

THE POLITICS OF ETHICS AND ELECTIONS: CAN NEGATIVE CAMPAIGN ADVERTISING BE REGULATED IN FLORIDA?

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* Pursuant to an assignment by the Speaker of the Florida House of Representatives during the 1995 interim period, the author, as an intern for the Florida House of Representatives Committee on Ethics & Elections, studied the subject of this Comment and compiled a report on his findings. Those findings are the basis of this Comment, and the author has excerpted portions of the report into the Comment. The views expressed in this Comment are those of the author and are not intended to reflect the opinion of the Florida House of Representatives or the Committee on Ethics & Elections. The author thanks Sarah Jane Bradshaw, staff director of the Committee on Ethics & Elections, for giving him the charge to complete the project, as well as the rest of the Committee staff for their assistance. The author also thanks Professor Steve Gey for his inspiration and assistance on First Amendment rights and Tommy Neal, policy specialist, National Conference of State Legislatures, for his assistance. (Editor’s note: After the November 1996 elections, the Florida House of Representatives completely revamped its committee structure. The committee with oversight responsibility for the subject matter of this Comment is now called the Florida House of Representatives Committee on Election Reform.)

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I. INTRODUCTION

Negative campaign advertising has been a staple of American political tradition since John Adams' victory over Thomas Jefferson in the 1796 presidential election.¹ Citizens coolly received the handbills distributed to disparage Jefferson's character.² Observers could not deny the effectiveness of the negative advertising that helped catapult Adams into the Presidency.³ No accusation was too strong—"from drunkenness and gambling to impotence and adultery."⁴ Even Abraham Lincoln was referred to in derogatory terms in nineteenth-century campaign literature.⁵ More recently, negative advertising has taken the form of anonymous telephone calls made to Floridians by Governor Chiles' reelection campaign, which may have contributed to his victory over Republican challenger Jeb Bush.⁶

Florida's voters became upset as they witnessed another example of why political campaigns are perceived unfavorably. The evidence is stronger now than at any other time in history that voters' disdain for negative campaign advertising decreases their faith in the politi-

1. See Richard Stengel, *Accentuating the Negative; Viewers, Beware: Campaign Commercials Can Be Nasty*, TIME, Feb. 29, 1988, at 46.

2. See BRUCE L. FELKNOR, *DIRTY POLITICS* 20-21 (1966).

3. See *id.*

4. KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, *NEGATIVE POLITICAL ADVERTISING: COMING OF AGE 4-5* (Lawrence Erlbaum Assoc. eds., 1991) (quoting G.S. WOOD, *THE DEMOCRATIZATION OF MIND IN THE AMERICAN REVOLUTION* 109, reprinted in *THE MORAL FOUNDATION OF THE AMERICAN REPUBLIC* (R.H. Horwitz ed., 1978)) (discussing the attack ads found in 1791 publications, including *The Gazette of the United States*, owned by the Federalist party, and *The National Gazette*, owned by the Democratic-Republicans); JOHN M. BLUM ET AL., *THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES* 144 (4th ed. 1977).

5. See FELKNOR, *supra* note 2, at 27 (Lincoln was called an "[a]pe, [b]uffoon, [c]oward, [and a] [d]runkard").

6. See William Booth, *Chiles Admits Campaign Made 'Scare Calls' in '94 Florida Gubernatorial Race*, WASH. POST, Nov. 10, 1995, at A4. The anonymous telephone calls were made to 70,000 senior citizens in Florida; the aftermath has heightened Florida's awareness of negative campaign advertising. See David Segal, *Fear in Florida: Did Scare Calls Influence a Race Too Close to Call?*, WASH. POST, Mar. 4, 1996, at F13.

cal process.⁷ Furthermore, negative advertising often results in public disenchantment with all candidates.⁸

A recent poll revealed that almost half of voters aged forty-five to sixty-four have no confidence in the political process.⁹ Fifty-eight percent of Floridians believe that negative campaigning hinders the political process.¹⁰ Consequently, by using negative advertising, candidates may actually reduce voter turnout among their own supporters.¹¹ Despite these statistics, politicians continue to use negative campaign tactics because of the perception that such tactics remain the most effective means of increasing a candidate's support while simultaneously reducing support for an opposing candidate.¹²

Negative campaign advertising is often divided into three categories: fair, false, and deceptive.¹³ Fair ads are those that represent factual occurrences with the intent of embarrassing an opponent by accentuating the negative attributes of the opponent's character or career.¹⁴ While potentially informative to swing voters,¹⁵ these ads commonly contain abrasive, condescending, and volatile words, phrases, or images.¹⁶ False ads, unlike fair ads, can be challenged through the Florida Division of Elections if they contain untrue statements made with actual malice.¹⁷

Perhaps no campaign technique eludes regulation more than deceptive negative campaign advertising. Deceptive campaign advertising is misleading and distorts the truth about an opposing candi-

7. See L. Patrick Devlin, *An Analysis of Presidential Television Commercials, 1952-1984*, in *NEW PERSPECTIVES ON POLITICAL ADVERTISING* 21, 23 (Lynda Lee Kaid et al. eds., 1986).

8. See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* 109 (1995).

9. See Howard Troxler & Tom Fiedler, *Voters See Government Making Little Progress*, *TALL. DEM.*, Nov. 5, 1995, at 12A (citing *Voices of Florida* poll conducted by Selzer Boddy, Inc.).

10. See *id.*

11. See ANSOLABEHRE & IYENGAR, *supra* note 8, at 109.

12. See L. Patrick Devlin, *Political Commercials in American Presidential Elections*, in *POLITICAL ADVERTISING IN WESTERN DEMOCRACIES* 187-200 (Lynda Lee Kaid & Christina Holtz-Bacha eds., 1995).

13. See FLA. H.R. COMM. ON ETHICS & ELEC., *DECEPTIVE AND FALSE ADVERTISING IN THE POLITICAL PROCESS* 3 (1995) (on file with Fla. H.R. Comm. on Elec. Reform) [hereinafter *DECEPTIVE AND FALSE ADVERTISING*].

14. See Devlin, *supra* note 12, at 196-97.

15. See *id.* at 187. "Swing voters are the 10% to 20% of the 50% to 60% of Americans who vote." *Id.* Researchers agree that swing voters are most affected by negative campaign advertising because they tend to be the least partisan and the least committed to candidates until quite close to election day. See *id.* Swing voters also are largely registered Independents. See *id.* "Today one person in three considers him or herself to be an Independent; a generation ago, less than one in four did." ANSOLABEHRE & IYENGAR, *supra* note 8, at 97.

16. See Devlin, *supra* note 12, at 195-96.

17. See FLA. STAT. § 104.271 (1995).

date.¹⁸ Consequently, the Florida Department of State (DOS) and the Florida Legislature targeted these types of advertisements, as well as other negative campaign tactics, as part of their 1996 elections reform package.¹⁹

Historically, the Florida Legislature has entertained various proposals to regulate negative campaign tactics, in particular negative campaign advertising.²⁰ The proposals have ranged from prior notice requirements to a statewide fair campaign practices board authorized to investigate challenged advertisements.²¹ The Legislature, however, never adopted these proposals. Even if they had been adopted, they likely would not have passed constitutional muster under the First Amendment.²²

State regulation of political speech is subject to strict scrutiny.²³ To justify regulating the content of political speech, proscribed statements must be false, must have been made with actual malice, and parties challenging such statements must satisfy a "clear and convincing" evidentiary standard.²⁴ In addition, the law regulating the speech cannot be overbroad or vague.²⁵ Finally, the law cannot constitute a prior restraint on the time, place, or manner of speech.²⁶ The First Amendment offers the broadest protection of free speech during political campaigns;²⁷ therefore, any laws that regulate negative campaigning are subject to strict scrutiny.²⁸

18. See Victor Kamber, *Political Discourse Descends Into Trivia*, *ADVER. AGE*, Feb. 1991, at 20.

19. In 1995, DOS's Division of Elections made a few internal election reforms. Some of the most notable were: establishing a World Wide Web home page that provides instantaneous access to county-by-county election totals; providing on-line access to Florida Administrative Weekly; and accepting electronic filing of campaign treasurer's reports and granting the public access to the information at no cost. See FLA. DEPT OF STATE, *CAMPAIGN & ELECTION REFORM LEGISLATIVE PROPOSALS 2-3* (1996); see also Division of Elections (visited Sept. 27, 1996) <<http://election.dos.state.fl.us>>. The Division's e-mail address is <election@mail.dos.state.fl.us>.

20. See, e.g., Fla. HB 1319 (1975) (proposing the creation of an elections board to hear elections complaints).

21. See *DECEPTIVE AND FALSE ADVERTISING*, *supra* note 13, at 3.

22. See, e.g., Fla. HB 669 (1995) (proposing to make negative advertisements illegal). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend I. The First Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

23. See *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992).

24. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

25. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) ("Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential.").

26. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940).

27. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (the First Amendment has its "fullest and most urgent application" to political campaigns).

28. See *DECEPTIVE AND FALSE ADVERTISING*, *supra* note 13, at 40.

This Comment examines the negative campaign tactics that have been employed by Florida candidates, with particular emphasis on negative campaign advertising. Part II attempts to define negative advertising. Part III discusses the constitutional limitations on regulation of campaign advertising. Part IV examines the role that negative campaign advertising plays in Florida politics and reviews historical attempts to address negative campaign advertising through both legislative and nonlegislative means. Part V evaluates the success of legislation, enacted by Florida and other states, that attempts to regulate negative campaign advertising. Part VI analyzes the attempts of DOS and the Florida Legislature during the 1996 Regular Session to enact legislation aimed at curbing the use of negative campaigning.

Part VII concludes that the First Amendment protects those politicians who engage in negative campaign tactics, while narrowly restricting those who truly remain committed to campaign reform. Part VII further concludes that DOS, as the state's chief regulatory agency for elections, needs to apply more pressure to the political leadership to challenge powerful lobbies and to make meaningful campaign reform a legislative priority. Finally, Part VII offers a challenge to Florida citizens to participate in cleaning up negative campaign tactics.

II. DEFINING NEGATIVE CAMPAIGN ADVERTISING

No single definition of negative campaign advertising exists. The most simplistic definition is "a mud-slinging ad."²⁹ One view is that negative campaign advertising consists of forcefully and persuasively attacking an opponent's strength—and highlighting the weaknesses within—with facts that can be documented.³⁰ One commentator believes that negative campaign advertising involves an ad that "attacks the other candidate personally, the issues for which the other candidate stands, or the party of the other candidate."³¹ Another view believes that it is defining one's opponent with negative information to instill anxiety in the observer,³² while yet another view suggests that negative campaign advertising is simply a method of contrasting candidates with their opponents via an emo-

29. Charles J. Stewart, *Voter Perception of Mud-Slinging in Political Communication*, *CENT. STS. SPEECH J.* 279, 279 (1975).

30. See Terry Cooper, *Negative Image*, *CAMPAIGNS & ELECTIONS*, Sept. 1991, at 21; *DECEPTIVE & FALSE ADVERTISING*, *supra* note 13, at 5.

31. Gina M. Garromone, *Voter Response to Negative Political Ads*, *JOURNALISM Q.* 251, 253 (1984).

32. See Devlin, *supra* note 12, at 198-99; Bill Huey, *Where's the Beef?*, *CAMPAIGNS & ELECTIONS*, June 1995, at 67.

tive component.³³ Despite the varying definitions, most campaign analysts agree that negative campaign advertising “degrad[es] perceptions of the rival, to the advantage of the sponsor.”³⁴

Negative campaign advertising seeks to “prevent the development of bonds of identification and empathy between the opposing candidate and the viewer by linking the opponent with a threat.”³⁵ Negative advertisements also diminish the voters’ ability to assess candidates and their views by oversimplifying issues and painting distorted pictures of a candidate’s character.³⁶ With these general goals achieved, the swing voters’ opinions of candidates become malleable and open to influence by campaign strategists.³⁷

Some campaigns become so divisive as a result of negative campaign advertising that they engender more hostility to the ad’s sponsor than to the candidate being attacked.³⁸ If all candidates employ negative campaign advertising in an election, voters may become desensitized to the entire process.³⁹ Some commentators express concern that negative ads highlight negative reactions: “[I]t is not always the most liked candidate, but more the least disliked candidate who wins the election.”⁴⁰

Nevertheless, it is widely believed by campaign strategists that an ad can only present all of the reasons why voters should vote for one candidate by presenting the reasons why voters should not vote for the candidate’s opponent.⁴¹ As one media consultant succinctly put it: “The most effective negative ads are deadly serious; they work because they make voters mad at your opponent.”⁴²

Although negative ads may upset many voters and candidates, campaign strategists continue to use them aggressively. Generally, the types of negative campaign advertising used will depend upon the nature of the campaign—the more narrow the margin between

33. See Adam Goodman, *Going Negative! Producing TV: A Survival Guide*, CAMPAIGNS AND ELECTIONS, July 1995, at 22. Generally, campaign strategists have a *laissez-faire* attitude about negative campaign advertising. Some operate by a code of “fairness.” See discussion *infra* Part II.A. Those who teach in schools of communication across the United States seem to have the greatest reservations about negative campaigning and the strongest views about what constitutes negative campaigning.

34. Sharyne Merritt, *Negative Political Advertising: Some Empirical Findings*, J. ADVER. 27, 30 (1984).

35. Peter F. May, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 182 (1992) (quoting Montague Kern, Professor of Communications, Rutgers University).

36. See Kamber, *supra* note 18, at 20.

37. See Devlin, *supra* note 12, at 187.

38. See JOHNSON-CARTEE & COPELAND, *supra* note 4, at 9.

39. See *id.*

40. Devlin, *supra* note 12, at 197.

41. See DECEPTIVE & FALSE ADVERTISING, *supra* note 13, at 9-11.

42. David Doak, *Going Negative! Attack Ads: Rethinking the Rules*, CAMPAIGNS & ELECTIONS, July 1995, at 21.

the candidates in the opinion polls, the more belittling the advertisements tend to be.⁴³ "Negativity, alone, isn't the real culprit; dishonesty is. That's where a realistic line between right and wrong must be drawn."⁴⁴

Many campaign strategists agree that a line can be drawn between legitimate attacks on an opponent's record and planned, condescendingly emotive strikes designed to inflame voters.⁴⁵ Consistent with this distinction, negative campaign advertising is often divided into three categories: fair, false, and deceptive.⁴⁶

A. "Fair" Negative Campaign Advertising

Some campaign strategists suggest that if an advertisement is true, fair, and relevant, it can be aired in good conscience.⁴⁷ Under this approach, advertising that addresses documented statements from the political career of an opposing candidate is "fair," even if negative.⁴⁸ One political consultant believes that a "fair" advertisement should not only be accurate, but also should represent opponents fairly and be based upon facts contained in the public record.⁴⁹

Another expert identifies types of ads with three similar characteristics as examples of "fair" negative campaign advertising: ads that (1) contrast written or publicly proclaimed ideas, positions, or attitudes, (2) attack a candidate's lack of experience and qualifications for office, or (3) highlight an opponent's public voting record with appropriate and irrefutable citation.⁵⁰

B. "False" Negative Campaign Advertising

"[T]he right to attack doesn't license lies, in any form."⁵¹ False campaign advertising is prohibited in many states, and defamation suits often arise when such advertising is used.⁵² However, because defamation suits usually outlast campaigns, they are generally ineffective in providing an adequate remedy before the election.⁵³ Fur-

43. See *id.* at 21; Devlin, *supra* note 12, at 193-97. In Florida, these have ranged from the biographical ads in Connie Mack's 1994 Senate campaign to the fierce attack ads in the 1994 gubernatorial campaign.

44. Ron Faucheux, *Unfair Ads, Push Polls*, *CAMPAIGNS & ELECTIONS*, Apr. 1996, at 5.

45. See Goodman, *supra* note 33, at 22.

46. See *DECEPTIVE AND FALSE ADVERTISING*, *supra* note 13, at 5.

47. See John Franzén, *Common Sense on Going Negative*, *CAMPAIGNS & ELECTIONS*, Sept. 1995, at 67.

48. See *id.*

49. See Doak, *supra* note 42, at 20.

50. See Goodman, *supra* note 33, at 22.

51. Faucheux, *supra* note 44, at 5.

52. See *DECEPTIVE AND FALSE ADVERTISING*, *supra* note 13, at 6.

53. See *id.* at 6-7.

thermore, a candidate trying to recover from the presumed damage inflicted upon his or her polling percentages by false advertising will be hard-pressed to file a lawsuit during a political campaign.⁵⁴

C. “Deceptive” Negative Campaign Advertising

Deceptive campaign advertising distorts the truth to the detriment of the opponent. The deception may go so far as to appear to make the advertisement false. Because it contains an element of truth, however, the advertisement is not technically false.⁵⁵

Once it used to be that if there was one thing that wasn't true in an ad it destroyed the whole credibility of the ad. Press and public reaction would force [a candidate] to pull it off the air. Now [public reaction] ha[s] gone the other way. Innuendo and accusation are built on one accuracy—if one statement is true, almost anything else [a candidate] say[s] in an ad must also be true.⁵⁶

This perspective is not only accurate, it is reflected in constitutional case law, which only prohibits false statements made with actual malice.⁵⁷

III. CONSTITUTIONAL CONSIDERATIONS

As a form of political speech, negative campaign advertising is protected by the First Amendment.⁵⁸ The U.S. Supreme Court has stated, however, that political speech is not automatically entitled to constitutional protection.⁵⁹ Further, calculated falsehoods do not constitute protected speech under the First Amendment.⁶⁰ Nevertheless, misleading or deceptive campaign advertising remains protected under the First Amendment as a part of the “robust and wide open”⁶¹ debate that “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁶²

54. See Robert M. O'Neil, *Regulating Speech to Cleanse Political Campaigns*, 21 *CAP. U. L. REV.* 575, 578 (1992).

55. See *DECEPTIVE AND FALSE ADVERTISING*, *supra* note 13, at 6.

56. Devlin, *supra* note 12, at 200. Devlin makes this point because while many voters are turned off by negative campaign advertising, a great many would rather enjoy the political arena's soap-opera style than deal with issues. See May, *supra* note 35, at 179.

57. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

58. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988).

59. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

60. See *id.* at 75 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

61. *Sullivan*, 376 U.S. at 270.

62. *Id.*

A. Content-Based Regulation

The leading case regarding regulation of the content of political speech is *New York Times v. Sullivan*.⁶³ In *Sullivan*, an elected official sued the *New York Times* for libel for publishing an advertisement that allegedly represented the official's activities falsely.⁶⁴ The Court concluded that "neither factual error, which is inevitable in free debate, nor defamatory content, which injures [a public figure's] reputation, is sufficient to remove the constitutional protection from such statements."⁶⁵ The Court thereby fashioned a standard under which a public official may seek redress for a statement in a political advertisement only by proving by clear and convincing evidence⁶⁶ "that the statement was made with 'actual malice'—that is, with knowledge that it was false or reckless disregard of whether it was false or [not]."⁶⁷

The Court subsequently elaborated upon the actual malice standard in *St. Amant v. Thompson*.⁶⁸ In *St. Amant*, a public official sued his opponent for making false statements about his actions with "reckless disregard" during a television broadcast.⁶⁹ The Court, relying upon *Sullivan*, held that reckless disregard could not be shown by proof of mere negligence.⁷⁰ Rather, the public official must prove that the speaker had strong suspicions regarding the truth of the information: "Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."⁷¹

In *Vanasco v. Schwartz*,⁷² the Court affirmed a lower court's expansion of the actual malice requirement to apply to state regulation of political campaign speech.⁷³ In *Vanasco*, the New York State Board of Elections had found that a candidate violated the New York Fair Campaign Code⁷⁴ by misrepresenting his party endorse-

63. 376 U.S. 254 (1964).

64. See *id.* at 255.

65. *Id.* at 273.

66. The Court actually used the phrase "convincing clarity" to describe the plaintiff's burden of proof. See *id.* In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court used the more traditional term "clear and convincing evidence" to characterize the plaintiff's burden in such cases. See *id.* at 342.

67. *Sullivan*, 376 U.S. at 279-80. While falsity had been a familiar element of proof in libel claims brought by public officials, actual malice—requiring knowledge or reckless disregard of falsity—had not. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.33, at 1090-91 (5th ed. 1995).

68. 390 U.S. 727 (1968).

69. See *id.* at 728-29.

70. See *id.* at 730-31.

71. *Id.* at 731.

72. 423 U.S. 1041 (1976), *aff'g* 401 F. Supp. 87 (E.D.N.Y. 1975).

73. See 401 F. Supp. at 92.

74. Among other things, the New York Fair Campaign Code prohibited the following:
(c) Attacks on a candidate based on race, sex, religion or ethnic background;

ment during a campaign.⁷⁵ However, the Board had failed to determine whether actual malice existed, and had required a “substantial evidence” rather than a “clear and convincing” standard for the burden of proof.⁷⁶ The district court found the Code unconstitutional because it was overbroad, vague, and did not meet the Sullivan test, i.e., it did not require a showing of actual malice by clear and convincing evidence.⁷⁷ Further, the district court expressed concern that the New York statute did not provide for immediate judicial review.⁷⁸

Thus, after *Vanasco*, a state statute attempting to regulate the content of political speech requires a clear and convincing showing of actual malice and must provide for immediate judicial review of any decision by a state agency charged with hearing claims under the statute.

A clear statement of opposition to the Sullivan standard came from Justice Byron White.⁷⁹ Justice White argued that Sullivan struck an “improvident balance . . . between the public’s interest in being fully informed . . . and the competing interest of those who have been defamed in vindicating their reputations.”⁸⁰ Justice White also urged the Court to permit a strict liability test through which a public official would be awarded damages if the official could simply show that the statement were false.⁸¹ Such an approach, according to Justice White, would permit a defamed public figure to clear his or her name.⁸² Notwithstanding Justice White’s urgings, however, the Court has consistently reaffirmed its holding in *Sullivan* and appears unlikely to reexamine its position in the near future.⁸³

(d) Misrepresentation of any candidate’s qualifications including personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidate, his or her staff, or personal or family life, or misuse of title or misuse of the phrase “re-elect”;

(e) Misrepresentation of any candidate’s position, including misrepresentation of political issues or voting record, use of false or misleading quotations or attributing a particular position to a candidate solely by virtue of a candidate’s membership in an organization; and

(f) Misrepresentation of any candidate’s party affiliation or party endorsement by persons or organizations, including use of doctored photographs or writing or fraudulent or untrue endorsements.

Id. app. at 101.

75. See id. at 89.

76. See id. at 98-99.

77. See id. at 94-95.

78. See id. at 99.

79. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring).

80. Id. at 767.

81. See id. at 772.

82. See id. at 769.

83. See, e.g., *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

B. Content-Neutral Regulation

Some states have employed creative methods in attempting to circumvent the Sullivan requirement for content-based regulation by regulating the time, place, or manner of the speech.⁸⁴ These states have found the Supreme Court's standard for the regulation of such content-neutral speech equally stringent: a time, place, or manner restriction must (1) be justified without reference to the content of the speech; (2) be narrowly tailored to serve a substantial government interest; and (3) leave open ample alternative channels for communication of the information.⁸⁵

In *Commonwealth v. Wadzinski*,⁸⁶ the Pennsylvania Supreme Court considered whether a portion of the Pennsylvania Elections Code was unconstitutional because it imposed a sanction upon any candidate who published a political advertisement about an opponent without previously filing a copy of the advertisement with the county board of elections.⁸⁷ Because prescribed notice requirements have the effect of chilling speech before it is uttered, the crux of the issue was whether the Pennsylvania notice requirement constituted a prior restraint.⁸⁸ Notice requirements in this case effectively forced the candidate to obtain a license to speak from the state.⁸⁹ Although the state argued that the notice requirement was a reasonable time, place, and manner restriction, the court held that required disclosure of political advertising and the associated waiting period for publishing the advertisement were unconstitutional because these requirements severely limited a candidate's ability to disseminate information.⁹⁰

C. Regulation of Elections

The U.S. Supreme Court has acknowledged that states have a legitimate interest in regulating the elections of their own officials.⁹¹ This interest, however, often comes into direct conflict with the constitutionally protected free speech rights of candidates.⁹² Thus, the Court has required that laws attempting to regulate the speech of political candidates during elections be narrowly tailored: "Because the

84. See *DECEPTIVE AND FALSE ADVERTISING*, supra note 13, at 11.

85. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 308 (1984).

86. 422 A.2d 124 (Pa. 1980).

87. See *id.* at 126.

88. See *id.* at 135.

89. See Interview with Steven G. Gey, Professor of Constitutional Law, Florida State University, Tallahassee, Fla. (Oct. 25, 1995).

90. See *Wadzinski*, 422 A.2d at 130-31.

91. See *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (noting that the Tenth Amendment reserves to states the power to regulate elections of state officials); see also *Storer v. Brown*, 415 U.S. 724, 730 (1974).

92. See *DECEPTIVE AND FALSE ADVERTISING*, supra note 13, at 12.

right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest.⁹³

In *Buckley v. Valeo*,⁹⁴ for example, the Court stated that some regulation of campaign speech may withstand constitutional scrutiny.⁹⁵ The Court rejected the argument that disclosure requirements and limitations upon political contributions reduce the quantity of political expression through prior restraint and restrict the freedom of political association.⁹⁶ In addition, the Court upheld the federal public financing scheme, which provided presidential candidates public funds in exchange for waiving their constitutional free speech rights to spend unlimited amounts of money in their campaigns.⁹⁷

In *McIntyre v. Ohio Elections Commission*,⁹⁸ the Court addressed the constitutionality of an Ohio statute that provided for a blanket prohibition on all forms of anonymous political publications.⁹⁹ The plaintiff contended that the statute impermissibly infringed upon an individual's right to anonymously draft and distribute leaflets, which in this case were distributed in opposition to an imminent referendum on a proposed school tax levy.¹⁰⁰ The Court agreed with the plaintiff, finding that the Ohio statute violated First Amendment free speech guarantees because it was not narrowly tailored to effectuate the state's compelling interest in preventing fraud and libel in the election process.¹⁰¹

In a dissenting opinion, Justice Scalia warned that permitting anonymous political publication would result in more negative campaign tactics:

The usefulness of a signing requirement lies not only in promoting observance of the law against campaign falsehoods It lies also in promoting a civil and dignified level of campaign debate Observers of the past few national elections have expressed concern

93. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972)).

94. 424 U.S. 1 (1976).

95. See *id.* at 20-22.

96. See *id.* at 20-21.

97. See *id.* at 23-25.

98. 115 S. Ct. 1511 (1995).

99. See *id.* at 1514.

100. See *id.* at 1518.

101. See *id.* The Court's decision suggests that a more tightly drafted statute could withstand strict scrutiny. See *id.* at 1522. Section 106.143, Florida Statutes, is similar to the Ohio statute struck down by *McIntyre*, suggesting that Florida's statutory ban on all anonymously written political advertising may be unconstitutional. Nevertheless, the *McIntyre* Court instructed that its decision be read narrowly and specifically reserved ruling on whether its decision would apply to other forms of unidentified communication, such as radio or television ads. See *id.* at 1514 n.3.

about the increase of character assassination—"mudslinging" is the colloquial term—engaged in by political candidates and their supporters to the detriment of the democratic process. Not all of this, in fact not much of it, consists of actionable untruth; most is innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office. Imagine how much all of this would increase if it could be done anonymously.¹⁰²

D. States' Rights

The U.S. Court of Appeals for the Sixth Circuit allowed the State of Ohio to regulate political speech in *Pestrak v. Ohio Elections Commission*.¹⁰³ In *Pestrak*, the court partially upheld an Ohio law that prohibited false political speech made with actual malice and empowered the Ohio Elections Commission to hold adjudicatory hearings to enforce violations of the statute.¹⁰⁴ The statute authorized the Commission to enforce violations through four distinct means: cease and desist orders, fines, recommendations to the county prosecutor for criminal prosecution, and publication of Commission findings.¹⁰⁵ The court found that the actual malice requirement in the statute was consistent with *Sullivan* and thus held that portion of the statute constitutional.¹⁰⁶ However, the court invalidated those sections of the statute that empowered the Commission to issue fines and cease and desist orders because the statute did not provide for immediate judicial review and lacked a "clear and convincing" burden of proof standard.¹⁰⁷ Nevertheless, the court found that the Commission did not violate the First Amendment simply by making and publishing findings on the veracity of certain political statements.¹⁰⁸ The court compared this situation to government speech in other fora, such as when government-sponsored news media make pronouncements on the truthfulness of statements made by public officials.¹⁰⁹ Thus, the *Pestrak* court recognized

102. *Id.* at 1536 (Scalia, J., dissenting).

103. 926 F.2d 573 (6th Cir. 1991).

104. *See id.* at 575-76.

105. *See id.* at 578.

106. *See id.* at 577.

107. *See id.* at 578.

108. *See id.* at 579-80.

109. *See id.* at 579. The *Pestrak* court noted that an "even more egregious" government intervention in the electoral process had been upheld in a recent Ninth Circuit case. *See id.* at 580. In *Geary v. Renne*, 914 F.2d 1249 (9th Cir. 1990) (*Geary I*), reh'g granted, 924 F.2d 175 (9th Cir. 1991), withdrawn and superseded, 2 F.3d 989 (9th Cir. 1993) (en banc) (*Geary II*), a Ninth Circuit panel upheld a California statute that allowed local governments to strike false or misleading statements from government-published voter information pamphlets. *See id.* at 1256. The panel found it significant that the pamphlet was prepared and distributed by the government, and concluded that the statute did not suppress protected expression because

the right of the government, through an adjudicatory hearing, to evaluate the veracity of political speech, provided the Sullivan requirements are satisfied.

E. Constitutional Challenges to Florida's Election Laws

Challenges to Florida law based upon McIntyre are being made in the U.S. District Court for the Middle District of Florida¹¹⁰ and in the Florida Second Circuit Court.¹¹¹ Plaintiffs in both cases are challenging the facial constitutionality of sections 106.071 and 106.143(1), Florida Statutes.¹¹² Both cases involve individuals making or seeking to make independent expenditures.¹¹³ The Eleventh Circuit Court of Appeals has not addressed these issues. Nevertheless, federal district courts within the Eleventh Circuit, and even the U.S. Supreme Court, have held unconstitutional several Florida statutes and local ordinances seeking to curb negative campaign tactics.

In *Miami Herald Publishing Co. v. Tornillo*,¹¹⁴ the U.S. Supreme Court considered whether section 104.38, Florida Statutes, which granted a political candidate the right to equal space to reply to a newspaper's editorial criticisms¹¹⁵ violated the free press guarantee of the First Amendment.¹¹⁶ Citing Sullivan for the principle that "debate on public issues should be uninhibited, robust, and wide-open,"¹¹⁷ the Court held the statute unconstitutional, stating that "a responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."¹¹⁸ The Court implied that any governmental regulation of a newspaper's editorial treatment of

the government did not attempt to keep the deleted material from reaching the public through other means. See *id.* at 1252-53. Three years later, however, after the U.S. Supreme Court's decision in the parallel case of *Renne v. Geary*, 501 U.S. 312, 320 (1991) (finding moot claim that party endorsements had been deleted from candidate statements in government-sponsored brochures), the Ninth Circuit, sitting en banc, vacated and dismissed *Geary I* without prejudice for lack of a justiciable controversy. See *Geary II*, 2 F.3d at 990.

110. See *Roe v. Florida Elections Comm'n.*, No. 94-308-CIV-FTM-23D (M.D. Fla. filed Sept. 30, 1994).

111. See *Doe v. Mortham*, No. 96-630 (Fla. 2d Cir. Ct. filed Feb. 6, 1996) (challenging the constitutionality of related Florida statutes dealing with disclosure and identification requirements involving miscellaneous advertisements and endorsements).

112. See Complaint at 1, *Roe* (No. 94-308-CIV-FTM-23D); Complaint at 3, *Doe* (No. 96-630).

113. See Complaint at 1, *Roe* (No. 94-308-CIV-FTM-23D); Complaint at 3, *Doe* (No. 96-630).

114. 418 U.S. 241 (1974).

115. See FLA. STAT. § 104.38 (1973).

116. See *Tornillo*, 418 U.S. at 242.

117. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

118. *Tornillo*, 418 U.S. at 256.

public issues and officials would likely violate the Constitution's free press guarantee.¹¹⁹

Gore Newspapers Co. v. Shevin,¹²⁰ a federal district court case, involved a challenge to a Florida statute enacted to curb last-minute "smear tactics" against candidates.¹²¹ The statute in question prohibited both "new" attacks and the republication of old charges and adverse information raised earlier in a campaign.¹²² Relying in part upon *Tornillo*—and, like the *Tornillo* Court, noting that a responsible press cannot be legislated—the court held that the statute violated the First Amendment.¹²³

The Florida Supreme Court also held unconstitutional a municipal ordinance making it a crime for any person to publish or circulate a charge or attack against a candidate during the last seven days of an election campaign, unless the charge had been personally served upon the candidate at least seven days before the election.¹²⁴ The ordinance permitted candidates a meaningful opportunity to respond to last-minute, negative attacks.¹²⁵ Citing various free press cases, including *Tornillo*, the court found that the statute violated the First Amendment's free speech and free press guarantees.¹²⁶

IV. THE ROLE OF NEGATIVE CAMPAIGN ADVERTISING IN FLORIDA POLITICS

A. The Political Landscape

In November 1996, all 120 seats in the Florida House of Representatives were up for election, as well as twenty of the forty seats in the Florida Senate.¹²⁷ In the House, Republicans took control for the first time since Reconstruction, winning a two-seat margin.¹²⁸ In the Senate, Republicans hold a six-seat margin.¹²⁹ "Now that Republicans have caught up, and the parties are competing on equal terms, most of the weakest legislators already have been swept out of office . . . , [a]ll the low-hanging fruit has been cut It's time for hand-

119. See *id.* at 254-56.

120. 397 F. Supp. 1253 (S.D. Fla. 1975), *aff'd*, 550 F.2d 1057 (5th Cir. 1977).

121. See *id.* at 1257-58 (citing FLA. STAT. § 104.35 (1973)).

122. See *id.* at 1257.

123. See *id.* at 1257-58.

124. See *Town of Lantana v. Pelczynski*, 303 So. 2d 326, 326-27 (Fla. 1974).

125. See *id.* at 327-28.

126. See *id.*

127. See Howard Troxler, *Battle Lines, Party Lines*, ST. PETE. TIMES, Apr. 7, 1996, at 1B.

128. There are now 61 Republicans and 59 Democrats in the Florida House of Representatives. See Lucy Morgan, *Chiles Tries to Make the Best of GOP Situation*, ST. PETE. TIMES, Nov. 7, 1996, at 6B.

129. There are now 23 Republicans and 17 Democrats in the Florida Senate. See *id.*

to-hand, trench warfare."¹³⁰ Negative campaign advertising is viewed as an ideal weapon for such fierce battles because it enables a campaign committee to divide voters, shape views, and define the opposition in a highly negative light.

Negative campaign advertising draws voters' attention away from campaign issues.¹³¹ It discourages meaningful examination of campaign issues by oversimplifying them through soundbites and catch phrases that ultimately degrade the democratic process.¹³² Although it is true that "[d]emocratic theory assumes that voters will evaluate candidates on the basis of the information that is available to them,"¹³³ if the information is skewed from the initial point of presentation, then voters are unable to synthesize the information objectively. As a result, voters must act based upon their emotions. Unfortunately, negative campaign advertising may force candidates to become preoccupied with defending against their opponents' attacks out of fear that not responding will increase the risk of losing the election.¹³⁴

Negative advertising is popular in Florida because of its success.¹³⁵ For example, in 1994, former Representative Ron Glickman¹³⁶ was defeated by Faye Culp, a local school board member.¹³⁷ Culp got a last-minute boost from a Republican Party brochure, which alleged that "Ron Glickman claims four titles: liberal, lawyer, legislator, liar. It's time to take one away."¹³⁸ Glickman lost by twenty votes.¹³⁹

Another vivid example of a negative campaign attack came during the 1994 election, when a Republican named Hugh Brotherton

130. Troxler, *supra* note 127 (quoting Assistant Secretary of State Rich Hefley). Hefley ran Republican legislative campaigns before becoming assistant secretary of state. See *id.*

131. See DECEPTIVE AND FALSE ADVERTISING, *supra* note 13, at 6.

132. See *id.*

133. Jack Winsbro, Comment, Misrepresentation in Political Advertising: The Role of Legal Sanctions, 36 EMORY L.J. 853, 863 (1987).

134. See Devlin, *supra* note 12, at 197. Michael Dukakis waited too long to respond to George Bush's attack ads in the 1988 presidential campaign. See ANSOLABEHERE & IYENGAR, *supra* note 8, at 4. The infamous "Willie Horton" ad portrayed Dukakis as ineffective on crime. See *id.* Consequently, 34% of those who voted for the Dukakis/Bentsen ticket did so because they "liked" the candidates, whereas 50% of those who voted against the ticket did so because of doubts engendered by the ads. See Devlin, *supra* note 12, at 197.

135. "Negative ads are employed in Florida because they work." Philip J. Troutine, Lying With the Facts, CAMPAIGNS & ELECTIONS, May 1991, at 16 (quoting Democratic pollster Mark Mellman). Just three years earlier Mellman had stated, "If you're filling empty heads, it's a lot easier to do it with negatives." Robert Guskind & Jerry Hagstrom, In the Gutter, 20 NAT'L J. 2782 (Nov. 5, 1988).

136. Dem., Tampa, 1986-1994.

137. See Beverly Hills Retiree Ready to Get to Work, ST. PETE. TIMES, Nov. 10, 1994, at 7B.

138. Peter Mitchell, Low Fliers: The Worst Political Mail of 1994, WALL ST. J., Nov. 16, 1994, at F4.

139. See *id.*

challenged former Representative Vernon Peeples.¹⁴⁰ According to the Democrat's brochure,

Brotherton got into a feud with a neighbor over flooding between their lawns. Instead of going for an agreement, Brotherton turned on the pipes and let the water flow . . . right into his neighbor's yard. And Brotherton didn't quit until his neighbor's lawn was completely flooded. Vote no on Hugh John Brotherton. He's Just Weird.¹⁴¹

This ad was untrue. Brotherton was actually sued by the neighbor because he built a berm in his own yard.¹⁴² Brotherton lost the election and is suing for libel.¹⁴³

B. History of Regulation Attempts

The Florida Legislature began considering various forms of campaign advertising regulation as early as the mid-1970s. A 1974 proposal required candidates to pledge that they would conduct a fair campaign.¹⁴⁴ Complaints of unfair campaign advertisements and rebuttals to those complaints would have been heard by a county elections board, which would then have released relevant documents to the media.¹⁴⁵ In 1975, a similar bill was proposed that provided for a mandatory code but removed the provisions for filing complaints with a county elections board.¹⁴⁶ The bill analysis indicated that the complaint provision was removed because the Florida House of Representatives Committee on Elections felt "that public exposure and opinion would be enough of a penalty for violating the oath."¹⁴⁷ In the 1980s, legislators filed several bills prohibiting candidates from making false statements about themselves and providing civil penalties for violating the prohibition.¹⁴⁸

140. Dem., Punta Gorda, 1982-1996. Representative Peeples was a prominent member of the Committee on House Ethics & Elections and was affectionately considered the Committee's "historian."

141. Troxler, *supra* note 127.

142. See *id.*

143. See *id.* This case was closed on July 26, 1995, with a finding of no probable cause by the Division of Elections. See Division of Elections v. Peeples, FFEC No. 95-002, Statement of Findings 4 (July 25, 1995) (on file with Fla. Elec. Comm'n). Brotherton immediately appealed this finding. See Letter from Hugh J. Brotherton to David Rancourt, Director, Div. of Elec. (July 26, 1995) (on file with Fla. Elec. Comm'n) (requesting a hearing before the Elections Commission). Brotherton withdrew his appeal on November 15, 1995, and filed a civil suit for libel against Peeples. See Letter from Hugh J. Brotherton to David Rancourt, Director, Div. of Elec. (Nov. 2, 1995) (on file with Fla. Elec. Comm'n) (withdrawing previous request for hearing and attaching a copy of a complaint filed in Florida's 20th Judicial Circuit).

144. See DECEPTIVE AND NEGATIVE ADVERTISING, *supra* note 13, at 20.

145. See *id.*

146. See Fla. HB 1319 (1975).

147. Fla. H.R. Comm. on Elec., HB 1319 (1975) Staff Analysis 2 (final Apr. 21, 1975) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

148. See DECEPTIVE AND FALSE ADVERTISING, *supra* note 13, at 20.

In 1986, Secretary of State George Firestone included a "Pledge of Fair Campaign Practices" in packets of information sent to candidates by DOS.¹⁴⁹ The pledge was strictly voluntary.¹⁵⁰ DOS included signed pledges as part of the candidates' campaign files.¹⁵¹ However, there was no enforcement of the pledge.¹⁵² DOS did not officially acknowledge the pledge and consequently could not make statements about candidate adherence.¹⁵³

In 1995, Secretary of State Sandra B. Mortham announced a package of campaign and election law reform proposals that included a fair campaign practices code.¹⁵⁴ The goal of the package was to establish a bipartisan fair campaign practices board to handle complaints of unfair campaign tactics.¹⁵⁵ The board, operating under

149. See *id.* at 22. The pledge stated:

Pledge of Fair Campaign Practices: There are basic principles of decency, honesty, and fair play which every candidate for public office in the United States and the state of Florida has a moral obligation to observe and uphold in order that, after vigorously contested but fairly conducted campaign, our citizens may exercise their constitutional right to a free and untrammelled choice and the will of the people may be fully and clearly expressed on the issues before the county and state,

Therefore:

I shall conduct my campaign in the best American tradition, discussing the issues as I see them,

I shall present my record and policies with sincerity and frankness, and criticizing without fear or favor, the record and policies of my opponents and their parties which merit such criticism.

I shall defend and uphold the right of every qualified American voter to full and equal participation in the electoral process.

I shall condemn the use of personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidates or on their personal or family lives.

I shall condemn the use of campaign material of any sort which misrepresents, distorts, or otherwise falsifies the facts regarding accusations against any candidates which aim at creating or exploiting doubts, without justification, as to their loyalty and patriotism.

I shall condemn any appeal to bigotry based on race, creed, sex, or nation origin.

I shall condemn any dishonest or unethical practice which tends to corrupt or undermine our American dream or free elections or which hampers or prevents the full and free expression of the will of the voters.

I shall immediately and publicly repudiate support deriving from any individual or group which resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics which I condemn.

I, the undersigned candidate for election to public office in the United States of America and the State of Florida, hereby endorse, subscribe to and solemnly pledge myself to conduct my campaign in accordance with the above principles and practices.

Id. app. A.

150. See *id.* at 22.

151. See *id.*

152. See *id.*

153. See *id.*

154. See Press Release from Fla. Dep't of State, Mortham Proposes Campaign & Election Reform (Nov. 15, 1995) (on file with Dep't); see also discussion *infra* Part VI.D.

155. See *id.*

the auspices of DOS, would have heard complaints statewide.¹⁵⁶ In addition, the package would have required a notice of candidate authorization within the standard disclaimer.¹⁵⁷ This new disclaimer also would have been required on all paid telephone contacts and campaign messages placed on the Internet.¹⁵⁸

Other proposals included defining a cap on party contributions to candidates and eliminating primaries.¹⁵⁹ Every proposal that required legislative approval failed.¹⁶⁰

C. Nonlegislative Solutions

1. The LeRoy Collins Center for Public Policy

In October 1991, a group of approximately sixty Florida citizens convened in Tallahassee at the LeRoy Collins Center for Public Policy.¹⁶¹ The bipartisan gathering consisted of representatives from public and private sector interest groups, governmental institutions, and the media.¹⁶² Their goal was to create a proposal aimed at halting the use of unfair and deceptive negative campaign practices.¹⁶³ Among the issues discussed were citizen participation in the electoral process, voluntary actions to increase voter participation, and a voluntary code for fair campaign practices.¹⁶⁴

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. See Martin Dyckman, *Election Reform Stalled on the Tracks*, ST. PETE. TIMES, May 2, 1996, at A15; see also discussion *infra* Part VI.F. One reason the reform proposals failed was because Governor Lawton Chiles was adamantly opposed to removing any public financing provisions from the election laws. See Dyckman, *supra*, at A15.

161. See COLLINS CTR. FOR PUB. POL'Y, POLICY STATEMENT: POLITICAL CAMPAIGN PRACTICES AND CITIZEN PARTICIPATION IN THE ELECTORAL PROCESS (1991) (providing conclusions and recommendations of 60 bipartisan conference participants who met in Tallahassee, Florida, to discuss fair campaign practices in Florida) (on file with Div. of Elec.).

162. See *id.*

163. See *id.*

164. See *id.* The proposed Florida Voluntary Code of Fair Campaign Practices read:

To refresh the people's participation in their democratic process, Florida's citizens should expect their candidates for public office at all levels to observe and uphold standards of fairness and honesty during election campaigns so as to give voters a clear look at the personal values that motivate their candidates and a clean choice on the political issues that define their differences. Along with the candidates, the news media and the general public play their own parts in the self-governing process. This voluntary code addresses all three and invites all to subscribe.

The Candidates

As I seek public office in Florida, I honor the following principles as a guide to conduct which the public is entitled to expect of me:

1. I will address valid issues in my campaign, will tell the truth as to my intentions if I am elected, and will fight fairly in any contest with my opponent(s).

2. I will shun demagoguery that seeks to deflect the public's attention to sham issues that obscure real concerns of the electorate.

3. I will limit my attacks on an opponent to legitimate challenges to that person's record, qualifications, and positions.

4. I will neither use nor permit the use of malicious untruths or scurrilous innuendos about an opponent's personal life nor will I make or condone unfounded accusations discrediting that person's integrity.

5. I will take personal responsibility for approving or disavowing the substance of attacks on my opponent that may come from third parties supporting my candidacy.

6. I will not use or permit the use of campaign material that falsifies, distorts, or misrepresents facts.

7. I will neither use nor permit the use of appeals to bigotry in any form, and specifically to prejudice based on race, sex, sexual orientation, religion, or national origin.

8. I will neither use nor permit the use of last-minute charges made without giving my opponent reasonable time in which to respond before election day.

9. I will demand that persons or organizations supporting me maintain these standards of fairness.

10. I will repudiate any abuses of this code.

The News Media

As a journalist, free under the First Amendment to report to the people on their election process, I honor the following principles as a guide to my professional conduct which the public should reasonably expect of me:

1. I will report the campaigns of all candidates fairly and will ensure their access to equitable coverage. While editorial expression of preferences in spaces reserved for opinion is an expected part of a robust press in a free society, the news presentation of political debate presupposes fair access to the public ear for the messages of all candidates.

2. I will emphasize coverage of candidates' stands on substantive issues and I will not allow my coverage to be distracted by images that some candidates seek to substitute for substance.

3. I will listen to the citizens and convey their concerns to the candidates through my questioning as a reporter, and in turn I will persist in efforts to elicit the candidates' responses to those concerns.

4. While offering news space or time to candidates who seek to state positions on serious issues, I have a like duty to draw the public's attention to the means by which less-than-honest campaigners may seek to mislead, distort, or falsify.

5. When accepting campaign advertising, I will require the identity of the person or organization buying the ad to appear with the ad; if the advertisement (including television commercial) in behalf of a candidate attacks an opponent, I will ask the candidate to state personally as a part of the ad itself whether the candidate approves or disapproves of it; and I will keep a watch on campaign advertising so as to monitor and consistently publicize misrepresentations or untruths that may appear in advertisements in any of the news media including my own channel, frequency or publication.

The Public

As the 20th century closes, peoples all over the world are casting off failed authoritarian rule and are laying down their lives, their fortunes, and their sacred honor in a reach for the free democratic process which my American forebears won through revolution and which I now accept as a routine part of my life. Surely it is a time for me to join with all voters and renew our pride in participating in the majesty of self-government, to demand the cleansing of its unswept corners, and to demonstrate by our interest and our vote that we care about the political process that keeps this land free for ourselves and our posterity.

The group also recommended steps for the news media and the public to take to clean up elections, including: emphasizing issues rather than a candidate's image; encouraging the use of ad watches by the media; encouraging organizations supporting or opposing candidates and/or issues to maintain consistent standards of fairness; encouraging candidates to endorse all campaign materials and requiring candidates to disclose whether they have endorsed an advertisement; encouraging the media to ensure that candidates receive equitable coverage and expanded access; and ensuring that campaigns, advertisements, and dialogue are based upon facts.¹⁶⁵

Two fair campaign practice groups have formed in Florida as an outgrowth of the Collins Center for Public Policy gathering: Citizens for Fair Campaign Practices in Pinellas County and the Dade County Fair Campaign Practices Committee.

2. Citizens for Fair Campaign Practice

The Citizens for Fair Campaign Practices formed in 1993 in Pinellas County to implement the Voluntary Code of Fair Campaign Practices.¹⁶⁶ The Citizens for Fair Campaign Practices is open to all registered voters.¹⁶⁷ The review board is composed of officers, directors, and five alternates chosen from the group's general membership.¹⁶⁸ All candidates seeking public office in Pinellas County are asked to sign a fair campaign practices pledge.¹⁶⁹ Although the pledge is voluntary, the board informs the media whether individual candidates agreed to sign the pledge.¹⁷⁰

Any person can register a complaint with the committee alleging a violation of the pledge.¹⁷¹ The review board meets to determine whether the conduct complained of constitutes a pledge violation.¹⁷² If the board determines that there has been an unfair campaign practice, a hearing is scheduled and both parties are asked to appear before the board.¹⁷³ While the review board has no legal authority to enforce rulings or issue sanctions, it does announce its findings to the news media.¹⁷⁴

165. See *id.*

166. See Martin Dyckman, *Unhealthy Only for Bad Campaigns*, ST. PETE. TIMES, May 19, 1996, at 3D.

167. See DECEPTIVE & FALSE ADVERTISING, *supra* note 13, at 23.

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.*

172. See *id.*

173. See *id.*

174. See *id.*; see also Telephone Interview with Ray Aden, Treasurer, Citizens for Fair Campaign Practices Comm. (Feb. 24, 1995).

Four candidates were cited with violations of the Voluntary Code of Fair Campaign practices during the 1994 elections.¹⁷⁵ All four candidates lost their respective elections.¹⁷⁶ The Pinellas County Democratic Party supports the Citizens for Fair Campaign Practices; the Pinellas County Republican Party does not.¹⁷⁷ Moreover, the state Republican Party formally banned Republican committees and clubs throughout Florida from endorsing any nonpartisan or bipartisan private group, committee, or organization established for the purpose of monitoring or regulating political campaigns.¹⁷⁸

3. Dade County Fair Campaign Practices Committee

The board of the Dade County Fair Practices Committee has twenty-five members.¹⁷⁹ Membership is determined by the committee and is by invitation only.¹⁸⁰ Unlike the Citizens for Fair Campaign Practices Committee, the Dade County committee is loosely established and has no formal campaign practices code or formal rules to govern the committee's actions.¹⁸¹ The committee is nonpartisan and has a diverse ethnic and racial composition.¹⁸²

The committee limits its scope of inquiry to ethnic issues.¹⁸³ Any candidate who makes an ethnic appeal during the course of a campaign is condemned by the committee.¹⁸⁴ For example, if a white candidate makes a disparaging remark about an African-American opponent, the committee will condemn that candidate.¹⁸⁵ Likewise, if an African-American candidate makes a race-based appeal to African-American voters, the committee will condemn that candidate as well.¹⁸⁶

Minority groups have expressed concern that this puts them at an unfair disadvantage and limits the use of a powerful political

175. See Dyckman, *supra* note 166, at 3D.

176. See *id.*

177. See *id.*

178. See *id.* Dale M. Gross, vice-chair of the Pinellas County Republican Party, called the decision "a day of shame for the state Republican party." *Id.* Currently, the majority of incumbents in Pinellas County are Republicans. See *id.* The prevailing opinions of many Republicans in the area is that a fair campaign practices board would protect incumbents. See *id.* Further, most of the local office holders who sponsor the committee are Republicans. See *id.* Two of the most outspoken lawmakers on election reform during the 1996 Regular Session, Senator Charlie Crist, Repub., St. Petersburg, and Secretary of State Sandra B. Mortham, are from Pinellas County.

179. See DECEPTIVE & FALSE ADVERTISING, *supra* note 13, at 23.

180. See *id.*

181. See Telephone Interview with Rafael Penalver, Chairperson, Dade County Fair Campaign Practices Comm. (March 2, 1995).

182. See DECEPTIVE & FALSE ADVERTISING, *supra* note 13, at 23.

183. See *id.*

184. See *id.*

185. See Penalver, *supra* note 181.

186. See *id.*

tool.¹⁸⁷ They also complain that the committee only looks at speech, and does not consider whether certain campaign contributions are solicited by way of “ethnically” unfair practices.¹⁸⁸ Further, many in the minority community distrust the committee and believe that it is actually a tool of the establishment designed to frustrate their candidates.¹⁸⁹

The committee currently will act upon complaints filed by candidates or upon its own initiative.¹⁹⁰ However, the committee chair stated that the committee will start to act more upon its own initiative.¹⁹¹ The committee reviews a complaint and publicly announces the results of its review. The committee consistently receives laudable press coverage, particularly in the *Miami Herald*.¹⁹² Further, a condemnation by the committee is thought to have a significant impact upon a candidate’s chances for success.¹⁹³ This fact may only heighten the concerns of minority communities about the power of this committee and its potential to discourage minority candidates.

V. CURRENT REGULATION THROUGH LEGISLATION

A. Other States

Many states have enacted statutes regulating the speech or conduct of candidates for election to public office.¹⁹⁴ Twenty states have adopted laws prohibiting certain false statements regarding candidates.¹⁹⁵ Violations are generally misdemeanors; however, the penalties range from civil fines to felony convictions.¹⁹⁶

Several states have included procedural aspects that make their laws noteworthy. For example, an Ohio statute provides that if a person, committee, or corporation falsely identifies itself in a politi-

187. See *id.*

188. See *id.*

189. See *id.* Mr. Penalver also states that the committee members most likely to participate in fair campaign practices decisions are white Anglo-Americans, who comprise a majority of the committee. See *id.*

190. See *id.*

191. See *id.*

192. See, e.g., *Watchdogs of Civility*, *MIAMI HERALD*, Aug. 22, 1994, at 12A.

193. See *id.*

194. A chart detailing the existence of state statutes containing fair campaign practices codes and prohibitions on false campaign statements, as well as court challenges to such statutes, can be found in the Appendix to this Comment.

195. See Appendix.

196. See *id.* California has elevated such a prohibition to constitutional status. Under the California Constitution, a candidate may lose his or her office if found liable in a civil action for making slanderous or libelous statements that were “a major contributing cause in the defeat of the opposing candidate.” CAL. CONST. art. VII, § 10.

cal publication, then the Ohio Elections Commission may impose a fine and refer the matter to a prosecuting attorney.¹⁹⁷

Oregon provides that there is "a rebuttable presumption that a candidate knows of and consents to any publication or advertisement prohibited by this section caused by a political committee over which the candidate exercises any direction and control."¹⁹⁸

Montana law provides that in addition to being subject to a misdemeanor penalty, a successful candidate who is found guilty of making or publishing false statements reflecting upon a candidate's character or morality or misrepresenting the voting record or position on public issues of a candidate may be removed from office.¹⁹⁹

In a further effort to address campaign advertising that is not necessarily false, several states have adopted or endorsed fair campaign practices codes for candidates.²⁰⁰ Generally, these codes contain broad principles to be used as a guide in conducting campaigns. The codes contain such ideals as conducting the campaign without the use of personal vilification,²⁰¹ character defamation,²⁰² whispering campaigns, libel, slander, or scurrilous attacks on one's opponent or the opponent's personal or family life,²⁰³ not using campaign material that misrepresents, distorts, or otherwise falsifies the facts,²⁰⁴ and not making any appeal to prejudice based upon race, sex, creed, or national origin.²⁰⁵ The codes are voluntary rather than state-enforced.²⁰⁶

197. See OHIO REV. CODE ANN. § 3517.20(A) (Anderson 1996). The Ohio Legislature nevertheless recognized that anonymous materials protected by McIntyre were exempt from this provision. See Act effective Aug. 22, 1995, ch. 60, § 6, 1995 Ohio Laws (WESTLAW).

198. OR. REV. STAT. § 260.532(3) (1995).

199. See MONT. CODE ANN. § 13-35-234(2) (1995).

200. See CAL. ELEC. CODE § 20440 (Deering 1995); 10 ILL. COMP. STAT. ANN. 5/29B-10 (West 1995); ME. REV. STAT. ANN. tit. 21-A, § 1101 (West 1995); MONT. CODE ANN. § 13-35-301 (1995); NEV. REV. STAT. ANN. § 294A.290 (Michie 1995); W. VA. CODE ANN. § 3-1B-5 (Michie 1996).

201. See MONT. CODE ANN. § 13-35-301 (1995).

202. See CAL. ELEC. CODE § 20440 (Deering 1995); 10 ILL. COMP. STAT. ANN. 5/29B-10 (West 1995); MONT. CODE ANN. § 13-35-301 (1995); NEV. REV. STAT. ANN. § 294A.290 (Michie 1995); W. VA. CODE ANN. § 3-1B-5 (Michie 1996).

203. See CAL. ELEC. CODE § 20440 (Deering 1995); 10 ILL. COMP. STAT. ANN. 5/29B-10 (West 1995); MONT. CODE ANN. § 13-35-301 (1995); W. VA. CODE ANN. § 3-1B-5 (Michie 1996).

204. See 10 ILL. COMP. STAT. ANN. 5/29B-10 (West 1995); ME. REV. STAT. ANN. tit. 21-A, § 1101 (West 1995); MONT. CODE ANN. § 13-35-301 (1995); NEV. REV. STAT. ANN. § 294A.290 (Michie 1995); W. VA. CODE ANN. § 3-1B-5 (Michie 1996).

205. See ME. REV. STAT. ANN. tit. 21-A, § 1101 (West 1995); MONT. CODE ANN. § 13-35-301 (1995).

206. The Washington State Public Disclosure Commission has promulgated rules adopting a voluntary fair campaign practices code. See WASH. ADMIN. CODE § 390-32-030 (1995). The rules provide for complaints alleging a violation of the Code to be filed with the Commission. See *id.* After notifying the alleged violator and receiving a response, the Commission sends the complaint and response to the news media. See *id.* § 390-32-030(3).

B. Florida

The Florida Legislature has addressed the issue of campaign advertising in several ways. First, section 104.271(1), Florida Statutes, prohibits candidates from falsely or maliciously accusing an opposing candidate of violating any provision of the election code.²⁰⁷ A violation of this section is a third-degree felony and disqualifies the candidate from holding office.²⁰⁸ The Florida Elections Commission (FEC) has no jurisdiction over this section.²⁰⁹

Section 104.271(2), Florida Statutes, prohibits a candidate from making, "with actual malice[,] . . . any statement about an opposing candidate which is false."²¹⁰ This section provides that an aggrieved candidate may file a complaint with the Division of Elections pursuant to section 106.25, Florida Statutes.²¹¹ The FEC has jurisdiction to hold an expedited hearing and to assess a civil penalty of up to \$5,000 against a candidate found in violation of section 106.25.²¹²

Section 106.143, Florida Statutes, requires all political advertisements to contain certain information.²¹³ The sponsor of the advertisement must be identified along with the fact that it is a paid political advertisement.²¹⁴ If the advertisement is for a candidate seeking the nomination of a political party, the advertisement must identify that party.²¹⁵ Independent candidates must indicate that they are running as Independents.²¹⁶

Further, section 106.143(4), Florida Statutes, regulates the content of political advertising.²¹⁷ It prohibits a person who is not an incumbent for the office for which he or she is running from using the

The rules prohibit the Commission from issuing comments or opinions about complaints or responses. See *id.* § 390-32-030(5).

207. See FLA. STAT. § 104.271(1) (1995). The statute provides:

Any candidate who, in a primary election or other election, willfully charges an opposing candidate participating in such election with a violation of any provision of this code, which charge is known by the candidate making such charge to be false or malicious, is guilty of a felony of the third degree, punishable as provided in § 775.082 or § 775.083 and, in addition, after conviction shall be disqualified to hold office.

Id.

208. See *id.*

209. The FEC is only empowered to hear claims brought under section 104.271(2). See *id.* § 104.271(2) (providing that a candidate may file a complaint with the Division against another candidate for making a false statement with actual malice).

210. *Id.*

211. See *id.*; see also *id.* § 106.25(3) ("For the purposes of Florida Elections Commission jurisdiction, a violation shall mean the willful performance of an act prohibited by this chapter or the willful failure to perform an act required by this chapter.").

212. See *id.* § 104.271(2).

213. See *id.* § 106.143.

214. See *id.* § 106.143(1)(a)-(b).

215. See *id.* § 106.143(2).

216. See *id.*

217. See *id.* § 106.143(4).

word “re-elect.”²¹⁸ To avoid the implication of incumbency, such advertisements must include the word “for” between the candidate’s name and the office for which he or she is running.²¹⁹ A person who willfully violates section 106.143 is subject to civil penalties imposed by the FEC.²²⁰

Finally, section 106.071(1), Florida Statutes, requires every political advertisement paid for by independent expenditures to contain the name and address of the person paying for the advertisement and to carry the following disclaimer: “Paid political advertisement paid for by (name of person or committee paying for the advertisement) independently of any (candidate or committee).”²²¹ A person who fails to include the disclaimer required by this section is guilty of a first-degree misdemeanor.²²²

1. The Division of Elections

Complaints filed under sections 104.271(2) or 106.143 are received by the Division of Elections, which conducts an investigation to determine if there is probable cause to believe that a violation has occurred.²²³ A finding of no probable cause may be appealed by the complainant to the FEC.²²⁴ The Division also can investigate and make a probable cause determination without having received a sworn complaint.²²⁵ In addition, the Division has the duty to conduct random audits and investigations with respect to reports and statements filed under chapter 106, Florida Statutes, and with respect to the alleged failure to file any required reports and statements.²²⁶

2. The Florida Elections Commission

The seven commissioners on the FEC are appointed by the Governor, approved by three members of the Cabinet, and subject to Senate confirmation.²²⁷ The Chair is designated by the Governor.²²⁸

218. See *id.*

219. See *id.*

220. See *id.* § 106.143(7).

221. *Id.* § 106.071(1).

222. See *id.* § 106.071(2).

223. See *id.* § 106.25(4).

224. See *id.* § 106.25(7).

225. See *id.* § 106.25(2).

226. See *id.*

227. See *id.* § 106.24(1); see also COMM. ON ETHICS & ELEC., FLORIDA ELECTIONS COMMISSION: OVERVIEW 1 (Oct. 1995) (on file with Fla. H.R. Comm. on Elec. Reform) [hereinafter *FEC OVERVIEW*]. The Legislature created the FEC in 1973 and transferred responsibility for investigating violations to the Department of Legal Affairs. See *id.* at 11. Local candidate and committee complaints are given to the state’s attorney. See *id.* Because election law violations were not a priority for either body, the Legislature also vested the authority to impose civil or criminal penalties with the Division and the FEC in 1977. See *id.*

No more than four commissioners may be of the same political party.²²⁹ Commissioners are appointed to four-year terms and may not serve more than two terms.²³⁰ Commissioners do not receive a salary, but do receive travel and per diem compensation for expenses associated with the performance of their duties.²³¹

The FEC was created by statute within DOS.²³² Section 106.24, Florida Statutes, provides that the FEC shall not be subject to control, supervision, or direction by DOS in the performance of its duties.²³³ The FEC has no staff of its own; the Division of Elections provides administrative support and services to the FEC.²³⁴ The attorney general's office provides the FEC with an assistant attorney general who acts as general counsel.²³⁵

The FEC determines violations of chapter 106.²³⁶ Upon finding a violation, the FEC may levy civil penalties of up to \$1,000 for each violation of chapter 106 and up to \$5,000 for violations of section 104.271(2).²³⁷ The FEC also hears appeals of fines levied for the late filing of campaign treasurer reports.²³⁸ The FEC meets, on average, once every two months.²³⁹ It conducts a hearing, if requested, when probable cause is found.²⁴⁰ To date, the FEC has been unable to shorten the time between receipt of the complaint and a Division probable cause determination to under six months, by which time the election at issue has usually taken place.²⁴¹

A finding of probable cause by the Division is referred to the FEC, which considers the case and makes its own probable cause de-

228. See FLA. STAT. § 106.24(1) (1995).

229. See *id.* A commissioner may not be a member of any county, state, or national committee of a political party, or be an officer in any partisan political club or organization. See *id.* § 106.24(2). In addition, a commissioner cannot hold or be a candidate for any other public office, or have held an elective public office or office in a political party in the year immediately preceding appointment. See *id.*

230. See *id.* § 106.24(1).

231. See *id.*

232. See *id.*

233. See *id.*

234. See *id.* § 106.24(4).

235. See FEC OVERVIEW, *supra* note 227, at 3. The director of the Division is not involved in FEC investigations and does not see complaints until the statement of findings are completed. See *id.* Thereafter, the director, who has the final say on the wording of the statement of findings, may elect to sign the findings or rewrite them. See *id.*

236. See *id.* at 6.

237. See FLA. STAT. §§ 104.271(2), 106.265(1) (1995).

238. See FEC OVERVIEW, *supra* note 227, at 6.

239. See *id.* at 8.

240. See *id.* Following the hearing, the FEC makes a final determination of whether there has been a violation. See *id.* Section 104.271(2) requires an expedited hearing. See FLA. STAT. § 104.271(2) (1995). In such a case, the FEC may schedule a hearing within 30 days of the probable cause finding by the Division. See *id.* Beginning in 1994, some of the formal hearings have been referred to administrative law judges in the Division of Administrative Hearings. See FEC OVERVIEW, *supra* note 227, at 8.

241. See FEC OVERVIEW, *supra* note 227, at 8.

termination.²⁴² If probable cause is found, the respondent is entitled to request and receive a full evidentiary hearing.²⁴³ All complaints, papers, and investigations remain confidential until the Division renders a probable cause determination.²⁴⁴ If a finding of no probable cause is appealed, the information must remain confidential until the appeal is resolved.²⁴⁵ If the FEC finds probable cause within thirty days before an election, the findings remain confidential until noon of the day following the election.²⁴⁶

The FEC is empowered to issue subpoenas and invoke other necessary processes to compel the attendance of witnesses at the hearing.²⁴⁷ Following the hearing, the FEC determines whether a violation has occurred and whether to levy a civil penalty.²⁴⁸ The FEC has the authority to bring civil actions for relief, including actions for temporary or permanent injunctions.²⁴⁹ Since the enactment of section 104.271(2) in 1985, at least forty-two complaints have been filed alleging false statements with actual malice.²⁵⁰ The FEC has found violations in two of these cases.²⁵¹

3. Case Studies: *In re Clayton M. Reynolds III and Division of Elections v. Fischer*

During the 1990 general election, Clayton M. Reynolds III, a candidate for Florida House District 27, stated in advertisements mailed to voters that his opponent, Representative Stan Bainter,²⁵² attended sporting events paid for by political action committees (PACs).²⁵³ The ad also stated that Representative Bainter supported

242. See *id.* at 17.

243. See *id.*

244. See FLA. STAT. § 106.25(6) (1995).

245. See *id.*

246. See *id.*

247. See *id.*

248. See *id.*

249. See *id.*

250. See Memorandum from C.L. Ivey, Investigator Specialist, Div. of Elec., to Barbara M. Linthicum, Ass't Gen. Couns. (Dec. 13, 1995) (on file with Division).

251. See *In re Clayton M. Reynolds III*, FEC No. 90-69, Final Order 6 (on file with Fla. Elec. Comm'n); *Division of Elections v. Fischer*, FEC No. 94-122, Proposed Final Order 28 (on file with Fla. Elec. Comm'n). The low prosecution rates may not be based solely upon the legal issues, but may be influenced by the political arena. See Interview with Barbara Linthicum, Ass't Gen. Couns., Fla. Elec. Comm'n, Tallahassee, Fla. (Aug. 15, 1995). Complaints that bear significant resemblance to the facts of Reynolds, see *infra* notes 252-57 and accompanying text, were dismissed. See Linthicum, *supra*.

252. Repub., Eustis.

253. See Reynolds, FEC No. 90-69, Final Order at 3. The front of the first ad mailed to voters read: "HAS OUR REPRESENTATIVE INVITED YOU TO THE SUPER BOWL? KENTUCKY DERBY? WORLD SERIES?" *Id.* The reverse side read: "PAC'S TAKE LEGISLATORS ALL THE TIME AND WE PAY THE BILL! DOES OUR INCUMBENT DESERVE ANOTHER CHANCE TO GO TO THE SUPER BOWL? WE CANNOT AFFORD

a committee that could approve a state income tax without the vote of the electorate.²⁵⁴ The FEC determined that the candidate knew Representative Bainter had not attended any sports activities paid for by PACs.²⁵⁵ The FEC also determined that Reynolds reviewed the law regarding the Taxation and Budget Reform Commission and knew that the Commission could not approve a state income tax without the approval of the electorate.²⁵⁶ The FEC fined Reynolds \$5,000, suspending \$4,000 of the fine if Reynolds paid \$1,000 within sixty days of the final order.²⁵⁷

The Division achieved its second victory under section 104.271 in 1996.²⁵⁸ The case involved two candidates for the Lake County School Board in the 1994 general election.²⁵⁹ Kyleen Fischer accused her opponent of organizing Lake County residents to close down a predominantly African-American high school in Eustis, Florida.²⁶⁰ The Division found that Fischer participated in drafting the mailed advertisements, knew the advertisements were false, and paid for the ads out of her campaign account.²⁶¹ Fischer beat her opponent by 1,170 votes.²⁶² The Division recommended that she be fined \$5,000.²⁶³

All other cases brought under section 104.271(2) have ended with findings of no probable cause.²⁶⁴ Both the falsity and actual malice elements make finding a violation under this section extremely difficult. Similarly, although there have been several cases prosecuted under section 106.143, most have sustained findings of no probable

OUR INCUMBENT 'STAN'; Vote for a change . . . From Your Door To The House Floor; CLAY REYNOLDS WILL WORK FOR YOU." Id.

254. See *id.* This second advertisement read: "WHY DOES OUR REPRESENTATIVE BELIEVE IN A STATE INCOME TAX?" *Id.* at 4. The reverse side read: "HE SUPPORTS THE COMMITTEE THAT COULD APPROVE A STATE INCOME TAX WITHOUT OUR VOTE! DOES OUR INCUMBENT DESERVE ANOTHER CHANCE TO SUPPORT THIS GROUP . . . AGAIN? WE CANNOT AFFORD OUR INCUMBENT 'STAN'[:] Vote For A Change . . . From Your Door To The House Floor; CLAY REYNOLDS WILL WORK FOR YOU." *Id.*

255. See *id.* at 6.

256. See *id.*

257. See *id.* The final order was issued on September 29, 1993, and the Division informed Reynolds of the FEC's findings shortly thereafter. See *id.* Reynolds paid the \$1,000 fine by October 23, 1993, and the case was closed. See *id.*

258. See *Division of Elections v. Fischer*, FEC No. 94-122, Proposed Final Order 28 (on file with Fla. Elec. Comm'n).

259. See *id.* at 4.

260. See *id.* at 5.

261. See *id.* at 4.

262. See *id.*

263. See *id.*

264. See Ivey, *supra* note 250 (attaching a list of cases disposed of by the FEC since 1987).

cause based upon a requirement of willfulness.²⁶⁵ According to the Division, most complaints are filed against first-time candidates.²⁶⁶

VI. 1996 FLORIDA ELECTION REFORM PROPOSALS

Taking into account the constitutional case law and the renewed interest in election reform, the Florida Legislature recently attempted to cure the defects in the current Florida campaign laws through both specific and omnibus election reform bills.²⁶⁷

A. Committee on Ethics and Elections Proposal

Sections 104.271, 106.071, and 106.143, in their present form, lack many elements that the U.S. Supreme Court has determined are essential to the constitutional regulation of political speech.²⁶⁸ Thus, the House Committee on Ethics & Elections recommended that section 104.271 be amended to include immediate judicial review and a clear and convincing burden of proof standard to comply with the Sullivan test.²⁶⁹ The Committee also recommended that the provision's fines be extended to any person responsible for the advertisement, rather than just the candidate, by incorporating the doctrine of respondeat superior.²⁷⁰ The provision would make any person associated with the advertisement on behalf of the candidate vicariously liable for a violation.²⁷¹ The Committee further recommended increasing the fine for publishing false statements and making the candidate personally liable for the fine.²⁷²

In addition, the Committee recommended that sections 106.071 and 106.143 be amended to eliminate the disclaimer requirement on certain political advertisements produced and distributed by individuals or groups.²⁷³ The Committee also believed that if the statutes

265. See *id.*

266. See Interview with Barbara Linthicum, Ass't Gen. Couns., Fla. Elec. Comm'n, Tallahassee, Fla. (Aug. 15, 1995) (notes on file with Fla. H.R. Comm. on Elec. Reform).

267. See Fla. CS for HB 633 (1996); Fla. CS for HB 1005 (1996); Fla. CS for HB 1151 (1996); Fla. CS for HB 1907 (1996).

268. See discussion *supra* Part III.

269. See DECEPTIVE AND FALSE ADVERTISING, *supra* note 13, at 26.

270. See *id.*

271. See *id.*

272. See *id.*

273. See Internal Memorandum from Jonathan Fox, Staff Attorney, Fla. H.R. Comm. on Ethics & Elec., to Sarah Bradshaw, Staff Director, Fla. H.R. Comm. on Ethics & Elec. (Nov. 17, 1995) (discussing the impact of McIntyre on anonymous campaign literature). It was the Committee's view that the McIntyre decision appeared to render unconstitutional Florida's blanket ban on all anonymous political advertising involving written publications. See *id.* The McIntyre Court specifically reserved ruling on whether its decision would apply to other forms of unidentified communication, such as anonymous radio or television ads. See 115 S. Ct. at 1514 n.3.

were amended to comport with McIntyre, the amended statutes would be struck down under article I, section 23 of the Florida Constitution²⁷⁴ because of a Florida citizen's right to privacy.²⁷⁵ The Committee further suggested that anonymous political publications could involve violations of campaign finance reporting laws.²⁷⁶ Candidates and political committees are required to report campaign expenditures.²⁷⁷ The FEC investigates appropriate allegations to determine whether a candidate or political committee was involved in the dissemination of anonymous publications.²⁷⁸ If the process were widespread, according to the Committee, it could effectively circumvent any limited anonymity exemption for individuals drafted into the statutes because the FEC would be required to identify the proponent of the publication.²⁷⁹ The Committee suggested that a solution would be to draft an exemption to the public records law²⁸⁰ to protect identities obtained in this manner.²⁸¹

B. Committee Substitute for House Bill 633

Committee Substitute for House Bill 633 would have amended sections 104.271, 106.071, and 106.143, Florida Statutes, to meet current constitutional free speech requirements regarding false or anonymous political statements and to promote truthfulness in political advertising and campaigning.²⁸² The bill would have increased the burden of proof necessary to demonstrate actual malice, provided for an expedited judicial review process, and permitted individuals and groups spending less than \$500 annually to distribute anonymous political advertisements.²⁸³

To encourage a greater degree of ethical behavior in the election process, the bill would have expanded the categories of parties subject to administrative penalties for making false statements about a candidate.²⁸⁴ Under the proposed law, political parties, political committees, committees of continuous existence, and persons associ-

274. This section provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

275. See Fox, *supra* note 273.

276. See *id.*

277. FLA. STAT. §§ 106.021, .05-.07 (1995).

278. See FEC OVERVIEW, *supra* note 227, at 6.

279. See Fox, *supra* note 273.

280. FLA. STAT. ch. 119 (1995 & Supp. 1996).

281. See Fox, *supra* note 273.

282. See Fla. CS for HB 633 (1996); see also Fla. H.R. Comm. on Ethics & Elec., PCB EE 96-04 (1996) Staff Analysis 1 (Dec. 19, 1995) (on file with Fla. H.R. Comm. on Elec. Reform).

283. See Fla. CS for HB 633, §§ 1, 2. (1996). Both individuals and groups would have been required to act independently to avoid reporting requirements. See *id.* § 2.

284. See *id.* § 1.

ated with such entities would all have been subject to the penalties.²⁸⁵ The bill also would have increased the maximum fine that the FEC could impose for violations from \$5,000 to \$10,000.²⁸⁶ The bill identified factors that would have been considered in determining the amount of the penalty and would have subjected everyone involved in the violation to the fine.²⁸⁷ Finally, the bill would have reduced, from a felony to a misdemeanor, the punishment for willfully misrepresenting that an opposing candidate violated the election code.²⁸⁸

C. Committee Substitute for House Bill 1005

Senate hearings concerning the 70,000 calls placed to Florida citizens by Governor Chiles' reelection campaign²⁸⁹ prompted Committee Substitute for House Bill 1005.²⁹⁰ The bill would have required a telephone caller supporting or opposing any candidate, elected public official, or issue to disclose the identity of each person or organization that paid for any of the costs of the call.²⁹¹ The bill also would have required the caller to disclose the name of the candidate and the office sought if the sponsor of the call was affiliated with a candidate.²⁹² However, calls between individuals who knew each other and for which the caller received no compensation would have been exempted from these disclosure requirements.²⁹³ The bill would have prohibited the caller from stating or implying that he or she represented a person or organization that was either fictitious or had not authorized such representation in writing.²⁹⁴

The intent of the bill was to reduce the use of false or fraudulent representation of sponsoring organizations and to better define affiliations between those sponsoring or paying for the telephone solicitation and candidates or their campaigns.²⁹⁵ Further, requiring disclaimers by sponsors would have provided more information to the public to allow it to assess the credibility of political telephone solicitations.²⁹⁶

285. See *id.*

286. See *id.*

287. See *id.*

288. See *id.*

289. See Segal, *supra* note 6, at F13.

290. See Fla. CS for HB 1005 (1996).

291. See *id.* § 1.

292. See *id.*

293. See *id.*

294. See *id.*

295. See Fla. H.R. Comm. on Ethics & Elec., HB 1005 (1996) Staff Analysis 2 (Mar. 4, 1996) (on file with Fla. H.R. Comm. on Elec. Reform).

296. See *id.*

D. Committee Substitute for House Bill 1151

Committee Substitute for House Bill 1151 was an omnibus election reform bill that incorporated many of Secretary of State Mortham's 1996 legislative proposals.²⁹⁷ As one of its primary components, the bill adopted the Collins Center's voluntary fair campaign practices pledge and would have implemented the pledge through a statewide Fair Campaign Practices Board.²⁹⁸ The bill also would have required sponsor identification for political solicitation via telephone or the Internet²⁹⁹ and would have repealed the second primary election.³⁰⁰ In addition, the bill provided that "technical assistance" and "voter mobilization" services provided by a party to a candidate be counted toward the \$50,000 aggregate contribution limit.³⁰¹

E. Committee Substitute for House Bill 1907: The Election Campaign Reform Act of 1996

Committee Substitute for House Bill 1907, the Election Campaign Reform Act of 1996,³⁰² was one of the largest election reform proposals in Florida history. The bill would have doubled penalties for false statements from \$5,000 to \$10,000, and would have expanded the scope of parties subject to penalties.³⁰³ The bill also would have required additional disclaimers on all political advertisements and would have provided for the vicarious liability of candidates and political groups whose agents or employees made

297. See Fla. CS for HB 1151 (1996); see also *supra* text accompanying notes 154-58.

298. See *id.* § 2. The Speaker of the House, the House minority leader, the Senate President, the Senate minority leader, and the board chairperson each would have appointed one board member; the secretary of state would have appointed the board chairperson. See *id.* The board would have investigated complaints of any candidate signing the pledge who alleged violations by any other candidate signing the pledge, and would have issued public findings regarding violations. See *id.* The board would have had no independent sanction power and would not have been able to assess any civil or criminal penalty for violations. See *id.* (providing that the board must refer violations to the FEC or the state attorney's office).

299. See *id.* § 3. Currently, there is no requirement that a candidate or other person engaging in telephone solicitation or political polling identify who is paying for the call. Section 106.143, Florida Statutes, requires all "political advertisements" to identify the sponsor. See FLA. STAT. § 106.143 (1995). However, the definition of "political advertisement" specifically excluded paid communications by the "spoken word in direct conversation." See *id.* § 106.011(17). The bill would have subjected both media to the same form of sponsor identification as all other political advertisements under current law. See Fla. CS for HB 1151, § 3 (1996).

300. Fla. CS for HB 1151, § 51 (1996).

301. See *id.* § 19. Part of this bill was targeted at closing a loophole in the campaign financing laws that enabled persons, political committees, and committees of continuous existence to effectively circumvent the \$500 contribution limit by funneling earmarked funds through the political parties to their candidates. See *id.*

302. Fla. CS for HB 1907 (1996).

303. See *id.* § 2.

false statements about a candidate.³⁰⁴ The bill would have established the FEC as an independent budget entity within DOS and also would have created a voluntary fair campaign practices pledge to be administered by the FEC.³⁰⁵ Further, the bill would have limited turnbacks of surplus campaign funds from a candidate to a political party to \$10,000 and would have subjected a political party making excess campaign contributions to large civil penalties.³⁰⁶ Finally, the bill would have allowed political parties to allocate advance expenditures to candidates.³⁰⁷

1. Disclaimers

Committee Substitute for House Bill 1907 would have exempted individuals and groups spending less than \$500 per year on political campaigns from identifying themselves on written political advertisements, provided the individual or group paid for the advertisement and acted independently of any candidate or political party.³⁰⁸ Additionally, any political advertisement produced by or on behalf of a candidate, with the exception of those paid for by independent expenditures, would have required the candidate's advance approval.³⁰⁹ This approval would have been required to appear in the advertisement and the candidate would have been required to provide written authorization to the distribution medium.³¹⁰ The bill also would have required a political party to obtain candidate approval for all political advertisements produced on behalf of the candidate.³¹¹

304. See *id.*

305. See *id.* §§ 5, 14.

306. See *id.* § 9.

307. See *id.*

308. See *id.* § 8.

309. See *id.* § 10.

310. See *id.*

311. See *id.* A recent case addressed the issue of requiring "approved and authorized by" disclaimers on political advertisements. In *Shrink Missouri Government PAC v. Maupin*, 892 F. Supp. 1246 (E.D. Mo. 1995), *aff'd*, 71 F.3d 1422 (8th Cir. 1995), a Missouri federal district court ruled on the constitutionality of a Missouri statute that required negative political advertisements by candidates or candidate committees to contain a disclaimer that the advertisement had been "approved and authorized by" the candidate. See *id.* at 1254-55. The court struck down the statute, finding that the disclaimer "requires a speaker to make statements or disclosures she would otherwise omit" in violation of the First Amendment's free speech guarantee. *Id.* at 1255-56. The court also held that, absent a demonstration by the state that false and fraudulent campaign advertising was a major problem, the state's interests in using the disclaimer to discourage false statements and to hold candidates accountable for negative advertisements, although legitimate, were not compelling. See *id.* at 1256. Finally, the court held that the Missouri statute was not narrowly tailored to accomplish the state's purposes: "It seems that to whatever extent the state wishes to impose accountability and lessen the opportunity for deniability, the 'paid for by' requirement promotes that goal, without the need for the added 'approved and authorized' language." *Id.*

2. Fair Campaign Practices

Committee Substitute for House Bill 1907 essentially would have codified the voluntary code of fair campaign practices developed by the Collins Center.³¹² The bill would have offered candidates the opportunity to sign a fair campaign practices pledge and would have empowered the FEC to investigate and hold expedited hearings on complaints lodged against statewide and legislative candidates.³¹³ The FEC also would have investigated complaints against any candidate who signed the pledge.³¹⁴ The FEC's findings would then have been made public.³¹⁵

3. Contribution Limits

Committee Substitute for House Bill 1907 sought to include costs for telephone solicitations within the \$50,000 per candidate contribution limit applicable to political parties.³¹⁶ Polling services, research services, and salaries for full-time employees of the political party would have remained outside the contribution limit.³¹⁷ These expenses are currently required to be reported by both the candidate and the party.³¹⁸ All other in-kind contributions, including those for technical assistance and voter mobilization efforts, also would have remained outside the contribution limit under the bill.³¹⁹

The bill would have further precluded all in-kind contributions by political parties through the mailing of printed material to voters within ten days of an election.³²⁰ This provision might have reduced the last-minute negative political advertisements mailed to voters by the political parties.

The bill would have prohibited state or county executive committees of political parties from contributing to candidates beyond the \$50,000 limit³²¹ and would have subjected the committees to civil penalties of twice the amount of excess contributions.³²² This would have changed existing law, which imposes sanctions against candidates alone for accepting excess contributions.³²³

312. See Fla. CS for HB 1907, § 5 (1996); see also *supra* Part IV.C.1.

313. See Fla. CS for HB 1907, § 5 (1996).

314. See *id.*

315. See *id.*

316. *Id.*

317. See *id.*

318. See FLA. STAT. §§ 106.07, .29 (1995).

319. See Fla. CS for HB 1907, § 8 (1996).

320. See *id.*

321. See *id.*; see also FLA. STAT. § 106.08(2) (1995) (providing that no more than \$25,000 may be contributed prior to the 28th day before the election).

322. See Fla. CS for HB 1907, § 8 (1996).

323. See FLA. STAT. § 106.08(6) (1995).

4. Surplus Funds—Turnbacks

Committee Substitute for House Bill 1907 would have permitted a candidate to endorse, cash, and dispose of refund checks received after all surplus funds from a campaign had been disposed of and the necessary disposition reports had been filed with DOS, provided that the candidate filed an amended report with DOS.³²⁴ The bill also would have limited to \$10,000 the amount of surplus funds, or “turnbacks,” that a candidate could give to his or her political party.³²⁵ Limiting the amount of funds that could be turned back to a candidate’s party might have diminished the public perception that these dollars were buying influence with the party and party leaders.

5. Independent Florida Elections Commission

Committee Substitute for House Bill 1907 would have transformed the FEC into an independent body.³²⁶ Further, the bill would have authorized staffing for the FEC and would have established it as a separate budget entity.³²⁷ In addition, the bill would have reduced the FEC’s membership from seven to five, and would have changed the appointment process to include appointees by the President of the Senate and the Speaker of the House.³²⁸ The bill also would have transferred the authority to investigate complaints and determine probable cause regarding campaign finance violations and false or malicious political advertisements from the Division to the FEC.³²⁹

F. How Politics Stymied Productive Legislation

As the 1996 Regular Session wore on, legislators interested in meaningful election reform feared that the campaign reform bills were in trouble.³³⁰ Secretary of State Mortham had been negotiating with the opponents of her reform package throughout the final week of the Regular Session. The Senate Committee on Executive Business, Ethics and Elections, the House Committee on Ethics and Elections,

324. See Fla. CS for HB 1907, § 9 (1996).

325. See *id.*

326. See *id.* § 14. The bill’s sponsor, Representative Tracy Upchurch, Dem., St. Augustine, 1992-1996, believed that the FEC should function independently rather than under the control of a partisan secretary of state. “We are balancing a very self-serving interest against what will restore public confidence and ensure good and fair elections.” Lucy Morgan, Campaign Reform Expected to Come Calling, *ST. PETE. TIMES*, Feb. 25, 1996, at 5D (quoting Rep. Upchurch).

327. See Fla. CS for HB 1907, § 14 (1996).

328. See *id.*

329. See *id.* § 15.

330. Business and union lobbyists were concerned that the disclosure requirements would have a negative impact on telephone solicitations. See Lucy Morgan, Campaign Call Reform to Return, Says Crist, *ST. PETE. TIMES*, May 9, 1996, at 5B.

and Governor Chiles were prepared to see the bills passed. The plan was for Representative Tracy Upchurch³³¹ to simply move the bill on the floor of the House, obtain House approval, and for Senator Jack Latvala³³² to push it through the Senate after its transmittal there.³³³

On the final day of the Regular Session, Committee Substitute for House Bill 1151 was amended to include a combination of House Bills 101,³³⁴ 235,³³⁵ 633,³³⁶ 1005,³³⁷ 1151,³³⁸ and 1907.³³⁹ Representative Upchurch offered the amendment and it was temporarily deferred.³⁴⁰ Representative John Thrasher³⁴¹ tried to move the bill with the amendment; however, much to the surprise of the bill's sponsors, Committee Substitute for House Bill 1151 was left pending on the floor because two members of the Committee on Ethics and Elections believed that the telephone solicitation provision had been added to the amendment.³⁴²

Representative Beryl Roberts-Burke³⁴³ informed the House that the provision had been defeated in committee and was audibly angry that it had been reinserted.³⁴⁴ She expressed concern that each violation of this provision would cost a candidate \$1,000.³⁴⁵ Representative Roberts-Burke also stated that she believed a sixty-page amendment was too long to consider given the late hour.³⁴⁶

A second committee member, Representative Alzo Reddick,³⁴⁷ stated that passing this amendment would be like performing "brain surgery with a machete" and that it was not good public policy to vote on such an amendment at the "midnight hour."³⁴⁸

Representative Upchurch explained that he had attempted to speak with all the committee members and that he believed that he

331. Dem., St. Augustine, 1992-1996.

332. Repub., Palm Harbor.

333. See Martin Dyckman, Reform Wasn't In Their Interest, *ST. PETE. TIMES*, May 7, 1996, at 9A. The Republican leadership in the Senate said the secretary's package was not a priority; therefore, the bill would have to be passed through the House to put pressure on the Senate. See Ron Barlett, Election Laws Far Too Sacred for Politicians, *TAMPA TRIB.*, May 11, 1996, at 1B.

334. *FLA. H.R. JOUR.* 2182 (Reg. Sess. 1996) (amendment 1 to Fla. CS for HB 1151, § 5 (1996)).

335. See *id.* at 2183 (amendment 1 to § 7).

336. See *id.* at 2181 (amendment 1 to § 1) (keeping intact the false statement and disclaimer identification provisions).

337. See *id.* at 2189 (amendment 1 to § 33).

338. See *id.* at 2181, 2187-88 (amendment 1 to §§ 3, 29).

339. See *id.* at 2181 (amendment 1 to § 1).

340. See *FLA. H.R. JOUR.* 2219 (Reg. Sess. 1996).

341. Repub., Orange Park.

342. See Fla. H.R., unofficial tape recording of proceedings (May 3, 1996) (on file with clerk) (debate of Fla. CS for HB 1151 (1996)).

343. Dem., Miami.

344. See *id.*

345. See *id.*

346. See *id.*

347. Dem., Orlando.

348. *Id.*

had satisfied Representative Roberts-Burke's concern over the telephone solicitation provision.³⁴⁹ Nevertheless, he acquiesced to the concerns expressed by Representatives Roberts-Burke and Reddick and temporarily deferred the bill.³⁵⁰ However, the bill was never reconsidered and was effectively killed for the year.³⁵¹ Thus, at 10:50 p.m. on the final day of the 1996 regular session, several years of work and a two-year commitment to election reform were stymied because two members of the Committee on Ethics and Elections believed a sixty-page amendment was too long to consider for passage.³⁵² Countless hours of planning were wasted and likely constitutionally permissive proposals vaporized because of the power of lobbyists and the lack of true legislative commitment to election reform.

VII. CONCLUSION

The issue of negative campaign advertising is complex. Negative campaigning quickly degenerates into a vicious cycle where voters become increasingly desensitized, causing candidates to hire increasingly creative campaign strategists who seek to incite public passions, no matter how negative, to get the public to vote for their candidates.

State legislatures that truly desire to curb negative campaigning must operate within a narrow regulatory environment. Moreover, the U.S. Supreme Court has made it clear that to protect free speech, such regulation must withstand strict scrutiny. Therefore, regulation alone cannot address the serious negative campaign practices that have become commonplace in Florida.

The attack on negative campaigning must be twofold. First, voters must conduct independent research, sponsor local fora to discuss the issues, and support groups such as the Pinellas County Fair Campaign Practices Board. To turn a deaf ear on political campaigns simply because of distasteful advertising would take for granted representative democracy. From the American Revolution through the civil rights movement, thousands of Americans have given their lives to secure the right to choose their representatives.

Second, the media must continue to serve the public's interest in elections. The Florida media successfully exposed both the magnitude and the ridiculousness of the 70,000 "scare calls" made to senior citizens during the last gubernatorial election.

349. See *id.*

350. See *id.*

351. See FLA. LEGIS., HISTORY OF LEGISLATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 315, CS for HB 1151.

352. That same evening, the House passed a property insurance reform bill that was 91 pages long. See Fla. CS for HB 2314 (1996); FLA. H.R. JOUR. 2428 (Reg. Sess. 1996).

The election reform bills filed during the 1996 Regular Session should have passed. The Legislature simply failed to make reform a top priority. Lobbying efforts to organize campaigns aimed at persuading legislatures tend to work. The House Committee on Ethics and Elections, the Senate Committee on Executive Business, Ethics and Elections, and DOS should have recognized the lobbyists' power and severed the various election proposals from those that were more controversial. Further, the Legislature consists of 160 experts on elections; hence, when "too much" regulation is proposed, these experts consistently kill the bills.

Election reformers need to sever noncontroversial provisions from the political hot potatoes and inch toward progress rather than creating omnibus bills that are headed for defeat. However, the leadership in both chambers must truly commit itself if election reform is to be accomplished through the political process. Reformers must try to pass legislation early in the regular session rather than trying to push it through during the final days, when members are fatigued and are primarily concerned with passing bills that affect their constituencies.

Finally, candidates must be willing to stand up to political consultants instead of blindly deferring to the consultants' judgment. While it might be possible to create an advertising board akin to those of the American Bar Association or the American Medical Association, it is unlikely that the multi-million dollar campaign advertising industry will regulate itself voluntarily. The public must demand less emotionally charged soundbites and more substantive debates on relevant issues. The most promising possibility is to increase the number of fair campaign practices boards around the state and to publish the boards' findings, thus shaming the candidates who break their signed pledges. Candidates will listen when there are votes at stake. Voters must realize that the ability to cast a ballot remains the single most effective way to regulate negative campaign advertising.

APPENDIX

State	Fair Campaign Practices Code?	Laws Prohibiting False Campaign Statements?	Court Challenges?
Alabama	ALA. CODE § 17-22A-2 (Michie 1996)	No	—
Arkansas	No	No	—
Arizona	No	No	—
California	CAL. ELEC. CODE § 20440 (Deering 1995)	CAL. ELEC. CODE § 18351 (Deering 1995) (maximum fine \$1,000)	No
Colorado	No	COLO. REV. STAT. § 1-13-109 (1996) (misdemeanor)	No
Connecticut	No (voluntary code in effect '74-'78)	No	—
Delaware	No	No	—
Florida	No	FLA. STAT. § 104.271(1) (1995) (civil penalty)	Yes
Georgia	No	No	—
Hawaii	No	No	—
Idaho	No	No	—
Illinois	10 ILL. COMP. STAT. 5/29B-10 (West 1995)	No	—
Indiana	No	No	—
Iowa	No	No	—
Kansas	No	No	—
Kentucky	No	No	—
Louisiana	No	LA. REV. STAT. ANN. § 1463c(1) (West 1995) (misdemeanor)	State v. Burgess, 543 So. 2d 1332 (La. 1989) (holding unconstitutional prior version of § 1463c(1))
Maine	ME. REV. STAT. ANN. tit. 21-A, § 1101 (West 1995)	No	—
Maryland	No	No	—
Massachusetts	No	MASS. ANN. LAWS ch. 56, § 42 (Lawyer's Co-op 1996)	No
Michigan	No	MICH. COMP. LAWS §	No

State	Fair Campaign Practices Code?	Laws Prohibiting False Campaign Statements?	Court Challenges?
		168.944 (WESTLAW through 1996 Act 275) (misdemeanor)	
Minnesota	No	MINN. STAT. § 211B.06 (1996) (misdemeanor)	State v. Jude, No. C5-96-509, 1996 WL 588693 (Minn. Ct. App. Oct. 15, 1996) (finding § 211B.06 overbroad)
Mississippi	No	MISS. CODE ANN. § 23-15-875 (Lawyer's Co-op 1996)	No
Missouri	No	No	—
Montana	MONT. CODE ANN. § 13-35-301 (1995)	MONT. CODE ANN. § 13-35-234 (1995) (misdemeanor)	No
Nebraska	No	No	—
Nevada	NEV. REV. STAT. ANN. § 294A.290 (Michie 1995)	NEV. REV. STAT. ANN. § 294A.330 (Michie 1995)	No
New Hampshire	No	No	—
New Jersey	No	No	—
New Mexico	No	No	—
New York	N.Y. ELEC. LAW § 3-106 (McKinney 1996)	No	—
North Carolina	No	N.C. GEN. STAT. § 163-274(8) (Michie 1996) (misdemeanor)	No
North Dakota	No	N.D. CENT. CODE § 16.1-10-04 (Michie 1995) (misdemeanor)	No
Ohio	No	OHIO REV. CODE ANN. § 3517.21 (Anderson 1996) (misdemeanor)	McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995); Pestrak v. Ohio Elections Comm'n, 926 F. 2d 573 (6th Cir. 1991)
Oklahoma	No	No	—
Oregon	No	OR. REV. STAT. § 260.532 (1995) (civil damages, loss of office)	No
Pennsylvania	No	No	—
Rhode Island	No	No	—

State	Fair Campaign Practices Code?	Laws Prohibiting False Campaign Statements?	Court Challenges?
South Carolina	No	No	—
South Dakota	No	No	—
Tennessee	No	TENN. CODE ANN. § 2-19-142 (1996)	No
Texas	No	No	—
Utah	No	UTAH CODE ANN. § 20A-11-1103 (Michie 1996)	No
Vermont	No	No	—
Virginia	No	No	—
Washington	WASH. ADMIN. CODE § 390-32-030 (1995)	WASH. REV. CODE ANN. § 42.17.530 (Michie 1996)	No
West Virginia	W. VA. CODE § 3-1B-5 (Michie 1996)	W. VA. CODE § 3-8-11(c) (Michie 1996)	No
Wisconsin	No	WIS. STAT. § 12.05 (1995) (misdemeanor)	No
Wyoming	No	No	—
District of Columbia	No	No	—
Puerto Rico	No	No	—