. Gregg & G. Seigworth (Eds.), *The affect theory reader* (pp. 118-137). Durham, NC: Duke University Press.

Himmelstrand, U. (1962). A theoretical and empirical approach to depoliticization and political involvement. *Acta Sociological*, 6(1/2), pp. 83-110.

Hoffer, E. (1966). *The true believer*. New York: Harper Collins.

Hofstadter, R. (2008). *The paranoid style in American politics*. New York: Vintage Books.

Holan, A. (2009, December 18). PolitiFact's Lie of the Year: 'Death panels.' PolitiFact. Retrieved from http://www.politifact.com/truth-o-meter/article/2009/dec/18/politifact-lie-year-death-panels/

Holcomb, J., Mitchell, A., & Rosenstiel, T. (2011). "Cable: Audience vs. economics." A report from Pew Research Center's Project for Excellence in Journalism. Retrieved from http://stateofthemedia.org/2011/cable-essay/

Holcomb, J., Mitchell, A., & Rosenstiel, T. (2012). "Cable: CNN ends its ratings slide, Fox falls again." A report from Pew Research Center's Project for Excellence in Journalism. Retrieved from http://stateofthemedia.org/2012/cable-cnn-ends-its-ratings-slide-fox-falls-again/

Holderness, C., Jensen, M. & Meckling, W. (2000) The logic of the First Amendment. Harvard Business School NOM Research Paper No. 00-01. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=215468

Horowitz, D. (2006). *The professors: 101 most dangerous academics in America*. Washington D.C.: Regnery Publishing.

Horowitz, D. (2007). *Indoctrination U: The left's war against academic freedom*. New York: Encounter Books.

Houston Tea Party Society. (2009, October 6). A statement on the Tea Party Express. Retrieved from http://houstontps.org/?p=957

Howarth, D. & Stavrakakis, Y. (2000). Introducing discourse theory and political analysis. In Howarth, D., Norval, A. & Stavrakakis, Y. (Eds.), *Discourse theory and political analysis: Identities, hegemonies and social change* (pp. 1-23). Manchester: Manchester University Press.

Hughes, H. (1940). *News and the human interest story*. Piscataway, NJ: Transaction Publishers.

Huang, H. (2010). Electoral competition when some candidates lie and others pander. *Journal of Theoretical Politics*, 22(3), pp. 333-358.

Hughes, K. (n.d.). Why didn't Nixon burn the tapes? Retrieved from http://whitehousetapes.net

Huntzicker, W. (1999). National News Council. In M. Murray (Ed.), *Encyclopedia of television news* (p. 165). Phoenix, AZ: The Oryx Press.

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

Infiltration of campaign – false statements in a campaign – election of a candidate, Ohio R.C. § 3517.21 (1995).

Infiltration of campaign – false statements in campaign materials – issues, Ohio R.C. § 3517.22 (1995).

Intelligencer Journal. (2013, May 23). Wet in Pequea Twp. *Intelligencer Journal*. Retrieved from http://www.lancasteronline.com/opinion/editorials/wet-in-pequea-twp/article_b45a68fc-4ecb-5158-b5fd-fd611da71aab.html

Isenberg, A. (1964). Deontology and the ethics of lying. *Philosophy and Phenomenological Research*, 24(4), pp. 463-480.

Iskander, A. (2005). The great American bubble: Fox News Channel, the "mirage" of objectivity and the isolation of American public opinion. In Artz, L. and Kamalipour, Y. (Eds.) *Bring 'em on: Media and politics in the Iraq War*, pp. 155-173. Lanham, MD: Rowman & Littlefield.

Jackson, B. & Jamieson, K. (2007). *unSpun: Finding facts in a world of disinformation*. New York: Random House Trade Paperbacks.

Jacobson, J. (2006, April 7). Pa. lawmakers get mixed message on fixing perceived liberal bias in academe. *Chronicle of Higher Education*. Retrieved from http://chronicle.com

Jaffe, H. (2012, April 6). Washington's top three fact checkers. *Washingtonian*. Retrieved from http://www.washingtonian.com/blogs/capitalcomment/media/busted.php

Jamieson, K. (1992). *Dirty politics: Deception, distraction, and democracy*. New York: Oxford University Press.

Jamieson, K. & Waldman, P. (2003). *The press effect: Politicians, journalists, & the stories that shape the political world*. Oxford: Oxford University Press.

Jamieson, K. & Cappella, J. (2010). *Echo chamber: Rush Limbaugh and the conservative media establishment*. New York: Oxford University Press, USA.

Jay, M. (1992). “The aesthetic ideology" as ideology; Or, what does it mean to aestheticize politics? *Cultural Critique*, 21(1), pp. 41-61.

Jay, M. (2010). *The virtues of mendacity: On lying in politics*. Charlottesville, VA: University of Virginia Press.

Jefferey, S. (2002, October 8). We cannot wait for the smoking gun. *The Guardian*. Retrieved from http://www.theguardian.com/world/2002/oct/08/iraq.usa

Jefferson, T. (1791). Strengthening the state governments: To Archibald Stuart. Jefferson, Thomas, 1743-1826. Letters. Electronic Text Center, University of Virginia Library. Retrieved from http://etext.virginia.edu/toc/modeng/public/JefLett.html

Jefferson, T. (1807). History, Hume, and the press: To John Norvell. Jefferson, Thomas, 1743-1826. Letters. Electronic Text Center, University of Virginia Library. Retrieved from http://etext.virginia.edu/toc/modeng/public/JefLett.html

Johnson-Cartee, K. & Copeland, G. (1997). *Inside political campaigns: Theory and* practice. Westport, CT: Praeger Publishers.

Jonas, F. (1957) The art of political dynamiting. *The Western Political Quarterly*. 10(2), pp. 374-391.

Jordan, B. (2013, June 3). Obama signs new Stolen Valor Act. *Military.com*. Retrieved from http://www.military.com/daily-news/2013/06/03/obama-signs-new-stolen-valor-act.html

Jurkowitz, M., Hitlin, P. Mitchell, A., Santhanam, L., Adams, S., Anderson, M., Vogt, N. (2013). The changing TV news landscape. *The State of the News Media 2013*. Retrieved from http://stateofthemedia.org/2013/the-changing-tv-news-landscape/

Kalyvas, A. (2005). Popular sovereignty, democracy, and the constituent power. *Constellations*, 12(2), pp. 223-244.

Kane, T. (1999) Malice, lies, and videotape: Revisiting *New York Times v. Sullivan* in the modern age of political campaigns. *Rutgers Law Journal*, 30, pp. 755-815.

Kaplar, R. (1995). *The government factor: Undermining journalistic ethics in the information age*. Washington, D.C.: Cato Institute.

Karl, J. (2011, December 30). Gingrich: Politics Is a ‘Nasty, Vicious, Negative’ and Disgusting Business [Blog post]. *The Note* (ABC News). http://abcnews.go.com/blogs/politics/2011/12/politics-is-a-nasty-vicious-negative-and-disgusting-business/

Kartik, N. & McAfee, R. (2007). Signaling character in electoral competition. *The American Economic Review*, 97(3), pp. 852-870.

Keen, A. (2007). *The Cult of the Amateur: How Today's Internet is Killing our Culture*. New York: Doubleday.

Keeton v. Hustler Magazine, 465 U.S. 770 (1984).

Kellner, D. (2005). The media and election 2004. *Cultural Studies ←→ Critical Methodologies*, 5(3), pp. 298-308.

Kennedy, M. (2009, August 12). Protester at Obama healthcare town hall carried 9mm pistol – legally. *The Guardian*. Retrieved from http://www.theguardian.com/world/2009/aug/12/barack-obama-new-hampshire-gun

Kenney, R. & Ozkan, K. (2011) The ethics examiner and media councils: Improving ombudsmanship and news councils for true citizen journalism. *Journalism and Mass Media Ethics*, 26(1), pp. 38-55.

Kessler, G. (2012, August 8). Spin and counterspin in the welfare debate [Blog post]. Retrieved from http://www.washingtonpost.com/blogs/fact-checker/post/spin-and-counterspin-in-the-welfare-debate/2012/08/07/61bf03b6-e0e3-11e1-8fc5-a7dcf1fc161d_blog.html

Kiely, E. & Moss, R. (2012, August 9). Does Obama's plan 'gut welfare reform'? Fact Check.org. Retrieved from http://www.factcheck.org/2012/08/does-obamas-plan-gut-welfare-reform/

Kirtley, J. (2002, September). Overkill in Kansas. *American Journalism Review*. Retrieved from http://ajrarchive.org/article.asp?id=2606

Kleinknecht, W. (2010). *The man who sold the world: Ronald Reagan and the betrayal of main street America*. New York: Nation Books.

Knoll, C. (2014, January 25). Singer-actress Courtney Love wins landmark Twitter libel case. *Los Angeles Times*. Retrieved from http://www.latimes.com/local/la-me-love-libel-20140125,0,2561369.story#axzz2rWldub4Q

Knowingly publishing false campaign literature, Tenn. § 2-19-142 (2010).

Kovach, B & Rosenstiel, T. (2007). *The elements of journalism*. New York: Three Rivers Press.

Krauss, M. (2012). A Marine's honor: The Supreme Court from *Snyder* to *Alvarez*. *George Mason Law Review*, 20(1), pp. 1-23.

Krugman, P. (2011, December 20). Politifact, R.I.P. [Blog post]. *The Conscience of a Liberal*, (*New York Times*). Retrieved from http://krugman.blogs.nytimes.com/2011/12/20/politifact-r-i-p/

Kruse, B. (2001). The truth in masquerade: Regulating false ballot proposition ads through state anti-false speech statutes. *California Law Review*, 89(1), pp. 129-181.

Lamz v. Wells, 938 So.2d 792 (2006).

Laswell, H. (1931). Propaganda. In E. Seligman & A. Johnson (Eds.), *Encyclopedia of the social sciences* (pp. 523-527). New York: The MacMillan Company.

Latour, B. & Woolgar, S. (1986). *Laboratory life*. Princeton, NJ: Princeton University Press.

Latour, B. (1988). *The pasteurization of France*. Cambridge, MA: Harvard University Press.

Latour, B. (2010). *The making of law: An ethnography of the Conseil d'Etat.* Cambridge, UK: Polity Press.

Le Bon, G. (1896). *The crowd: A study of the popular mind*. Mineola, NY: Dover Publications.

League of Women Voters. (n.d.a.). About the league. Retrieved from http://www.lwv.org/content/about-league

League of Women Voters. (n.d.b.). About the league. Retrieved from http://www.lwv.org/our-work

Lears, T.J. (1985). The concept of cultural hegemony: Problems and possibilities. *The American Historical Review*, *90*(3), pp. 567-593.

Leary, A. (2014, February 3). Campaign site misleads man into donating money against Sink. *Tampa Bay Times*. Retrieved from http://www.tampabay.com/blogs/the-buzz-florida-politics/campaign-site-misleads-man-into-donating-money-against-alex-sink/2163901

Lee, J. & Pinker, S. (2010). Rationales for indirect speech: The theory of the strategic speaker. *Psychological Review*, 117(3), pp. 785-807.

Leibovich, M. (2013). *This town: Two parties and a funeral—plus, plenty of valet parking!—in America's gilded capital*. New York: Penguin Group.

Lemon , D. & Travis, S. (2010, October 30). *Boiling point: Inside the tea party*. Atlanta: CNN.

Lerche, C. (1948). Jefferson and the election of 1800: A case study in the political smear. *The William and Mary Quarterly*, 5(4), pp. 467-491.

Lessa, I. (2006). Discursive Struggles Within Social Welfare: Restaging Teen Motherhood. *British Journal of Social Work*, 36(2), pp. 283-298.

Lewis, A. (1992). *Make no law: The Sullivan case and the First Amendment*. New York: Vintage.

Lewis, A. (2008). *Freedom for the thought that we hate: A biography of the First Amendment.* New York: Basic Books.

Liasson, M. (2004, September 3). President Bush accepts his party's nomination and addresses the Republican National Convention [Radio Broadcast]. *Morning Addition*. Washington D.C.: National Public Radio.

Lidsky, L. (2000). Silencing John Doe: Defamation & discourse in cyberspace. *Duke Law Journal*, 49(4), pp. 855-946.

Lieffring, S. (2013). First Amendment and the right to lie: Regulating knowingly false campaign speech after United States v. Alvarez. *Minnesota Law Review*, 97(3), pp. 1047-1078.

Lippmann, W. (1997). *Public opinion*. New York: Free Press.

Lipset, S. (1996). *American exceptionalism: A double-edged sword*. New York: Norton & Company.

Liptak, A. (2011, September 19). A blockbuster case yields an unexpected result. *New York Times*. Retrieved from http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html

Lively, D. (1986). The Supreme Court's emerging vision of false speech: A First Amendment blind spot. *Rutgers Law Review*, 38(3), pp. 479-499.

Lloyd, M. (2006). *Prologue to a farce: Communication and democracy in America*. Champaign, IL: University of Illinois Press.

Lord, C. (2003). *The modern prince: What leaders need to know now*. New Haven, CT: Yale University Press.

Lostracco v. Fox, 150 Mich. App. 617 (1986).

Lowenstein, R. (1973). Press Councils: Idea and Reality. Columbia, MO: Freedom of Information Foundation.

MacGillis, A. (2011, December 20). The hard truth about fact-checking. *The New Republic*. Retrieved from http://www.newrepublic.com/blog/the-stump/98760/the-hard-truth-about-fact-checking

MacGuffie, B. (2009). Right principles: Rocking the town halls – Best practices. Retrieved from http://thinkprogress.org/wp-content/uploads/2009/07/townhallactionmemo.pdf

Maddow, R. (Host). (2009, August 14). *The Rachel Maddow Show* [Television broadcast]. New York: MSNBC.

Mahon, J. (2007). A definition of deceiving. *International Journal of Applied Philosophy*, 21(2), pp. 181-194.

Man, A. (2011, February 11). Broward's Fair Campaign Practices Committee shuts its doors. *Sun Sentinel*. Retrieved from http://weblogs.sun-sentinel.com/news/politics/broward/blog/2011/02/browards_fair_campaign_practic.html

Manasco v. Walley, 216 Miss. 614 (1953).

Manheim, J. (2011). *Strategy in information and influence campaigns: How policy advocates, social movements, insurgent groups, corporations, governments and other get what they want*. New York: Routledge.

Maraniss, D. (1998, January 28). First Lady launches counterattack. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/hillary012898.htm

Marano, L. (2002, February 26). Propaganda: Remember the Kuwaiti babies? *United Press International*. Retrieved from http://www.upi.com/Odd_News/2002/02/26/Propaganda-Remember-the-Kuwaiti-babies/UPI-60841014745117/

Maras, S. (2013). *Objectivity in journalism*. Cambridge, UK: Polity Press.

Marbury v. Madison, 5 U.S. 137 (1803).

Mark, D. (2009, August 14). Armey leaves firm amid health care flap. *Politico*. Retrieved from http://www.politico.com/news/stories/0809/26128.html

Marks v. United States, 430 U.S. 188 (1977).

Marshall, W. (2004). False campaign speech and the First Amendment. *University of Pennsylvania Law Review*, 153(1), pp. 285-323.

Martin, B. (2011). Tactics of political lying: The Iguanas Affair. Retrieved from http://www.bmartin.cc/pubs/preprints/lt111020.pdf

Martin, N. (1993, November 8). Voters to decide bitter race Miami mayor runoff scheduled on Tuesday. *Sun Sentinel*. Retrieved from http://articles.sun-sentinel.com/1993-11-08/news/9311080138_1_miriam-alonso-miami-mayor-runoff-miami-s-next-mayor

Marx, G. (2012, January 5). What the fact-checkers get wrong. *Columbia Journalism Review*. Retrieved from http://www.cjr.org/campaign_desk/what_the_fact-checkers_get_wro.php?page=all

Maskell, J. (2010, May 12). Post-employment, "revolving door," laws for federal personnel (Congressional Research Service 7-5700). Washington DC: Library of Congress Congressional Research Service. Retrieved from http://www.fas.org/sgp/crs/misc/97-875.pdf

Massumi, B. (2002a). *Parables for the virtual: Movement, affect, sensation*. Durham, NC: Duke University Press.

Massumi, B. (2002b). The Autonomy of Affect. In *Parables for the Virtual: Movement, Affect, Sensation*, p. 23-45. Duke University Press.

May, P. (1992). State regulation of political broadcast advertising: Stemming the tide of deceptive negative attacks. *Boston University Law Review* 72, pp. 179-216.

Mayer, J. (2010, August 30). Covert operations: The billionaire brothers who are waging a war against Obama. *The New Yorker*. Retrieved from http://www.newyorker.com/magazine/2010/08/30/covert-operations

McBride, A. (n.d.). *Marbury v. Madison (1803)*. Retrieved from http://www.pbs.org/wnet/supremecourt/democracy/landmark_marbury.html

McChesney, R. (2000). *Rich media, poor democracy: Communication politics in dubious times*. New York: The New Press.

McCutcheon v. Federal Election Commission, 572 U.S. _____ No. 12-536 (2014).

McLaughlin, J. (host). (2004, September 27). Panel. *The McLaughlin Group* [Television broadcast]. Arlington, VA: Public Broadcasting Service.

McLaughlin, J. (host). (2004, October 21). John McLaughlin's "one on one" guests. *The McLaughlin Group* [Television broadcast]. Arlington, VA: Public Broadcasting Service.

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

Mearsheimer, J. (2011). *Why leaders lie: The truth about lying in international politics*. Oxford: Oxford University Press.

Meiklejohn, A. (1948). *Freedom of speech and its relation to self-government*. New York: Harper & Brothers.

Meiklejohn, A. (1961). The First Amendment is an absolute. *Supreme Court Review 1961*,
pp. 245-266.

Memoirs v. Massachusetts, 383 U.S. 413 (1966).

Merriam-Webster. (n.d.). calumniate. Retrieved from http://www.merriam-webster.com/dictionary/calumniate

Messenger, A. (2012). The problem with *New York Times v. Sullivan*: An argument for moving from a "falsity model" of libel law to a "speech act model." *First Amendment Law Review*, 11(fall), pp. 172-234.

Miami Herald v. Tornillo, 418 U.S. 241 (1974).

Michigan v. Dewald, 705 NW 2d 167 (2005).
Michigan v. Reigle, 566 N.W.2d 21 (1997).

Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

Mill, J.S. (1961). *The essential works of John Stuart Mill*. New York: Bantam Books.

Miller v. California, 413 U.S. 15 (1973).

Miller, D. (2013, November 8). White guy wins after leading voters to believe he's black. KHOU. Retrieved from http://www.khou.com/news/local/White-guy-wins-after-leading-voters-to-believe-hes-black-231222981.html

Miller, N. (2005). Anti-spin: Using Internet resources to unwind political claims. *Etc.: A Review of General Semantics*, 62(1), pp. 76-79.

Milton, J. (1874). *Areopagitica*. Clarendon Press.

Minnesota v. Thaddeus Victor Jude. 554 N.W.2d 750 (1996).

Misrepresentation of petition, Wyoming § 22-24-125(c) (2012).

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

Morris, E. (1999). *Dutch: A memoir of Ronald Reagan*. New York: Random House.

MSNBC. (2006, February 19). *Meet the Press*: Transcript for February 19. Retrieved from http://www.nbcnews.com/id/11363075/ns/meet_the_press/t/transcript-february/#.VCREWGTF_io

Murphy, R. (2012). Tea party constitutionalism: Do the "astroturf" have roots in the history of the Constitution? *Hastings Constitutional Law Quarterly*, 40(1), pp. 187-220.

NAACP v. Button, 371 U.S. 415 (1963).

Napoli, P. Paradoxes of media policy analysis: Implications for public interest media regulation. *Administrative Law Review*, 60(4), pp. 801-812.

National Commission on Egg Nutrition v. FTC, 570 F.2d 157 (1977).

National Conference of State legislatures. (2014, January 6). Rules against legislators lobbying state government after they leave office. Retrieved from http://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Negri, A. (1999) *Insurgencies: Constituent power and the modern state*. Minneapolis, MN: University of Minnesota Press.

Nemeth, N. (2000). A news ombudsman as an agent of accountability. In D. Pritchard (Ed.), *Holding the media accountable: Citizens, ethics, and the law* (pp. 55-67). Bloomington, IN: Indiana University Press.

New York Times. (1988, November 4). George Bush and Willie Horton. *New York Times*. Retrieved from http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html

New York Times. (1992, January 12). Theater; When 'Macbeth' shook the world of Astor Place. *New York Times*. Retrieved from http://www.nytimes.com/1992/01/12/theater/theater-when-macbeth-shook-the-world-of-astor-place.html

New York Times Co. v. L.B. Sullivan, 144 So.2d 25 (1962).

New York Times v. Sullivan, 376 U.S. 254 (1964).

Newcomb, T. (1953). An approach to the study of communicative acts. *Psychological Review*, 60(6), pp. 393-404.

Newey, G. (1997). Political lying: A defense. *Public Affairs Quarterly*, 11(2), pp. 93-116.

Newman, M., Pennebaker, J., Berry, D. & Richards, J. (2003). Lying words: Predicting deception from linguistic styles. *Personality and Social Psychology Bulletin*, 29(5),
pp. 665-675.

Nixon Library. (n.d.). Silent Majority. Nixon Presidential Library & Museum. Retrieved from http://www.nixonlibrary.gov/forkids/speechesforkids/silentmajority.php

Ngai, S. (2005) *Ugly Feelings*. Cambridge, MA: Harvard University Press.

Nolan, M. (2005). Orwell meets Nixon: When and why "the press" became "the media." *The Harvard International Journal of Press/Politics*, 10(2), pp. 69-84.

Noonan, P. (1999). *When character was king: A story of Ronald Reagan*. New York: Penguin.

Norton, H. (2011). Campaign speech law with a twist: When the government is the speaker, not the regulator. *Emory Law Journal*, 61(2), pp. 209-263.

Norton, H. (2013). Lies and the Constitution. *The Supreme Court Review*, 2012(1), pp. 161-201.

November Company, The (Producer). (1992). Gray Dot [Television Ad]. The Museum of the Moving Image. Retrieved from http://www.livingroomcandidate.org/commercials/1992/gray-dot

Nyhan, B. (2010). Why the "death panel" myth wouldn't die: Misinformation in the health care reform debate. *The Forum*, 8(1), pp. 1-24.

Nyhan, B. & Reifler, J. (2010) When corrections fail: The persistence of political misperceptions. *Political Behavior*, 32(2), pp. 303-330.

O'Brien, M. (2014, February 3). GOP defends tricky campaign contribution websites. *First Read* (NBC News). Retrieved from http://firstread.nbcnews.com/_news/2014/02/03/22559321-gop-defends-tricky-campaign-contribution-websites?lite

O'Neill, J. & Corsi, J. (2004). *Unfit for command: Swift boat veterans speak out against John Kerry*. Washington, D.C.: Regnery Publishing.

Ohio Democratic Party et al. v. Ohio Elections Commission, 4256 Court of Appeals of Ohio, Tenth District (2008).

On the Media. (2004, April 16). Podium standoff. Retrieved from http://www.onthemedia.org

Ordonez, F. (2012, July 26). Fox, MSNBC viewers see world differently. *McClatchyDC*. Retrieved from http://www.mcclatchydc.com/2012/07/26/157899/fox-mnsbc-viewers-see-world-differently.html

Orwell, G. (1972). *The road to Wigan Pier*. New York: Mariner Books.

Oyez. (n.d.) Hugo Black: 1968 interview on broadcast television. Retrieved from http://www.oyez.org/sites/default/files/justices/hugo_l_black/hugo_l_black-1968-interview.mp3

Painter, C. & Hodges, L. (2010). Mocking the news: How *The Daily Show with Jon Stewart* holds traditional broadcast news accountable. *Journal of Mass Media Ethics*, 25(4),
pp. 257-274.

Pallitto, R. & Weaver, W. (2007) *Presidential secrecy and the law*. Baltimore, MD: Johns Hopkins University Press.

Paranada, D. (2012, August 30). A list of fact-checking websites. *Marketplace*. Retrieved from http://www.marketplace.org/topics/elections/list-fact-checking-websites

Patterson, T. (2002). The vanishing voter: Public involvement in an age of uncertainty. New York: Alfred Knopf.

Pederson, R. (2012). The game frame and political efficacy: Beyond the spiral of cynicism. *European Journal of Communication*, 27(3), pp. 225–240.

People v. Wogaman, 133 Mich. App. 823 (1984).

Perloff, R. (2010). *The dynamics of persuasion: Communication and attitudes in the 21st century*. New York: Taylor & Francis.

Pestrak v. Ohio Elections Commission, 926 F. 2d 573 (1991).

Peterson, T. The social responsibility theory. In *Four theories of the press* (pp. 73-103). Chicago: University of Illinois Press.

Pew Research Center. (2004, January 11). Cable and Internet loom large in fragmented political universe. Retrieved from http://www.people-press.org/2004/01/11/cable-and-internet-loom-large-in-fragmented-political-news-universe/

Pew Research Center. (2010, September 12). Ideological news sources: Who watches and why. Retrieved from http://www.people-press.org/2010/09/12/americans-spending-more-time-following-the-news/

Pew Research Center. (2012a, February 7). Cable leads the pack as campaign news source: Twitter, Facebook play very modest roles. Retrieved from http://www.people-press.org/2012/02/07/cable-leads-the-pack-as-campaign-news-source/

Pew Research Center. (2012b, August 23). The master character narratives in campaign 2012. Project for Excellence in Journalism. Retrieved from http://www.journalism.org/2012/08/23/2012-campaign-character-narratives/

Pew Research Center's Journalism Project Staff. (2012c, November 2). Winning the media campaign 2012. Pew Research Journalism Project. Retrieved from http://www.journalism.org/2012/11/02/winning-media-campaign-2012/

Pew Research Center. (2013). The state of the news media 2013: An annual report on American Journalism. Project for Excellence in Journalism. Retrieved from http://stateofthemedia.org/2013

Phillips, B. (2012). Mitt Romney: "I like being able to fire people." Retrieved from *Mr. Media Training*. Retrieved from http://www.mrmediatraining.com/2012/01/09/mitt-romney-i-like-firing-people/

Phillips-Fein, K. (2009). *Invisible hands: The making of the conservative movement from the New Deal to Reagan*. New York: W.W. Norton & Company.

Pickard, V. (2010). "Whether the giants should be slain or persuaded to be good": Revisiting the Hutchins Commission and the role of media in a democratic society. *Critical Studies in Media Communication*, 27(4), pp. 391-411.

Pierce, C. (2011, December 20). PolitiFact and the myth of objectivity [Blog post]. The Politics Blog, *Esquire*. Retrieved from http://www.esquire.com/blogs/politics/politifact-lie-of-the-year-6619997

Pinker, S. (2010). The stuff of thought: Language as a window into human nature. *The RSA*. Retrieved from http://www.thersa.org/events/video/archive/steven-pinker

Piper. B. (n.d.). *A brief analysis of voter behavior regarding tax initiatives*. Initiative & Referendum Institute at the University of Southern California. Retrieved from http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Piper%20-%20I&R%20Tax%20Measures%201978%20-%201999%20IRI.pdf

Pittenger, J. (2005). *Politics ain't beanbag.* Bloomington, IN: AuthorHouse.

Plato. (1987). *The Republic*. London: Penguin Classics.

Political Advertising, Washington RCW § 42.17A.335 (2009).

Political Material, Louisiana § 18:1463 (2011).

PolitiFact. (n.d.). About PolitiFact. Retrieved from http://www.politifact.com/about/

PolitiFact. (2010, September 8). Medicare 'cuts' in the health care law will hurt seniors, says 60 Plus Association. *Tampa Bay Times*. Retrieved from http://www.politifact.com/truth-o-meter/statements/2010/sep/20/60-plus-association/medicare-cuts-health-care-law-will-hurt-seniors-sa/

Politifact. (2011a, April 8). Jon Kyl says abortion services are "well over 90 percent of what Planned Parenthood does." *Tampa Bay Times*. Retrieved from http://www.politifact.com/truth-o-meter/statements/2011/apr/08/jon-kyl/jon-kyl-says-abortion-services-are-well-over-90-pe/

Politifact. (2011b, November 21). Mitt Romney ad charges Obama said, 'If we keep talking about the economy, we're going to lose. *Tampa Bay Times*. Retrieved from http://www.politifact.com/truth-o-meter/statements/2011/nov/22/mitt-romney/mitt-romney-says-obama-said-if-we-keep-talking-abo/

PolitiFact. (2012, August 6). Mitt Romney says Barack Obama's plan for welfare reform: "They just send you your check." PolitiFact. Retrieved from http://www.politifact.com/truth-o-meter/statements/2012/aug/07/mitt-romney/mitt-romney-says-barack-obamas-plan-abandons-tenet/

Potter, L. (2002). *SLAPP suits*. First Amendment Center. Retrieved from http://www.firstamendmentcenter.org/slapp-suits

Prettyman, J. (Producer) & Spheeris, P. (Director). (1981) *The Decline of Western Civilization* [Motion picture]. United States: Spheeris Films, inc.

Pritchard, D. (2000). Structural flaws in press council decision-making. In D. Pritchard (Ed.), *Holding the media accountable: Citizens, ethics, and the law* (pp. 90-108). Bloomington, IN: Indiana University Press.

Prohibitions relating to circulation, filing or certification of initiative, referendum or recall petition, Oregon § 260.555 (2011)

Pytka, J. [director] (n.d.). Prouder, stronger, better [Reagan presidential campaign ad]. Retrieved from http://www.livingroomcandidate.org/commercials/1984/prouder-stronger-better

Quiggin, J. (2010). *Zombie economics: How dead ideas still walk among us*. Princeton, NJ: Princeton University Press.

Ranciere, J. (2010). *Dissensus: On politics and aesthetics*. London: Continuum.

Reagan, R. (1981). First inaugural address. Presidential Rhetoric. Retrieved from http://www.presidentialrhetoric.com/historicspeeches/reagan/first_inaugural.html

Rector, R. & Bradley, K. (2012, July 12). Obama guts welfare reform [Blog post]. *The Daily Signal*. Retrieved from http://dailysignal.com/2012/07/12/obama-guts-welfare-reform/

Republican Party of Minnesota v. White, 416 F.3d 738 (2005).

Richey, S. & Greabe, J. (2013). Stolen Valor and the First Amendment. *New England Law Review*, 47(2), pp. 293-313.

Richman, E. (1998). Deception in political advertising: The clash between the First Amendment and defamation law. *Cardozo Arts & Entertainment Law Journal*, 16(2-3), pp. 667-705.

Rickert v. State of Washington Public Disclosure Committee, 168 P. 3d 826 (2007).

Rieder, R. (2011, May 24). The rise of political fact checking. *American Journalism Review*. Retrieved from http://ajrarchive.org/article.asp?id=5092

Rodell, S. (2008). False statements v. free debate: Is the First Amendment a license to lie in elections? *Florida Law Review*, 60(4), pp. 947-960.

Rogers, E. (1973). *Communication strategies for family planning.* New York: Free Press.

Rogers, E. (1994). *A history of communication study: A biographical approach*. New York: The Free Press.

Rose, C. (host) (2011, June 6). *The Charlie Rose Show* [Television broadcast]. New York: Public Broadcasting Service.

Rosenblatt v. Baer, 383 U.S. 75 (1966).

Rosenstiel, T. & Kovach, B. (2009). Lessons of the election. *The State of the news media 2009: An annual report on American journalism*. Retrieved from http://stateofthemedia.org/2009/special-reports-summary-essay/lessons-of-the-election/

Roth, M. (2012, November 14). Facts still dead. *American Journalism Review*, pp. 4-5.

Sandler, J. (2011, January 25). *Citizen United's* biggest surprise: The collapse of disclosure [Blog post]. *American Constitution Society for Law and Policy*.

Retrieved from http://www.acslaw.org/acsblog/citizens-united%E2%80%99s-biggest-surprise-the-collapse-of-disclosure

Sanford, B. (1999). *Don't shoot the messenger: How our growing hatred of the media threatens free speech for all of us*. Lanham, MD: Rowman & Littlefield.

Southwest Computer Bureau Incorporated. (n.d.). *Services provided*. Retrieved from http://www.scbi.com/political2.asp

Schaffner, B & Atkinson, M. (2009) Taxing death or estates? When frames influence citizens' issue beliefs. In B. Schaffner & P. Sellers (Eds.), *Winning with Words: The Origins and Impact of Political Framing*, (pp. 121-135). New York: Taylor & Francis.

Schauer, F. (2010). Facts and the First Amendment. *UCLA Law Review*, 57(4), pp. 897-919.

Schedler, A. (1996). Anti-political-establishment parties. *Party Politics*, 2(3), pp. 291-312.

Schlect, B. (2011). Case note & comment: The *New York Times* solution to the Ninth Circuit 'Stolen Valor' problem. *Idaho Law Review*, 48(1), pp. 175-212.

Schmitt, C. (1996). *The concept of the political*. Chicago: University of Chicago Press.

Schmitt, E. & Dao, J. (2002, February 27). A nation challenged: Hearts and minds; a 'damaged' information office is declared closed by Rumsfeld. *New York Times*. Retrieved from http://www.nytimes.com/2002/02/27/world/nation-challenged-hearts-minds-damaged-information-office-declared-closed.html

Schneider, S. (Producer) & Pollack, S. (Director). (1975). *Three Days of the Condor* [Motion Picture]. United States of America: Paramount Pictures.

Schudson, M. (1999). Social origins of press cynicism in portraying politics. *American Behavioral Scientist*, 42(6), pp. 998-1008.

Schudson, M. (2008). *Why democracies need an unlovable press*. Cambridge, UK: Polity Press.

Seigworth, G. (2005). From affection to soul. In C. Stivale (Ed.), *Gilles Deleuze: Key concepts* (pp. 159-169). Durham, England: Acumen Publishing.

SEIU. (n.d.). FreedomWorks. Retrieved from http://www.seiu.org/a/healthcare/freedomworks.php

Seldes, G. (1935). *Freedom of the press*. New York: Garden City Publishing Company.

SF Critical Mass. (n.d.). 20th Anniversary. http://www.sfcriticalmass.org/20th-anniversary/

Shapiro, A. (2012, August 22). Despite fact checks, Romney escalates welfare work requirement charge. National Public Radio. Retrieved from http://www.npr.org/blogs/itsallpolitics/2012/08/22/159791065/despite-fact-checks-romney-escalates-welfare-work-requirement-charge

Shear, M. (2011, November 22). Democrats cry foul over new Romney ad. *New York Times*. Retrieved from http://www.nytimes.com/2011/11/23/us/politics/romney-ad-slams-obama-on-economy.html

Shephard, A. (1996, July/August). Schmoozing with the stars. *American Journalism Review*. Retrieved from http://ajrarchive.org/article.asp?id=779

Shirley & Banister. (n.d.). Our philosophy. Retrieved from http://sbpublicaffairs.com/about/philosophy/

Shulman, D. (2007). *From hire to liar: The role of deception in the workplace*. Ithaca, NY: ILR Press.

Siebert, F. (1963a). The authoritarian theory. In *Four theories of the press*. Chicago: University of Illinois Press.

Siebert, F. (1963b) The libertarian theory. In *Four theories of the press*. Chicago: University of Illinois Press.

Silcock, B.W., Schwalbe, C.B., & Keith, S. (2008). "Secret" casualties: Images of injury and death in the Iraq War across media platforms. *Journal of Mass Media Ethics*, 23(1), pp. 36-50.

Silverman, C. (2009). *Regret the error: How media mistakes pollute the press and imperil free speech*. New York: Sterling Publishing Company, inc.

Silverman, C. (2012, August 14). How the last U.S. news council hopes to survive. *Poynter*. Retrieved from http://www.poynter.org/latest-news/regret-the-error/177854/how-the-last-u-s-news-council-hopes-to-survive/

Simon, W. (1998). Virtuous lying: A critique of quasi-categorical moralism. *The Georgetown Journal of Legal Ethics*, 12, pp. 433-463.

Simpson, C. (1994). *Science of coercion: Communication research and psychological warfare 1945-1960*. New York: Oxford University Press.

Sink, J. (2011, November 23). Huntsman says he has not seen PAC's ad, not sure if father funded NH buy [Blog post]. *The Hill*. Retrieved from

http://thehill.com/blogs/blog-briefing-room/news/195285-huntsman-says-he-has-not-seen-pacs-ad-not-sure-if-father-funded-nh-buy

Slack, J.D. (2006). Communication as articulation. In Shepherd, G., St. John, J., & Striphas, T. (Eds.), *Communication as … Perspectives on Theory* (pp. 223-231). New York: Sage Publications.

Sloan, W. (1991). *Perspectives on mass communication history*. Hillsdale, New Jersey: Lawrence Erlbaum Associates, Inc.

Smith, B. (2011a, April 22). Kyl statement stricken from the record [Blog post]. *Politico*. Retrieved from http://www.politico.com//blogs/bensmith/0411/Kyl_statement_stricken_from_the_record.html

Smith, B. (2011b, November 26). Perry ad features SuperPAC footage [Blog post]. *Politico*. Retrieved from http://www.politico.com/blogs/bensmith/1111/Perry_ad_features_SuprPAC_footage.html

Smith, B. (2011c, November 1). The facts about the fact checkers. *Politico*. Retrieved from http://www.politico.com/news/stories/1011/67175.html

Smith, B. (2012, August 28). Romney camp bets on welfare attack. *BuzzFeed*. Retrieved from http://www.buzzfeed.com/bensmith/romney-camp-bets-welfare-attack

Smith, S. (2007). *The fact checker's bible: A guide to getting it right*. New York: Random House.

Smoking Gun. (2002). Senate hopeful quits citing gay-baiting TV ad. *The Smoking Gun*. Retrieved from http://www.thesmokinggun.com/file/senate-hopeful-quits-citing-gay-baiting-tv-ad

Snyder v. Phelps, 131 U.S. 1207 (2011).

Socolow, M. (2010). 'We should make money on our news': The problem of profitability in network broadcast journalism history. *Journalism*, 11(6), pp. 675-691.

Sokolowski, R. (2007) Freedom, responsibility, and truth. In R. Velkley (Ed.), *Freedom and the human person*, (pp. 39-53). Washington, D.C.: The Catholic University of America Press.

Solomon, D. & Cardillo, B. (1985). The elements and process of communication campaigns. In Van Dijk, T. (Ed.), *Discourse and communication: New approaches to the analysis of mass media discourse and communication* (pp. 60-68). Berlin: Walter de Gruyter & Co.

Sowell, T. (2012). "*Trickle down theory" and "tax cuts for the rich."* Stanford, CA: Hoover Institution.

Spicer, R. (2010). The Obama mass: Barack Obama, image, and fear of the crowd. In Harris, H., Moffitt, K. & Squires, C. (Eds.), *The Obama effect: Multidisciplinary renderings of the 2008 campaign* (pp. 190-208). Albany, NY: SUNY Press.

Spicer, R. (2012, October 23). How to (not) call your opponent a liar. *Campaigns & Elections:* Campaign Insider. http://www.campaignsandelections.com/campaign-insider/451/how-to-not-call-your-opponent-a-liar

Spicer, R. (2013, January 29). The First Amendment, lies and campaigns. *Campaigns & Elections*. Retrieved from http://www.campaignsandelections.com/magazine/1773/the-first-amendment-lies-and-campaigns

Spiridellis, G. & Spiridellis E. (director). (2004). This land. Retrieved from http://sendables.jibjab.com

Spivak, C. (2010, December 2). The fact-checking explosion. *American Journalism Review*, pp. 38-43.

Spruiell, S. (2009, August 24). See Rachel Calumniate. *National Review*. Retrieved from http://www.nationalreview.com/articles/228109/see-rachel-calumniate/stephen-spruiell

St. Amant v. Thompson, 390 U.S. 727 (1968).

Stahl, R. (2008). Vietnam flashbacks. In T. Benson & B. Snee (Eds.), *The rhetoric of the new political documentary* (pp. 78-104). Carbondale, IL: Southern Illinois University Press.

Stanley, A. (2012, August 31). How MSNBC became Fox's liberal evil twin. *New York Times*. Retrieved from http://www.nytimes.com/2012/08/31/us/politics/msnbc-as-foxs-liberal-evil-twin.html?_r=5&

Starr, K. (1998). *The Starr report: The findings of independent counsel Kenneth W. Starr on President Clinton and the Lewinsky affair*. New York: Public Affairs.

Stauber, J. (2009, September 18). The cashroots conspiracy behind FreedomWorks and Americans for Prosperity. *PR Watch*. Retrieved from http://www.prwatch.org/spin/2009/09/8564/cashroots-conspiracy-behind-freedomworks-and-americans-prosperity

Stead, W.T. (1886). Government by journalism. *The Contemporary Review*, 49(5), pp. 653-674.

Stein, J. (1970). *The Random House dictionary of the English language*. New York: Random House.

Stein, L. (2006). *Speech rights in America: The First Amendment, democracy, and the media*. Chicago: University of Illinois Press.

Stern, N. (2008) The looming collapse of restrictions on judicial campaign speech. *Seton Hall Law Review*, 38(1), pp. 63-135.

Stockdale, S. (2005). Calling out the symbol rulers. *ETC: A Review of General Semantics*, 62(1), pp. 64-66.

Stolen Valor Act of 2005, 120 Stat. 3266 (2006).

Storer v. Brown, 415 U.S. 724 (1974).

Strauss, L. (1964). *The city and man*. Chicago: University of Chicago Press.

Strout, R. (1950, May 27). Ordeal by publicity: The McCarthy hearings prove once more the distorting effects of 'straight reporting.' *Christian Science Monitor*, p. 5.

Sulkin, T. (2010). Promises made and promises kept. In Dodd, L. & Oppenheimer, B. (Eds.), *Congress reconsidered* (pp. 119-140). Washington D.C.: CQ Press.

Susan B. Anthony List v. Driehaus, Action No. 1:10cv720 (Doc. #18), U.S. District Court, Southern District of Ohio, Western Division (2010).

Susan B. Anthony List v. Driehaus, 805 F.Supp.2d 412 (2011a).

Susan B. Anthony List v. Driehaus, 805 F.Supp.2d 423 (2011b).

Susan B. Anthony List v. Driehaus, United States District Court, S.D. Ohio, Western Division, Action No. 1:10cv720 (Doc. 89) (2013a).

Susan B. Anthony List v. Driehaus, United States Court of Appeals, Sixth Circuit, Nos. 11-3894/11-3925 (2013b).

Susan B. Anthony List v. Driehaus, No. 13-193, slip op. (U.S. Supreme Court, June 16, 2014).

Suskind, R. (2004, October 17). Faith, certainty and the presidency of George W. Bush. *The New York Times*. Retrieved from http://www.nytimes.com/2004/10/17/magazine/17BUSH.html

Suter, W. (2012). Today's Supreme Court. *Montana Law Review*, 73(1), pp. 241-253.

Tau, B. (2014, January 23). Supreme Court takes political ads case. *Politico*. Retrieved from http://www.politico.com/blogs/under-the-radar/2014/01/supreme-court-to-mull-right-to-lie-in-political-ads-180995.html

Tax Policy Center. (2011). Historical returns as percentage of deaths. Retrieved from http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=52

Terranova, T. (2004a). *Network culture: Politics for the information age*. London: Pluto Press.

Thompson v. St. Amant, 184 So.2d 314 (1966).

Thompson v. St. Amant, 196 So.2d 314 (1967).

Time. (n.d.). Top 10 campaign ads. *Time*. Retrieved from http://content.time.com/time/specials/packages/article/0,28804,1842516_1842514_1842557,00.html

Time, Inc. v. Hill, 385 U.S. 374 (1967).

Tomei v. Finley, 512 F. Supp. 695 (1981).

Torfing, J. (1999). *New theories of discourse: Laclau, Mouffe and Zizek*. Oxford: Blackwell Publishers.

Tuathail, G. & Agnew, J. (1992). Geopolitics and discourse: Practical geopolitical reasoning in American foreign policy. *Political Geography* 11(2), pp. 190-204.

Tye, L. (2002). *The father of spin: Edward Bernays and the birth of public relations*. New York: Picador.

United States v. Alvarez, 617 F. 3d 1198 (2010).

United States v. Alvarez, 132 U.S. 2537 (2012).

United States v. Hamilton, 699 F.3d 356 (2012).

United States v. Schwimmer, 279 U.S. 644 (1929).

United States v. Stevens, 130 U.S. 1577 (2010).

United States v. Williams, 128 U.S. 1830 (2008).

Valentine v. Chrestensen, 316 U.S. 52 (1942).

Van Susteren, G. (2004, September 29). Interview with Kerry campaign adviser Tad Devine/Interview with Bush campaign Adviser Tucker Eskew. *Fox on the Record with Greta Van Susteren* [Television broadcast]. New York: Fox News Channel.

Varat, J. (2007). Deception and the First Amendment: A central, complex, and somewhat curious relationship. *UCLA Law Review*, 53(5), pp. 1107-1141.

Vedantam, S. (2008, September 15). The power of political misinformation. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2008/09/14/AR2008091402375.html

Viebeck, E. (2014, January 11). High court to hear Susan B. Anthony List case. *The Hill*. Retrieved from http://thehill.com/blogs/healthwatch/politics-elections/195154-supreme-court-to-hear-susan-b-anthony-list-case

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976).

Waldman, P. (2011, November 1). Does fact-checking work? *The American Prospect*. Retrieved from http://www.cjr.org/united_states_project/does_fact-checking_work_false.php

Walker, E. (2013). Grassroots mobilization and outside lobbying. In M. Grossman (Ed.), *New directions in American politics* (pp. 44-59). New York: Routledge.

Walsh, L. (1997). *Firewall: The Iran-Contra conspiracy and cover-up*. New York: W.W. Norton and Company.

Warren Spahn v. Julian Messner, 21 N.Y.2d 124 (1967)

Washington v. 119 Vote No! Committee, 957 P. 2d 691 (1998).

Washington News Council. (2014). About us. Retrieved from http://wanewscouncil.org/aboutthecouncil/

Washington Post. (n.d.). The Iran-Contra affair – 1986-1987. *Washington Post*. Retrieved from http://www.washingtonpost.com/wp-srv/politics/special/clinton/frenzy/iran.htm

Washington Post. (2013, May 24). The press must have the ability to ask questions. *Washington Post*. Retrieved from http://www.washingtonpost.com/opinions/the-press-must-have-the-ability-to-ask-questions/2013/05/24/8e9ce4ba-c356-11e2-914f-a7aba60512a7_story.html

Watts, M., Domke, D., Shah, D., & Fan, D. (1999). Elite cues and media bias in presidential campaigns. *Communication Research*, 26(2), pp. 144-175.

Weaver, P. (1974). The new journalism and the old--thoughts after Watergate. *Commentary*, 35 (spring), pp. 67-88.

Weaver, D., Beam, R., Brownlee, B., Voakes, P. & Wilhoit, G. (2007). *The American journalist in the 21st century: U.S. news people at the dawn of a new millennium*. Mahwah, New Jersey: Lawrence Erlbaum Associates, Publishers.

Weber, J. (2009, July 16). Exclusive: Coburn: Dem health plan will kill Americans. *The Washington Times*. Retrieved from http://www.washingtontimes.com/news/2009/jul/16/coburn-obama-health-plan-will-kill-americans/

Weigel, D. (2009a, October 8). FreedomWorks builds opposition to a health care cloture vote. *The Washington Independent*. Retrieved from http://washingtonindependent.com/62949/freedomworks-builds-opposition-to-a-health-care-cloture-vote

Weigel, D. (2009b, October 9). Tea party activists reject PAC-backed 'Tea Party Express. *The Washington Independent*. Retrieved from http://washingtonindependent.com/63299/tea-party-activists-reject-pac-backed-tea-party-express

Weikart, W. (2006). Critical multitude, war machine: What the left can learn, and the right may have already learned, from a bunch of bicyclists. *Situations: Project of the Radical Imagination*, 1(2), pp. 93-116.

Wells, C. (2012). Lies, honor, & the government's good name: Seditious libel & the Stolen Valor Act. *UCLA Law Review Discourse*, 136, pp. 138-160.

West, E. (2009). *Keywords for studying the emotional audience*. Unpublished paper presented at the International Communication Association conference, Montreal, QC.

White, C. (2009). The straight talk express: Yes we can have a false political advertising statute. *UCLA Journal of Law & Technology*, 13(1), pp. 1-55.

White, G. (1979). *F.D.R. and the press*. Chicago: University of Chicago Press.

Wiggins, R. (2000). Al Gore and the creation of the Internet. *First Monday*, 5(10). Retrieved from http://firstmonday.org/ojs/index.php/fm/article/view/799/708

Wilentz, S. (2008). Introduction. In Hofstadter, R., *The paranoid style in American politics*,
pp. xi-xxx. New York: Vintage Books.

Williams, R. (1978). Structures of feeling. In *Marxism and literature*, pp. 128-135. Oxford: Oxford University Press.

Williams, W. (2007). Necessary compromise: Protecting electoral integrity through the regulation of false campaign speech. *South Dakota Law Review*, 52(2), 321-354.

Williamson, V., Skocpol, T., & Coggin, J. (2011). The tea party and the remaking of Republican conservatism. *Perspectives on Politics*, 9(1), pp. 25-43.

Winfield, B. (1994). *FDR and the news media*. New York: Columbia University Press.

Winsbro, J. (1987). Misrepresentation in political advertising: The role of legal sanctions. *Emory Law Journal*, 36, pp. 853-916.

Wolfe, C. (1994). *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-made Law*. Lanham, MD: Rowman & Littlefield.

Womack, A. (2013). "Stare what?": The Fourth Circuit's questionable holding in *U.S. v. Hamilton*. *North Carolina Central Law Review*, 35(2), pp. 293-306.

Wood, J. (2011). Truth, lies, and stolen valor: A case for protecting false statements fo fact under the First Amendment. *Duke Law Journal*, 61(2), pp. 469-510.

Woodward, B., & Bernstein, C. (1974). *All the president's men*. New York: Simon and Schuster.

Wortham, S. & Locher, M. (1999). Embedded metapragmatics and lying politicians. *Language & Communication* 19(2), pp. 109-125.

Zeleny, J. (2011, November 29). The Caucus; Gingrich takes a poke or two at Romney. *The New York Times*. Retrieved from http://query.nytimes.com/gst/fullpage.html?res=9E05E0D91230F93AA15752C1A9679D8B63

Zernike, K. (2010). *Boiling mad: Inside Tea Party America*. New York: Times Books.

Zizek, S. (1994). The spectre of ideology. In S. Zizek (Ed.), *Mapping ideology* (pp. 1-33). Brooklyn, NY: Verso.

Zizek, S. (2011). *Living in the end of times*. Brooklyn, NY: Verso.

Zurawik, D. (1997, April). Saving CBS News. *American Journalism Review*. Retrieved from http://ajrarchive.org/article.asp?id=923