The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes

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In the century since they first appeared in this country, ballot propositions have developed into important political instruments. Proposition use has been on the rise in recent years, bringing with it increased campaign spending on increasingly sophisticated, often misleading ads. These false or misleading ads have the greatest effect on women, minorities, the poor, and the less educated by creating a tendency either not to vote, or to vote inadvertently against conscience. Some states address this problem by prohibiting false proposition ads through anti-false speech statutes. This Comment seeks both to explore the problem of false ballot proposition ads and to examine the viability of anti-false speech statutes as a solution in terms of constitutionality, applicability, and practicality.

“Raised by a single mother, worked her way through community college, then the University of Washington with honors . . . but the law school rejected her because she was white.”¹

This message appeared on television screens across Washington state in the fall of 1998, urging voters to support I-200, a ballot initiative to prohibit racial and gender preferences in state and local government hiring.²

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1. Joni Balter, *Affirmative Action Tug of War: Separating Fact from Fiction on This Misleading Measure*, SEATTLE TIMES, Nov. 1, 1998, at B11 (quoting television ad for Initiative 200, referring to Katuria Smith, who is suing the University of Washington law school for allegedly discriminating against her in admission because of her race).

The opposition fired back with a television ad declaring:

"Initiative 200 is written to sound good, but it's misleading and full of hidden consequences. It will abolish affirmative action and hurt real people."³

Was either statement true? Not technically.⁴ In order to discern the truth, a Washington voter would need to study the language of the initiative, sift through commentaries discussing its meaning and implications, and judge the reliability of statements from its opponents and advocates. In an ideal world, all voters would educate themselves to such a degree before punching a hole in their ballots. In reality, however, many voters gather their political information from television, and much of the political information on television comes from advertisements. Political ads can play an important role in educating voters, but when an ad contains false information, its message may mislead and confuse voters into either not voting or voting contrary to their beliefs. In either case, the confused voter's true voice goes unheard in the election.

In the century since ballot propositions first appeared,⁵ American voters have decided on more than 1,900 initiatives and referenda⁶ and thousands of other statewide propositions and constitutional amendments.⁷ Propositions may not always reflect the issues most pressing in voters'

2. See *Washington State Initiative Measure 200*, 1998 ONLINE VOTERS GUIDE FOR THE GENERAL ELECTION, Nov. 3, 1998, (Office of the Secretary of State, Wash.) at <http://www.wa.gov/sec/vote98/i299fa.htm> (last visited Mar. 19, 1999) [hereinafter WASHINGTON BALLOT PAMPHLET].

3. David Postman, *Locke Takes to TV to Challenge I-200*, SEATTLE TIMES, Oct. 11, 1998, at A1 (quoting television ad for the No! 200 campaign, featuring Washington Governor Gary Locke).

4. The first ad refers to a statement Dean Roland Hjorth may or may not have made. According to reporter Nat Hentoff, when asked at a faculty lunch whether the University of Washington would admit a student with Katuria Smith's scores and proof of overcoming poverty if she were African American, Dean Hjorth answered, "yes." Nat Hentoff, *Katuria Smith Goes to Court*, VILLAGE VOICE, July 14, 1998, at 18. Dean Hjorth, however, denies making this statement. Robert L. Jamieson Jr., *UW Law Dean Denies Quote on Affirmative Action*, SEATTLE POST-INTELLIGENCER, Aug. 26, 1998, at B2. Depending on whose story one believes, Hentoff's or Hjorth's, the ad's veracity is at the very least debatable.

Governor Locke's statement in the second ad involves his opinion that I-200 is a Trojan horse, but does use the term "affirmative action." See Postman, *supra* note 3, at A1. I-200 prohibits gender and racial preferences only in government hiring, not affirmative action in general, so Locke's statement is technically false. See WASHINGTON BALLOT PAMPHLET, *supra* note 2.

5. In 1898, South Dakota became the first state to allow the initiative and referendum. See Appendix A.

6. This figure is current as of 1998. See INITIATIVE AND REFERENDUM INSTITUTE, *Initiative Usage by Number on Ballot 1898-1998*, in I & R USAGE, at <http://www.iandrinstitute.org/usage/bypassage.htm> (last visited Aug. 17, 2000).

7. DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 70 (1984); see also *id.* at 71 tbl.4.3 (showing statutory and constitutional initiative use from 1898-1979); PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE* 31 tbl.4 (1998) (showing statutory and constitutional initiative use from 1978-96).

minds,⁸ but they do represent important policy decisions, often affecting group rights or the economy. In the 1998 general election, citizens in sixteen states voted on sixty-one initiatives and 170 other measures concerning issues such as affirmative action, medical marijuana, abortion, campaign finance, taxes, minimum wage, environmental protection, utility rates, term limits, animals rights, gay rights, and equal rights.⁹ These issues often draw national media attention, making propositions increasingly important in setting the nation's political agenda.

Propositions become even more important considering that direct democracy use in general is on the rise.¹⁰ After a decline in the 1960s and 1970s, ballot proposition use is higher now than at any other time in our nation's history. With increased use and attention have come rising campaign budgets and increasingly sophisticated campaign ads. Like commercial or political ads, ballot proposition ads seek to persuade, often through confusing or misleading information. The effects of misleading ads are particularly acute for lower-income, less-educated, minority, and female voters who are more likely to rely primarily on television and ads for election information. When confused by misleading ads, members of these groups are also more likely than the average voter not to vote or mistakenly vote against conscience, tarnishing the integrity of our electoral process by taking the democracy out of direct democracy.

When political advertisements involve candidates, defamation law prohibits publication of maliciously false statements that would damage a candidate's reputation. But defamation laws do not apply to ballot propositions where there is no candidate and no personal reputation at stake. Nevertheless, false ads for initiatives and referenda have as much potential to poison the political process as false ads for political candidates.

Unfortunately, there are few avenues for regulating these false ads. Direct democracy through propositions emerged during the Progressive movement, born of a profound distrust of government.¹¹ Because of this distrust, the initiative and popular referendum—the two purest forms of direct democracy—include virtually none of the checks and balances of traditional representative government. The only real check on ballot propositions is the courts. Courts often rule on the pre-election activities of campaigners and election officials as well as the constitutionality of

8. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 35 (1995) (arguing that initiative issues rarely reflect the most important political issues in the minds of voters, particularly voters who are poor, less educated, or lack political power and resources).

9. Sam Howe Verhovek, *Popularity of Ballot Initiatives Leads to Questions*, N.Y. TIMES, Nov. 2, 1998, at A22.

10. By "direct democracy" I mean the political process by which voters decide policy issues directly through ballot propositions.

11. MAGLEBY, *supra* note 7, at 21-25.

propositions once passed.¹² Ironically, this puts the least democratic branch of government in the position to regulate one of the purest forms of democracy this country has to offer. While courts may be in the best position to judge constitutionality, most campaign conduct cases do not involve constitutional issues. More often, these cases involve activities like fraudulent signature gathering or non-disclosure of campaign funds. Only a handful of states ask the courts to invoke the First Amendment through anti-false speech statutes and judge activities involving speech.

Seventeen states currently have statutes prohibiting false political speech regarding political candidates.¹³ These statutes vary in degree and scope, but most read like a codification of common law defamation. Ten of these states, plus South Dakota, also prohibit false political speech regarding ballot propositions.¹⁴ In essence, these statutes extend defamation beyond human reputation to inanimate entities. Unlike traditional defamation, however, anti-false political speech statutes seek to prevent damage not to the target of the speech, but to the audience. Even under this standard, though, it is not clear that either of the I-200 ads above would rise to the level of violating a statute, either because they lack maliciousness or because the falsity lies in an issue of semantics.¹⁵

Even if these ads might violate an anti-false political speech statute, the Washington State Supreme Court declared that state's statute

12. Magleby, *supra* note 8, at 40. For discussions of judicial review for ballot propositions, see generally Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298 (1989).

13. ALASKA STAT. § 15.56.010(a)(3) (Michie 1995); COLO. REV. STAT. ANN. § 1-13-109 (West 1989); FLA. STAT. ANN. § 104.271 (West 1992); LA. REV. STAT. ANN. § 18:1463(C) (West 1979); MASS. GEN. LAWS ch. 56, § 42 (1998); MINN. STAT. § 211B.06 (1998); MISS. CODE ANN. § 23-15-875 (1990); MONT. CODE ANN. § 13-35-234 (1999); NEV. REV. STAT. ANN. § 294A.345(1) (Michie 1997); N.C. GEN. STAT. § 163-274(8) (1999); N.D. CENT. CODE § 16.1.10.04 (1997); OHIO REV. CODE ANN. § 3517.21(B) (Anderson 1996); OR. REV. STAT. § 260.532 (1997); TENN. CODE ANN. § 2-19-142 (1998); UTAH CODE ANN. § 20A-11-1103 (1998); W. VA. CODE § 3-8-11(c) (1999); WIS. STAT. § 12.05 (1998). Indiana repealed its false campaign speech law in 1992. See IND. CODE ANN. § 3-14-3-22 (1988). The Washington State Supreme Court ruled the state's anti-false campaign speech statute unconstitutional in 1998. See *State Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998). Although the case dealt primarily with the statute's application to ballot proposition campaigns, the court apparently invalidated the statute in its application to candidate campaigns as well. See *id.*; WASH. REV. CODE § 42.17.530 (1998). The Washington State legislature acted quickly to propose bills to reinstate the statute regarding false speech about candidates. Beth Silver, *Legislature 1999: Bills Again Target Lying in Campaigns*, NEWS TRIB. (Tacoma), Feb. 20, 1999, at B1.

14. COLO. REV. STAT. ANN. § 1-13-109; LA. REV. STAT. ANN. § 18:1463(C); MASS. GEN. LAWS ch. 56, § 42; MINN. STAT. § 211B.06; NEV. REV. STAT. ANN. § 294A.345(2); N.D. CENT. CODE § 16.1.10.04; OHIO REV. CODE ANN. § 3517.22(B)(2); OR. REV. STAT. § 260.532; S.D. CODIFIED LAWS § 12-13-16 (Michie 1995); UTAH CODE ANN. § 20A-11-1103; WIS. STAT. § 12.05; see also IND. CODE ANN. § 3-14-3-22 (1988) (repealed 1992); WASH. REV. CODE § 42.17.530 (invalidated 1998).

15. Chances are the pro I-200 ad probably would not qualify as malicious since it relies on a published article, and the truth of the dean's statement is debatable. The anti-I-200 ad presents more an issue of semantics than falsity and most likely would fail to qualify as malicious as well. See *supra* note 4. For discussion of whether an anti-false speech statute would apply to these ads, see Part V.

unconstitutional several months before either ad appeared.¹⁶ The case that did so, *State Public Disclosure Commission v. 119 Vote No! Committee*,¹⁷ was the first case to apply the federal Constitution to an anti-false political speech statute. The majority claimed that Washington's statute placed the right to discern truth from falsity with the state when, under the First Amendment, that right belongs to the people.¹⁸ Thus the statute, including its prohibition of false political speech regarding candidates, was unconstitutional. Several justices disagreed, however, including Justice Talmadge who stated that the majority's opinion was the first "in the history of the Republic to declare First Amendment protection for calculated lies."¹⁹

Contrary to the court's opinion, anti-false political speech statutes for ballot propositions should be constitutional. Narrowly drawn, the statutes would prohibit only false speech unprotected by the First Amendment. Moreover, states have an interest in limiting false speech to protect both the integrity of their electoral processes and the general public debate.

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

"[I-200] could eliminate job training programs that help women and minorities transition from welfare to work."

"[I-200] is confusing and will create a tangle of expensive law suits."

"I-200 will hurt women and pay equity."²⁰

Arguably, these are all opinions. Under the First Amendment, opinions carry absolute protection and thus no statute can prohibit them. Between opinion and technical or half-truths, many ads will fail to fall within the narrow category of speech permissibly governed by an anti-false speech statute. At the same time, these statutes are a step in the right direction, despite their limited applicability, because they establish the outward boundary of permissible speech and serve as a possible deterrent to misleading ads.

This Comment seeks both to explore the problem of false ballot proposition ads and to examine the viability of anti-false speech statutes as a solution in terms of their constitutionality, applicability, and practicality. Part I discusses the basis for direct democracy and examines the reasons

16. 957 P.2d 691 (Wash. 1998).

17. *Id.*

18. *Id.* at 695.

19. *Id.* at 70 (Talmadge, J., concurring).

20. WASHINGTON BALLOT PAMPHLET, *supra* note 2.

behind its growing use. Part II addresses the role of media and advertising in influencing voters, particularly voters from underrepresented groups such as minorities, women, and the less educated. Part III looks at *119 Vote No! Committee* and the First Amendment implications of prohibiting false political speech for ballot initiatives. Part IV explores state statutes prohibiting false political speech for ballot propositions, including the scope and standards of the various statutes. It then examines the deficiencies of these statutes, primarily overbreadth, and suggests a model statute to overcome these deficiencies. Finally, Part V examines the application of the model anti-false speech statute to actual ballot proposition ads. This section will present the dilemma of parsing fact from opinion as well as the prevalence of opinion and technical truths in political ads.

I

DIRECT DEMOCRACY IN AMERICA

Direct democracy emerged in this country as early as 1640 with town meetings and other community fora,²¹ and survived the founding of our representative government in a limited capacity as state constitution ratification and the recall.²² The idea of ballot propositions, though, is really a product of the last hundred years, taking hold during the Progressive movement of the early twentieth century. As we enter a new century, propositions have both solidified themselves in the political landscape and become increasingly important political tools. Proposition use is on the rise, propelled by several factors including frustration with representative politics, increased media attention, increased spending, a growing number of issue activists and politicians using them to push specific issues, the emergence of counterinitiatives, and the birth of an entire initiative industry. These factors combine not only to increase initiative use, but also to increase the professionalization of those campaigns. As initiative campaigns become bigger, slicker, and more important in their agenda-setting capacity, their advertising becomes more sophisticated and persuasive. The leap between persuasion and manipulation is a short one though, and with increased proposition use, the potential for misleading advertising grows as well.

A. *Direct Democracy and Its Origins*

Although propositions have come to be used by the politically powerful, they began as a method of combating corruption and big politics.

21. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 41 (1989).

22. Massachusetts and New Hampshire submitted constitutions to popular vote in the 1770s and 1780s, but few other states did the same until the nineteenth century. By the end of that century, popularly ratified state constitutions were the norm. *Id.* at 41.

Drawing on an existing desire for direct popular legislation and a profound distrust of representative legislatures,²³ the Progressives worked to increase citizen involvement in government. Direct democracy represented an effective way to reform the established representative institutions, taking power away from private interests (namely the railroads) and putting it back in the hands of "the people."²⁴

Two basic beliefs lay at the heart of the Progressive ideology: (1) corrupt political parties, party officials, state legislatures, and local governments and officials were directly responsible for the defects of current democracy; and (2) individual citizens were both able and willing to exercise greater control and influence to determine the "public good."²⁵ To achieve these goals, the Progressives implemented or expanded several reforms, the most important of which was to open decision making on specific issues to the people through the initiative, the referendum, and the recall.²⁶

The *initiative* is a proposed legislative measure or constitutional amendment that advocates may bring before the people upon filing a petition with the requisite number of signatures. Initiatives come in two varieties: direct and indirect. Direct initiatives go straight to the people for a vote while indirect initiatives go first to the legislature. Only if the legislature does not approve the indirect initiative, or an acceptable incarnation of it, will the measure go up for a popular vote.²⁷

The *referendum* allows voters to pass judgment on laws or statutes the legislature has already proposed or enacted. Most often, legislatures themselves place referenda before the voters, but some states also allow popular referenda. Like initiatives, popular referenda require a petition with a minimum number of signatures before appearing on the ballot.²⁸

The *recall* permits voters to remove an elected official from office upon filing a petition with the necessary signatures. The recall emerged

23. See generally *id.* at 43-50 (detailing the Populist movement's push for direct democracy).

24. Unfortunately, this did not encompass all people. The Progressives also had a racist agenda, seeking to disenfranchise African Americans in the South and disadvantage Asian Americans in the West. Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 794-95 (1997). Professor Scheiber claims an element of this tradition continues today with initiatives like California's Proposition 209, which dismantled affirmative action in state actions, including college admissions. *Id.* at 795 & n.20; see generally Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (examining the racially discriminatory effects of modern direct democracy). However, it is the structural reforms brought about by the Progressives, not their political views, which represent the movement's primary legacy.

25. MAGLEBY, *supra* note 7, at 25.

26. *Id.* at 21-25. The Progressives were also responsible for bringing about or expanding nonpartisan elections, direct primaries, direct election of U.S. senators, and women's suffrage. *Id.*

27. *Id.* at 35-36.

28. *Id.* at 86; CRONIN, *supra* note 21, at 2.

early in American history, but did not achieve widespread approval until the Progressive movement.²⁹

South Dakota became the first state to adopt the initiative and referendum in 1898, with another twenty-two states following soon after.³⁰ The western states were in their formative years at this time, so not surprisingly, the initiative, referendum, and recall are largely a western phenomenon.³¹ Twenty-six states plus the District of Columbia currently allow the initiative or popular referendum, twenty-one of which allow both. Of those twenty-six states, eighteen are west of the Mississippi River. Western states are also more likely to have both these forms of direct democracy. The recall, though less prevalent overall, occurs largely in the West as well. Of the fifteen states allowing the recall, only three are in the East.³²

Western states are not only more likely to allow direct democracy, but also more likely to use it. The five states with the heaviest initiative activity in recent years are Oregon, California, North Dakota, Colorado, and Washington—all western states.³³ California easily heads the group, not only in overall usage, but also in its level of highly publicized, agenda-setting propositions.³⁴ This trend makes California, as well as other western states, the best setting in which to examine false proposition ads and their consequences, as well as the possibility of regulating them by statute.

In addition to the initiative, referendum, and recall, every state but Delaware requires voter approval of state constitutional amendments. Direct democracy is even more common at the local level. Hundreds of localities allow measures to be put on the ballot for voter approval, and thirty-six states allow the recall for local officials.³⁵ Thus, with the possible exception of Delaware, false proposition ads have the potential to affect voters in every state.

B. *Increased Use and Importance of Direct Democracy*

The Progressives not only pushed for processes of direct democracy, but also put them to immediate and considerable use. Over 250 initiatives

29. See CRONIN, *supra* note 21, at 42. The Massachusetts Constitution in 1780 and Articles of Confederation in 1781 both provided for recall of congressional delegates. A proposed recall appeared at the Constitutional Convention and some opposed ratifying the Constitution without it. Ultimately, however, the founders abandoned the recall in favor of short, limited terms. *Id.* at 42, 128-33.

30. For a list of states with direct democracy and their years of adoption, see Appendix A.

31. See Magleby, *supra* note 8, at 14-15; Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REP. 11 (1997).

32. See Appendix A. Mississippi adopted the initiative in 1992. The state had previously adopted the measure in 1916, but the Mississippi Supreme Court declared the adoption unconstitutional six years later in *Power v. Robertson*, 93 So. 769 (Miss. 1922). The court declined to reconsider its ruling in *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991). DUBOIS & FEENEY, *supra* note 7, at 27.

33. DUBOIS & FEENEY, *supra* note 7, at 31.

34. *Infra* text accompanying notes 46-47.

35. CRONIN, *supra* note 21, at 2-3.

and referenda appeared on state ballots between 1910 and 1919, with almost 100 gaining approval.³⁶ Proposition activity has fluctuated somewhat over the past century,³⁷ but is now on the rise. By 1998, the 1990s had already surpassed every other decade of the century in initiative activity.³⁸ In 1994 alone, voters decided a record 102 state initiatives.³⁹

Ballot proposition use in California followed general trends in direct democracy⁴⁰ until the 1970s, when the state's initiative use began to accelerate well beyond national averages. California has since become the national leader in initiative use.⁴¹ The 1980s saw a total of forty-six initiatives on the state's ballots, more than any other decade in the state's history. As of 1998, the 1990s had witnessed fifty-nine.⁴² In 1990 alone, eighteen initiatives found their way onto the ballot, twice the total number of California initiatives for the entire 1960s.⁴³ That record was surpassed by the March 2000 primary election which included twenty state propositions.⁴⁴ As of 1996, California voters had decided a total of 257 of the nation's 1,817 ballot initiatives, a total second only to Oregon.⁴⁵

Aside from the sheer volume of measures, California's experience with ballot initiatives demonstrates their increasing importance in

36. INITIATIVE AND REFERENDUM INSTITUTE, *Initiative Usage by State and Year 1898-1998*, in I & R USAGE, at <http://www.iandrinstitute.org/usage/byyear.htm> (last visited Aug. 17, 2000).

37. Proposition use remained high through the 1930s, then dropped off during World War II, but made a considerable comeback with a resurgence of progressivism in the 1960s and 1970s. The progressivism of this era focused more on direct citizen participation than on ending corrupt politics. These "Participationists" pushed for a national initiative, abolition of the electoral college, federal funding for elections, suffrage for minorities and eighteen- to twenty-one-year-olds, and mandatory citizen participation in federally funded projects. MAGELBY, *supra* note 7, at 25-27. The most successful achievement of this movement was expanding the frequency and importance of direct primaries for selecting presidential convention delegates. Through their efforts, the percentage of delegates selected through direct primaries rose from thirty-eight percent for Republicans and forty percent for Democrats in 1968 to seventy-seven percent for both parties in 1980. *Id.* at 25.

38. INITIATIVE AND REFERENDUM INSTITUTE, <http://www.iandrinstitute.org/usage/byyear.htm>, *supra* note 36.

39. Verhovek, *supra* note 9, at A22.

40. California began its direct democracy experience in 1911 with a whopping twenty-three measures requiring state constitutional amendments (twenty-two of which passed), marking an important turning point in the Progressive movement. Scheiber, *supra* note 24, at 793. Like other states, California continued to see high levels of initiative activity through the 1930s, followed by a considerable drop. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 53 (1992).

41. DUBOIS & FEENEY, *supra* note 7, at 2.

42. INITIATIVE AND REFERENDUM INSTITUTE, <http://www.iandrinstitute.org/usage/byyear.htm>, *supra* note 36.

43. *See id.*

44. *See* CALIFORNIA VOTER INFORMATION GUIDE: PRIMARY ELECTION MARCH 7, 2000 (Office of the Secretary of State, Cal.) [hereinafter CALIFORNIA BALLOT PAMPHLET]; CALIFORNIA VOTER SUPPLEMENTAL INFORMATION GUIDE: PRIMARY ELECTION MARCH 7, 2000 (Office of the Secretary of State, Cal.) [hereinafter CALIFORNIA SUPPLEMENT].

45. Oregon, which adopted direct democracy measures in 1902, had proposed a total of 292 initiatives as of 1996. DUBOIS & FEENEY, *supra* note 7, at 30.

American politics. In recent years, ballot propositions, regardless of their success or failure, have been instrumental in setting the agenda for national debate on important issues. Many of these issues first enter the national consciousness as California ballot initiatives. For instance, California's Proposition 13 in 1978 became a catalyst for modern tax revolts at both the state and federal level.⁴⁶ More recently, measures born in California regarding medical marijuana and affirmative action have sparked both considerable debate and similar measures in other states.⁴⁷ For California itself, direct democracy has become a principal source of important state policy, often relegating the state legislature to a reactive position.⁴⁸

Several factors contribute to the meteoric rise of initiative use, both in California and across the nation. These include frustration with representative politics, a growing number of issue activists and politicians using propositions to push specific issues or further their careers, increased media attention, increased campaign spending, the birth of an entire "initiative industry," and the emergence of counterinitiatives. Each of these factors also contributes in some way to the current problem of misleading ballot proposition ads.

1. *Frustration with Representative Government*

As was true for the Progressives, a major cause of increased initiative activity is frustration with government. Today's legislatures may be less blatantly corrupt than the legislatures of the Progressive Era, but campaign contributions and powerful special interest groups still dominate the landscape. Recent efforts to set term limits demonstrate some of voters' hostility toward the system.⁴⁹

Initiatives bypass the political system, at least in principle, because they allow the voters to decide without a politician's constant eye to constituents or the next campaign check. Voters' frustration with government inaction, whether a product of legislators' reluctance to address certain issues or their inability to resolve them, also spawns many

46. See Scheiber, *supra* note 24, at 796. Proposition 13 reduced property tax revenues by fifty-seven percent and capped future increases at two percent annually. Between 1978 and 1984, nine other states voted on similar initiatives and eleven adopted initiatives with moderate tax limitations. Carl E. Van Horn, *The Quiet Revolution*, in *THE STATE OF THE STATES* 5 (Carl E. Van Horn ed., 1996).

47. In 1998, two years after Californians voted on affirmative action and medical marijuana initiatives, voters in Washington voted on a virtually identical affirmative action measure, and voters in Alaska, Nevada, Oregon, and Washington voted on medical marijuana initiatives. See Verhovek, *supra* note 9, at A22. A year later, Maine passed its own medical marijuana measure. *Voters Overhaul Vehicle Tax in Washington State*, L.A. TIMES, Nov. 4, 1999, at A18.

48. Many initiatives have come directly from stalled legislative efforts. For instance, California's infamous Proposition 13, which sparked much of the tax reform movement, was a product of failed attempts in the legislature to approve property tax relief. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 53.

49. Magleby, *supra* note 8, at 30-31.

initiatives.⁵⁰ As frustration with elected officials and their perceived inactivity grows, more critical issues will find their way onto the ballot, where a decision, good or bad, is at least guaranteed. As this happens, however, it is essential for voters to receive the same accurate information on the issues that a legislator would receive before voting on a measure.

2. *Use by Issue Activists and Politicians*

Increased initiative activity is also a product of issue activists' discovery of the initiative's potential for drawing national media coverage and placing their issue on the country's agenda. Even a valiant and hard-fought loss on an initiative can be a victory in terms of increasing national awareness for the issue or bringing about a subsequent win on a similar initiative in another state.⁵¹ Thus proposition campaigns are dominated not by grass roots efforts, but by seasoned issue activists and special interest groups.⁵² In a less magnanimous vein, many issue activists also use initiative campaigns to bolster their own political careers. For some, championing an initiative campaign even becomes a step towards a campaign for political office.⁵³ Thus, for issue activists at least, the stakes have grown higher and the campaign more intense. This in turn increases the incentive to use deceptive tactics such as misleading or false advertising.

Politicians have realized the power of propositions as well and often use them to promote their own political interests. For instance, California candidates regularly propose measures as a way of focusing their campaign and garnering support.⁵⁴ Initiatives are equally attractive to current officeholders who can use them to propel issues they might be unable to act on through the legislature. In California in particular, elected officials, candidates, and political parties have begun using propositions as a way to define their ideologies, providing an additional voting cue for voters.⁵⁵ In 1990, for example, officeholders and candidates sponsored eleven out of eighteen of California's ballot initiatives.⁵⁶ Former Governor Pete Wilson was responsible for sponsoring and financially supporting many of California's more provocative initiatives in recent years, including Proposition 187 ending government benefits for illegal aliens, Proposition 115 on criminal justice reform, Proposition 226 making it more difficult for unions to raise political funds, and Proposition 209 ending affirmative

50. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 59.

51. See Magleby, *supra* note 8, at 28-29.

52. Carl E. Van Horn, *Power to the States*, in *THE STATE OF THE STATES*, *supra* note 46, at 240.

53. For examples of this trend, see Magleby, *supra* note 8, at 31.

54. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 62.

55. Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731, 736-37 (2000).

56. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 62.

action.⁵⁷ Candidates and officeholders in other states have sought to harness the power of initiatives as well.⁵⁸ Alternatively, elected officials also use propositions to pass the buck to the public on difficult decisions.⁵⁹ With so much at stake for both candidates and issue activists, it is far too tempting for them to shift from using ads to provide truthful information to using them to win elections by any means necessary.

3. *Increased Media Attention for Initiatives*

Driving politicians' and political activists' renewed interest in initiative campaigns is, of course, the media's increasing fascination with these campaigns.⁶⁰ Today's media, particularly television, thrives on controversy and drama. Barring the sexual affair outings of late, political candidates generate far less drama than underdog initiative activists fighting for issues like gay rights, physician-assisted suicide, and racial equality. Presidential and some federal Congressional campaigns may draw attention, but at the state level where ballot propositions arise, candidate campaigns often create little excitement.

Candidates can be especially hard to dramatize when they do not really stand for anything, or stand only for the party line. The intent of initiatives, on the other hand, is arguably clear. Initiatives also bring immediate and definite results when passed, such as changing a group's rights or lowering taxes. These immediate consequences are easier for the media to embrace—even sensationalize—than the indefinite potential effects of a political candidate.⁶¹ In some respects, increased media attention for initiatives brings substance back to popular political debate by focusing on issues and not the superficial hand-shaking, baby-kissing photo opportunities of candidate campaigns. At the same time, covering, even fueling, public debate places the media in a very powerful position, making the need for accurate and truthful political speech even greater.

57. Hasen, *supra* note 55, at 737; see also Magleby, *supra* note 8, at 29. Political parties have increasingly begun to harness the political power of propositions. For a discussion on political parties and direct democracy in California, see Hasen, *supra* note 55.

58. For instance, 1992 saw governors in Colorado and Michigan actively supporting initiatives on public education finance and tax cuts, respectively. Magleby, *supra* note 8, at 29 & n.57. More recently, Washington's Governor Gary Locke took a slightly different approach by heading up opposition to the affirmative action proposition, Initiative 200. See Postman, *supra* note 3, at A1. Locke and his supporters lost and I-200 passed, but his opposition to the measure bolstered a comparatively underfunded campaign and effectively kept debate on affirmative action alive in Washington and across the country. See *id.* But see Tom Brune, *I-200 Forces Matched Foes on Ad Outlays*, SEATTLE TIMES, July 21, 1999, at B1 (suggesting that contrary to popular belief, I-200 opposers spent as much on advertising as the measure's proponents).

59. Van Horn, *supra* note 52, at 240.

60. See Magleby, *supra* note 8, at 29.

61. See *id.* at 29-30.

4. *Increased Spending on Initiatives*

Whether a cause or effect of greater initiative activity, increases in campaign spending have certainly raised the profile of initiative campaigns. Each year, campaign spending records topple to bigger, flashier, more sophisticated campaigns. In 1988, the heaviest spending included \$6.8 million to oppose a gun control referendum in Maryland, \$21 million to oppose a California tobacco tax, and a total of \$101 million spent on five separate California auto insurance initiatives.⁶² California led campaign spending on ballot propositions in 1996 with a record \$57.5 million spent on a single securities fraud initiative. That record fell in 1998, when California Indian tribes and Nevada casinos spent an unbelievable \$100 million on a battle over an initiative to expand casino gambling on tribal lands.⁶³ High spending does not necessarily determine the outcome of an initiative campaign,⁶⁴ but it certainly attracts attention, prompting even more interest in initiative campaigns. High spending also means more ads, increasing the number of potentially misleading messages voters receive.

5. *The Initiative Industry*

An entire "initiative industry" has developed out of the increased spending and higher stakes for issue sponsors and proponents. This industry also contributes to increased initiative activity by facilitating this process and making success more likely. Professionals now dominate a process once intended to put government back into the hands of the people.⁶⁵ Initiative professionals draft the initiatives, gather the signatures, produce polls and media, and generally orchestrate the campaign. They also bring experience to the table, which may account for some of the growing success rate of initiatives.⁶⁶ Unfortunately, their successful tactics often involve raising false doubts, creating confusion, and playing on voters' emotions and fears.

62. See *id.* at 30.

63. Sam Howe Verhovek & B. Drummond Ayres Jr., *Voters Back End to State Preferences*, N.Y. TIMES, Nov. 4, 1998, at B2.

64. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 519-47 (1982) (examining twenty-five California propositions from 1968-1980 with heavy, one-sided spending, and finding the high spending successful for only forty-six percent of initiative proponents, but ninety percent of opponents). But cf. BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS 90-109 (1987) (finding in a study of fifty ballot propositions between 1976 and 1980 that the high spending side won eighty percent of the elections).

65. See Alan Rosenthal, *The Legislature: Unraveling of Institutional Fabric*, in THE STATE OF THE STATES, *supra* note 46, at 133 (observing that in California, initiative sponsors have become the state's true political leaders, while the legislature grows increasingly less relevant); Van Horn, *supra* note 52, at 240 (citing the dominance of interest groups and their use of professional television ads, direct mail, and tracking polls).

66. See Magleby, *supra* note 8, at 30.

6. *Counterinitiatives*

Finally, the use of counterinitiatives also contributes to the proliferation of initiatives across the country. Rather than simply oppose an initiative, business groups and issue activists increasingly propose alternative initiatives to counter those they oppose. For instance, in 1990, environmental groups proposed California Proposition 128—the “Big Green” initiative—which business groups countered with Proposition 135, offering less extreme environmental protection. That same year, redwood preservationists in California sponsored Proposition 130 to protect forests, which agriculture and business groups countered with Proposition 138.⁶⁷ This multitude of environmental initiatives on a single ballot certainly drew attention to important environmental issues. Yet counterinitiatives also underscore one of the great disadvantages of ballot propositions as compared to legislative measures—the inability to amend. Multiple and counterinitiatives may also confuse, even mislead voters, though, which belies the beauty of direct democracy.

Each of the above six factors contributes to varying and overlapping degrees to the increase in proposition use. Both the growing importance of propositions and the many factors propelling their growth indicate a powerful political force. The Progressives intended that force to put political decision making in the hands of the people. The reality of Progressive measures, though, was at least partly the perpetuation of racial discrimination, hidden beneath the guise of public involvement.⁶⁸ With propositions serving such an important role, and with increasingly sophisticated ads, it is just as possible today to conceal a hidden agenda by misleading the voting public regarding the true nature of a proposition. In that way, propositions may continue to discriminate—not necessarily against minorities, but against voters without the will or ability to learn the truth about a proposition. In light of these dangers, it is important that the Progressives’ legacy of direct democracy represent their ideal of involvement and not their covert discriminatory purpose.

II

VOTER REPRESENTATIVENESS AND THE ROLE OF THE MEDIA

The dramatic increase in proposition use in recent years has coincided with an increase in the presence and importance of the media in those campaigns.⁶⁹ The media plays a vital role in imparting political information. Television is the primary disseminating medium, but because it is largely a vehicle of entertainment, the information it imparts is not

67. See CALIFORNIA COMM’N ON CAMPAIGN FINANCING, *supra* note 40, at 61-62.

68. See *supra* note 23.

69. MAGLEBY, *supra* note 7, at 133.

always the most accurate or informative. While other avenues such as newspapers, ballot pamphlets, and independent research are certainly available, voters who lack the skills to utilize those alternatives must rely on television, particularly television ads, as their primary source of political information.⁷⁰ Left to the mercy of ads often employing misleading tactics, the voters who rely more on the media, namely minorities, the poor, and the less educated, become increasingly likely either to not vote or to vote contrary to their beliefs.⁷¹ With fewer members of those groups voting or voting “correctly,” propositions become less a product of the people and more a product of the people most privileged. Given this effect and the media’s growing influence in proposition campaigns, it is increasingly important that proposition ads impart accurate, not false or misleading, information.

A. *Representativeness in Proposition Voting*

Direct democracy places important decision making in the hands of the people; however it is not “the people” who usually vote. Voter turnout varies by the type of election—highest in presidential elections and lowest in primaries—but on average, less than half the American people vote, the lowest voter turnout of any Western nation.⁷² Fewer voters might not present a problem if those who did vote were representative of the nation’s adult population, but they are not. Women, minorities, the young, the poor, the less educated—all are underrepresented at the polls.⁷³ These groups are even more underrepresented in initiative elections since members of these groups who do go to the polls are less likely to vote on the propositions.⁷⁴ An average of 15 to 18 percent of people who do vote decline to vote on statewide propositions.⁷⁵ This voter “drop-off” is most prevalent among blue-collar workers, minorities, the less educated, and those over sixty-five. Members of these groups do not tend to drop-off in voting for candidates, however.⁷⁶ Thus, minorities, the poor, and the less educated are doubly underrepresented in proposition votes—first when fewer go to the polls, and second when those that do go to the polls fail to vote on the

70. *Id.* at 134 tbl.7.2.

71. *Infra* text accompanying notes 95-97, 99-100.

72. Eule, *supra* note 12, at 1514.

73. MAGLEBY, *supra* note 7, at 79-82 (discussing the variables affecting voter turnout, including education, income, and age); *id.* at 106 (“[C]ertain kinds of people—specifically those who are young, black, or female or who have less education or income—are less likely than other citizens to go to the polls.”).

74. *Id.* at 106-11 (discussing the difference in representativeness of certain groups between proposition and candidate contests).

75. *Id.* at 100.

76. *See id.* at 103-11 (comparing voter drop-off rates and ratio of representation for various groups in studies of Massachusetts, California, and Florida elections).

propositions. This hardly represents the active voice of the masses envisioned by the Progressives.⁷⁷

In studies of voter drop-off, education level appears to be the strongest and most determinative factor.⁷⁸ This correlation makes some sense considering the complexity of many initiatives, as well as the lack of cues such as personality and party affiliation which aid voters in candidate elections. To frame the situation in economic terms, voting involves "opportunity costs," namely the time required to register, gather information and learn about the candidates and issues, make a decision, and then go to the polls and vote. Education reduces these costs by providing the skills to more easily obtain information about the issues and candidates. Education also reduces the "information costs" involved in processing information about issues or candidates. Opportunity and information costs are high in proposition elections where complex language and the lack of party cues make reliable information on propositions harder to find and even harder to understand. The less educated are less able to bear the brunt of these higher costs, and thus are less likely to participate in a proposition vote.⁷⁹ To put it simply, propositions are often complex and technical with explanations that are hard to understand, even harder to find, all of which make the less educated less likely to vote and more likely to be absent from important direct democracy decisions.⁸⁰

Where ballot propositions are concerned, "less educated" does not refer solely to high-school drop-outs. While the least educated are the least likely to participate in voting,⁸¹ propositions can be difficult for anyone to understand. Because the actual texts are often highly complex and technical, states provide a proposition title and short summary on the ballot. These summaries provide little help to voters, however, when they themselves are difficult to read. A study of proposition summary readability in four states found Massachusetts and Rhode Island ballots with readability levels of fifteenth-grade (third year of college) and

77. Given the racist underpinnings of the movement, many Progressives were not concerned with a representative vote. The Progressive movement did contribute greatly to women's suffrage, though, in accord with its general ideal of shifting decision making from the government to the people. See MAGLEBY, *supra* note 7, at 21-25.

78. See, e.g., *id.* at 108. Voter fatigue (drop-off which increases further down the ballot, especially for long ballots) may also influence the decision not to vote on propositions, which typically appear further down the ballot than candidates. However, it is doubtful voters would vote for propositions and not candidates if their positions were reversed. Voter fatigue may have some influence on drop-off within the proposition portion of a ballot, but studies show voters are more likely to pick and choose between propositions, often voting on the most controversial, which would also have received the greatest media attention. CRONIN, *supra* note 22, at 69-70; MAGLEBY, *supra* note 7, at 90-95; see also ZISK, *supra* note 64, at 163-64 (finding little correlation between ballot position and drop-off in a study of eight elections containing ten or more ballot propositions).

79. See CRONIN, *supra* note 21, at 66-67.

80. See *id.*

81. MAGLEBY, *supra* note 7, at 108.

California and Oregon with a readability level of eighteenth-grade (a bachelor's degree plus two years).⁸²

To further explain the ballot and issues, a number of states also offer voters' pamphlets.⁸³ However, even these pamphlets are generally accessible only to the well-educated. A study of California's pamphlets from 1974 to 1980 shows reading levels ranging from thirteenth- to fourteenth-grade for the arguments pro and con section, fourteenth-grade for the analysis and explanation section, and seventeenth- to eighteenth-grade for the official description. Considering the propositions themselves had reading levels of fifteenth- to sixteenth-grade, the pamphlets provided little improvement and, in the case of the official description, were even worse.⁸⁴ By comparison, popular magazines like *Time*, *Newsweek*, *People*, and *Reader's Digest* demand reading levels of only ninth- to twelfth-grade, making them readable to most people.⁸⁵ Studies of the 1990 California pamphlet showed some improvement.⁸⁶ My own analysis of one of 1998's more confusing measures, Proposition 9 (involving utility rates),⁸⁷ found readability levels of seventeenth-grade for the official description, thirteenth-grade for both the analysis and pro/con sections, and fourteenth-grade for the actual text.⁸⁸ These reading levels are better than those in the earlier study, but still considerably higher than what the average California reader can comprehend. In a 1992 report, the California Commission on Campaign Financing proposed measures for reducing reading levels, but asserted that the complexity of ballot issues make reading levels below twelfth-grade unfeasible for voters' pamphlets.⁸⁹ Considering the average California voter reads at an eighth-grade level,⁹⁰ even the Commission's proposed improvements would leave many voters at a distinct disadvantage.

Not only must a voter be able to read the pamphlet, but he or she must also be willing to wade through it. The considerable length of these helpful handbooks makes the term "pamphlet" almost a misnomer. In 1988, for

82. *Id.* at 118.

83. Fourteen states distribute voters' pamphlets: Alaska, Arizona, California, Idaho, Illinois, Maine, Massachusetts, Montana, Nevada, Ohio, Oregon, Utah, Washington, and Wyoming. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 235 n.23 All of these states have the initiative and referendum. See Appendix A.

84. MAGLEBY, *supra* note 7, at 139. For an explanation of the readability tests used, see *id.* at app. D.

85. *Id.* at 138.

86. See CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 238 (discussing studies of readability levels showing improvement of a few grade levels).

87. See CALIFORNIA BALLOT PAMPHLET and CALIFORNIA SUPPLEMENT, *supra* note 44.

88. Readability levels are based on the Flesch-Kincaid test used by the California Commission on Campaign Financing in their earlier studies. For an explanation of the Flesch-Kincaid test, see MAGLEBY, DIRECT LEGISLATION, *supra* note 7, at app. D.

89. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 241.

90. *Id.* at 238.

example, California's pamphlet ran a record 159 pages—a record broken just two years later by a 224 page pamphlet.⁹¹ Much of the length is due to the volume of ballot measures—California's 1990 ballot included eighteen initiatives—as well as the length of the initiatives themselves. For instance, in 1988, California's ballot included four initiatives regarding automobile insurance. The shortest of these was 4,800 words, approximately the length of the United States Constitution. The longest of the four initiatives was over six times as long with 29,200 words. To read the ballot pamphlet information on all four initiatives would have taken an average adult-level reader one hour to read the analysis and pro/con sections and another four hours to read the actual texts⁹²—and that's just an initial reading.

B. *The Role of the Media*

I received my first California general election pamphlet in 1998. Together with the supplemental pamphlet that arrived soon after, the pamphlet offered 142 pages of elucidation on twelve propositions and nine statewide candidate races.⁹³ I looked at this tome just long enough to toss it into a pile—not because I am not civically minded (I not only voted, but voted on every candidate, proposition, judge, and local measure on my ballot), or because I lacked the reading level to understand the pamphlet (my level of education puts me somewhere near the twenty-first grade), but because as a law student I had greater pulls on my time than reading a voters' pamphlet. In the interest of time, I laid myself at the mercy of the media, primarily television, and drew my voter information from there.

My approach (or lack of) is not unusual. Although voters in states with voters' pamphlets tend to find them useful,⁹⁴ voters rely most heavily on mass media.⁹⁵ Media information on ballot propositions comes from two principal sources: newspapers and television. Again, education is important. The more educated the voter, the more likely he or she is to rely most heavily on newspapers. As education level decreases, dependence on television increases.⁹⁶ Television is a wonderful medium, bringing news and information to millions. However, television is also a vehicle for entertainment, and its entertainment aspect tends to dominate its educational one. Even news broadcasts are a barrage of images and thirty-second sound bites. This may make the news more exciting and more accessible to

91. Magleby, *supra* note 8, at 33.

92. DUBOIS & FEENEY, *supra* note 7, at 121.

93. See CALIFORNIA BALLOT PAMPHLET and CALIFORNIA SUPPLEMENT, *supra* note 44.

94. See CRONIN, *supra* note 22, at 80-82 (citing a 1976 Massachusetts study in which 59 percent of voters said they used the pamphlet "a lot" and a 1970 Oregon study in which 41 percent of voters found the pamphlet "very" useful in deciding how to vote on ballot propositions); see also CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 39, at 244-45.

95. MAGLEBY, *supra* note 7, at 133.

96. *Id.* at 134 tbl.7.2.

the less educated, but it also makes the information less extensive and informative.

Television advertisements tend to be even less informative. They are short, partisan, and above all, influenced by the techniques of commercial advertising. This is true of ads for both candidates and propositions, though proposition ads lack the voting cues of party affiliation and character that help voters to evaluate candidate ads. "Selling" an initiative might gain votes and win elections, but it does not give the voters accurate information or produce a true statement of the voters' will. The danger of misleading or false ads is particularly acute for the less educated, who are less likely to consult other sources.⁹⁷ The confusion that ads can produce may also be responsible for the lower voting rates among the less educated and other underrepresented groups.

One might say, "fine, let those best equipped and most interested inform themselves and vote on ballot propositions." The vote would then at least be a product of careful thought and consideration. It would not, however, be a product of the people. Leaving decision making to the well bred, well read, and well fed will also likely produce laws that favor those groups. For instance Derrick Bell points to racially discriminatory housing measures as an example of discrimination in direct democracy.⁹⁸ "Far from being the pure path to democracy," he writes, "direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process."⁹⁹ Bell also asserts that propositions allow racist attitudes to influence the vote because none of the accountability causing candidates to at least appear politically correct is present for propositions. "Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day."¹⁰⁰ Whether propositions inherently facilitate discrimination or not, false or misleading ads that dissuade certain voters from voting certainly contribute to that result. In divining direct democracy, the Progressives envisioned an electorate both willing and able to make important decisions on how to govern themselves.¹⁰¹ If our current voting trends fail to embody that ideal, it is less a problem with the people than a problem with the process.

A look at the ads used in practice reveals plenty of problems with the process. In a study of proposition campaigns in four states, Professor Betty

97. *Id.* at 135 tbl.7.3.

98. Bell, *supra* note 24, at 15-17.

99. *Id.* at 14.

100. *Id.* at 14-15.

101. *Supra* text accompanying note 25.

Zisk found that not just money, but "advertising that is at best simplistic, coming as it does in 30-second spots, and at its worse [sic] deceptive," has the greatest effect in shifting voter support.¹⁰² Victory, not education, is the primary objective of proposition campaigns, so ads tend to reveal only the information favorable to their cause or to latch onto minute issues to use against an opponent. Since propositions tend to be complicated, it is possible for an opponent to find an unfortunately worded or ambiguous point and, through advertising, turn it into the crux of the issue. Ads also have the power of images at their disposal, which tend to evoke emotional, though not necessarily well-founded, reactions. No one who witnessed the revolving door of the Willie Horton ads and Michael Dukakis's subsequent defeat would argue that "image is nothing."¹⁰³ Image is everything on television and can mean everything to a proposition campaign, whether representing an accurate portrayal of the issues or not. Thus proposition ad campaigns have acquired "a reputation for innuendo, deception and exaggeration."¹⁰⁴

Examples of successful yet deceptive ads are therefore not uncommon. One frequently cited ad comes from the opposition to California's 1982 Proposition 11, which sought to encourage recycling through a bottle deposit program.¹⁰⁵ The opposition's ad showed a Boy Scout asking his father why "the grown-ups" behind the proposition were closing down "Mr. Erickson's recycling center and putting us Scouts out of business."¹⁰⁶ In addition to aiming for an emotional response with the image of an all-American Scout and his bittersweet naiveté, the ad gives the impression that the proposition would discourage people from recycling, which was not the case.

Other ads from the opposition included ads calling the deposit a tax, when it was really a refundable deposit, and an ad featuring five Oregonians (who happened to be beer distributors and Safeway employees) claiming bottle deposits did not encourage recycling in Oregon, despite evidence to the contrary.¹⁰⁷ With these ads, along with vastly underfunded support for the measure, fifty-six percent of the usually environmentally-conscious California voters voted to defeat the proposition.¹⁰⁸ Similarly

102. Zisk, *supra* note 64, at 264; *see also* Lowenstein, *supra* note 64 (concluding from a study of one-sided, high spending initiative campaigns that the most successful opposition campaigns won because they relied on deceptive, confusing ads).

103. A popular Sprite soft drink ad campaign proclaims, "Image is nothing. Taste is everything. Obey your thirst."

104. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 199.

105. CRONIN, *supra* note 21, at 218

106. *Id.*

107. *See id.* at 218.

108. *See* CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 40, at 201.

deceptive campaigns crop up frequently¹⁰⁹ and will continue to appear as campaigns grow more sophisticated and highly funded. For the underrepresented groups who depend most heavily on television, particularly the less educated, these deceptive ads can have a profound effect on voting behavior.

Looking back at my voters' pamphlet and other information sources on the 1998 issues, I was fortunate to have voted "right," despite my own dependence on television and advertisements. This is not always the case. Studies show that on average, at least ten percent of voters cast proposition votes that are inconsistent with their views on the issue.¹¹⁰ For particularly complex or technical propositions, or propositions with confusing ad campaigns, the percentage increases. For instance, with California's 1976 nuclear power initiative, Proposition 15, eighteen percent of voters incorrectly identified a "yes" vote, rather than the "no" vote, as favoring continued or accelerated nuclear power plant construction in a poll just one month before the election. Exit polls from the vote itself showed only four percent fewer voters confused on the same question. Moreover, less-educated, minority, and low-income voters were more likely to vote contrary to their true opinions, making their voices even less audible in the results.¹¹¹

The confusion did not come from a lack of media coverage. The inherent complexity of Proposition 15 might have accounted for voter confusion if the issue was not widely covered and advertised, or if no information was available beyond the voters' pamphlet.¹¹² Proposition 15, however, was one of the most highly funded campaigns of its time with massive advertising on both sides as well as a great deal of media coverage.¹¹³ Considering the wealth of information, particularly televised information, available to Proposition 15's voters, it was more likely the information itself—or rather the way ads presented this information—that confused so many voters into voting against their true preferences.

California's Proposition 10, a 1980 rent control initiative, produced even greater levels of confusion and "wrong" voting. The proposition was confusing on its face since its title implied that a "yes" vote favored rent control and a "no" vote opposed it when really the opposite was true. Supporters exacerbated this confusion by representing to voters that the proposition would produce rent control, rather than severely limiting it as

109. For other examples of successful deceptive ads, see CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *supra* note 42, at 199; ZISK, *supra* note 64; and Lowenstein, *supra* note 64.

110. MAGLEBY, *supra* note 7, at 142.

111. *Id.* at 143.

112. See, e.g., ZISK, *supra* note 64, at 254 ("I have found (at least in Massachusetts) that it is almost impossible to obtain much information beyond the Voters Information Pamphlet about some of the less-publicized questions.").

113. Lowenstein, *supra* note 64, at 527.

the proposition actually stated.¹¹⁴ Consequently, exit polls showed over three-fourths of voters voted against their views, with eighty-two percent of the "no" voters voting for rent control when they believed they were voting against it.¹¹⁵

Thus confusing, misleading, or false advertising can affect proposition campaigns in three ways. First, confused voters are less likely to vote on propositions, particularly members of already underrepresented groups for whom, coincidentally, television plays the biggest role in voter education. Second, ads can sway voters by misrepresenting the possible outcome of a measure. Finally, ads and other political speech can mislead and confuse voters into voting against their views. Such ads often win campaigns, but they also rob direct democracy of its representativeness and legitimacy.

III

FALSE PROPOSITION ADS AND THE CONSTITUTION

With the increasing prevalence of propositions, as well as the growing reliance of many voters on the media, false proposition ads pose a serious threat to effective direct democracy. A number of states address this problem by regulating ads through anti-false speech statutes. The potential difficulty with such statutes, though, is that as speech regulations they must overcome the First Amendment. The degree of First Amendment protection afforded false proposition ads depends largely on where the ads fall within the scheme of protected speech. The Washington State Supreme Court in *119 Vote No! Committee* gave such ads absolute protection, whereas the concurrence did not. False proposition ads do not fit precisely into any established category of protected speech, but are analogous to many unprotected categories including defamation, false commercial speech, and speech impeding the investigative power of the legislature. Since these ads are analogous to unprotected speech, they should not receive protection under the First Amendment, and the state should be able to regulate them.

A. State Public Disclosure Commission v. 119 Vote No! Committee

In *State Public Disclosure Commission v. 119 Vote No! Committee*,¹¹⁶ a majority of the Washington State Supreme Court held that false proposition ads constitute protected speech that the state lacks a compelling interest to regulate. The concurrence argued, however, that the First Amendment allows regulation of false proposition ads since false speech is not protected. Moreover, the concurrence asserted that the state has a

114. *Id.* at 524-25.

115. MAGLEBY, *supra* note 7, at 144.

116. 957 P.2d 691 (Wash. 1998).

compelling interest in regulating this speech in order to protect the public and the integrity of the electoral process.

Most cases brought under state anti-false political speech statutes have dealt with the falsity of the speech in question, not the constitutionality of the statutes.¹¹⁷ Cases dealing with constitutional issues focus on whether the statutes are overbroad or whether they meet the *New York Times* maliciousness standard.¹¹⁸ With *119 Vote No! Committee*, the Washington State Supreme Court became the first to apply the federal First Amendment to an anti-false speech statute.

The case concerned an ad opposing a doctor-assisted suicide initiative. Among other things, the ad claimed the initiative required “No special qualifications—your eye doctor could kill you.”¹¹⁹ The state Public Disclosure Commission argued that this statement in particular was inflammatory because there was no evidence of an eye doctor ever assisting a suicide. Instead of ruling on the falsity, factuality, or maliciousness of the ad, the court held that the state’s statute “chills political speech, usurps the rights of the electorate to determine the merits of political initiatives without fear of government sanction, and lacks a compelling state interest in justification.”¹²⁰

The statute itself stated that “It is a violation of this chapter for a person to sponsor with actual malice: (a) Political advertising that

117. See Richard F. Neel, Jr., *Campaign Hyperbole: The Advisability of Legislating False Statements Out of Politics*, 2 J.L. & POL. 405, 410-14 (1985) (primarily discussing cases brought under statutes regarding candidates).

118. See *id.* at 414-18. *New York Times v. Sullivan* limits defamation for public officials to statements made “with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. 254, 280 (1964).

119. The full text of the I-119 ad is as follows:

INITIATIVE 119

It would let doctors end patients’ lives without benefit of safeguards . . .
No special qualifications,
Your eye doctor could kill you.

No rules against coercion,
Nothing to prevent “selling” the idea to the aged, the poor, the homeless
No reporting requirements,
No records kept.

No notification requirements,
Nobody need tell family members beforehand.

No protection for the depressed
No waiting period, no chance to change your mind.

INITIATIVE 119 . . . IS A DANGEROUS LAW
VOTE NO ON INITIATIVE 119

120. *119 Vote No! Comm.*, 957 P.2d at 699.

contains a false statement of material fact”¹²¹ Justice Sanders, writing for the majority, called the statute “patronizing and paternalistic”¹²² and analogous to the Sedition Act because it “coerces silence by force of law and presupposes the State will ‘separate the truth from the false’ for the citizenry.”¹²³ The statute’s requirements of “actual malice” and “material fact” failed to cure its infirmities, the court reasoned, because defamation cannot apply to a proposition that, unlike a political candidate, lacks a reputation to damage.¹²⁴ Instead of an anti-false speech statute and reliance on the state to weed out liability, the majority stated, the First Amendment requires us to depend on an opponent’s contrary speech¹²⁵ and the voters’ capacity to discern the truth for themselves.¹²⁶ Thus the majority invalidated the statute in its entirety, including its application to ads for candidates.

In a concurring opinion, Justice Talmadge agreed with the result in the sense that the ad in question did not violate the statute, but vehemently disagreed with the holding by declaring, “Today the Washington State Supreme Court becomes the first court in the history of the Republic to declare First Amendment protection for calculated lies.”¹²⁷ Talmadge criticized the majority and Justice Sanders for using sweeping rhetoric and a collage of quotations to “foray into uncharted First Amendment territory.”¹²⁸ Talmadge further accused the court of ignoring a mountain of state and Supreme Court authority that refuses to grant First Amendment protection to deliberate falsehoods, and of being unconnected with the real world where “more speech” cannot solve the evils of dirty politicking.¹²⁹ Finally, Talmadge argued, the court itself acted in a patronizing and paternalistic manner by claiming that the people of Washington have no compelling interest in prohibiting false political speech.

Dysfunctions of the Washington Supreme Court aside,¹³⁰ Justice Talmadge correctly concludes that false proposition ads do not violate the First Amendment and thus states may regulate them. The concurrence also aptly finds a distinct state interest in regulating these ads. What the opinion fails to do, though, is to locate false proposition ads within the First Amendment framework of protected and unprotected speech. Rather,

121. WASH. REV. CODE § 42.17.530 (1998) (invalidated 1998).

122. *119 Vote No! Comm.*, 957 P.2d at 698.

123. *Id.* at 696.

124. *Id.*

125. *Id.*

126. *Id.* at 699.

127. *Id.* at 701 (Talmadge, J., concurring).

128. *Id.*

129. *Id.*

130. See Victoria Slind-Flor, *Justices Feud in Washington State*, NAT’L L.J., June 15, 1998, at A1. But see Philip Talmadge, *Supreme Court Far From Dysfunctional*, SEATTLE TIMES, Jan. 11, 1999, at B5.

Talmadge more or less assumes the defamation standard should apply, most likely because the statute in question mirrors the language of defamation. The majority criticized the application of defamation to anti-false speech statutes, calling it “misplaced” since defamation applies to human reputation.¹³¹ Defamation almost always involves false political speech, however, so it is analogous to false proposition ads. These ads are also analogous to other areas of unprotected speech. Before determining how a state should regulate these ads, it is important to determine into which established areas of speech the ads fall, and which type of speech regulation most closely applies.

B. False Ads and First Amendment Speech Categories

First Amendment jurisprudence includes many categories of protected and unprotected speech, yet none of these precisely matches the characteristics and circumstances of false proposition ads. False ads easily fit the general category of false speech, which is not constitutionally protected. Within that broader category, however, false proposition ads also share many characteristics with two legally cognizable types of false speech: defamation and false commercial speech. These ads are also analogous to public fraud, although the Court has never formally recognized that as a category of false speech. Regulation of false ads also resembles the investigative power of the legislature to punish inaccurate speech that hinders its investigation. False proposition ads resemble these categories of unprotected speech closely enough to suggest that ads also should be unprotected, yet not closely enough to directly apply those areas of law. Rather, false proposition ads represent an amalgam of several categories. To regulate them, a state should combine standards from different categories, requiring a statement of fact, falsity, maliciousness, and an effect on the public.

1. False Speech

The First Amendment and the idea of free expression have always been premised on the value of truth. Absolute truth as an objective of dialogue, particularly political dialogue, provides the basis for the marketplace of ideas doctrine. “[T]he ultimate good desired is better reached by free trade in ideas,” wrote Justice Holmes in his famous *Abrams* dissent. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which [people’s] wishes safely can be carried out.”¹³² Current First Amendment jurisprudence may have evolved into something less than a pure marketplace of ideas model or the search for absolute truth, yet truth continues to

131. *119 Vote Nol Comm.*, 957 P.2d at 697.

132. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

represent an important value. Accordingly falsity, the complete absence of not just absolute truth, but all truth, has never enjoyed First Amendment protection. The *New York Times* line of cases provides protection for false statements made without actual malice, but they do not extend protection to deliberate lies.

In *Garrison v. Louisiana*, the Supreme Court included calculated falsehoods in one of the well-defined classes of speech described in *Chaplinsky* as being “no essential part of any exposition of ideas.”¹³³ In *Gertz*, the Court stated that while “there is no such thing as a false idea,” there is also “no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”¹³⁴ Likewise, *Herbert v. Lando* stated that “[s]preading false information in and of itself carries no First Amendment credentials.”¹³⁵ And, in *Time, Inc. v. Hill*, the Court said that “constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function.”¹³⁶

False ads for ballot propositions necessarily involve false speech. As such, these ads should not enjoy constitutional protection. Within the broad category of false speech, however, are several categories of speech types and contexts in which false speech receives varying degrees of protection. These include defamation, false commercial speech, fraud, and speech before the legislature. The degree to which false proposition ads do or do not fit into these categories should help determine which standards of regulation should apply to these ads.

2. Defamation

Many cases listing deliberate falsehoods as not qualifying for First Amendment protection, including the cases cited above, concern defamatory statements. The various state statutes also draw this analogy by employing the language of defamation.¹³⁷ If an ad involves falsities about a candidate, defamation law supplies a remedy, provided the ad also meets the other requirements for defamation, including maliciousness. And if defamatory, such an ad would enjoy no First Amendment protection. However, false speech regarding a ballot initiative differs from typical defamatory speech in its subject—a political measure rather than a political figure.

133. 379 U.S. 64, 75 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

134. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

135. *Herbert v. Lando*, 441 U.S. 153, 171 (1979).

136. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

137. See *infra* note 169.

Defamation seeks to protect a person's reputation in the eyes of the public. An initiative or referendum, however, has no personal reputation; it has the public's perception of the issues and of the propositions' capacity in addressing those issues, but this perception is not the same as a personal reputation. At the same time, despite defamation's focus on private not public damage, when defamatory speech affects an election, the private damage to the candidate's reputation also damages the public in that it influences the selection of the public's representative. Even when it does not involve a campaign, defamation, like all restrictions on speech, includes some degree of state interest at least where the public has an interest in the speech. Cases like *New York Times* exalt the virtues of a robust debate and the free marketplace of ideas, not just the need to protect personal reputation. If the state has an interest in maintaining the quality of public discourse through defamation regulation, it should have the same interest in restricting defamatory-like speech regarding ballot propositions. This state interest does not make false proposition ads perfectly analogous to defamatory speech, but it does mean the interest in restricting the two types of speech is similar.

3. *False Commercial Speech*

Although most statutes and cases involving false proposition ads analogize to defamation, false commercial advertising provides a possible analogy as well. False proposition ads unquestionably represent a form of false advertising, which the Constitution does not protect.¹³⁸ The Lanham Act also limits false ads.¹³⁹ Yet both the Lanham Act and constitutional cases concerning false advertising focus on purely commercial speech, and false proposition ads are not purely commercial. Like all ads, proposition ads are designed to convey information about a product and to sell it. Although proposition ads differ from false commercial ads in content, the two types of ads are similar in form, using many of the same tactics and techniques to sell their respective products.¹⁴⁰ Yet with proposition ads, the product is not toothpaste or laundry detergent, but a political initiative. While a similar interest exists for regulating political and commercial ads, the political content of the campaign ads potentially affords them greater protection than ads for commercial products.

Viewing the ads as political speech means a court would apply strict scrutiny in evaluating state regulation of them.¹⁴¹ Even so, strict scrutiny does not necessarily rule out a statute regulating false political speech since

138. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

139. 15 U.S.C. § 1124 (1994).

140. This similarity is increasing, given the growing budgets and professionalization of proposition campaigns. See *supra* text accompanying notes 65-66.

141. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

the statute could be narrowly tailored to meet a compelling state interest. While this standard is exacting, it is not insurmountable and thus speech regarding candidates or ballot propositions should not be immune from speech restriction merely by virtue of being political.

If a false speech restriction encompasses a category of unprotected speech, it matters little whether the speech is also political. For instance fighting words, which are frequently political, do not gain First Amendment protection simply by involving political speech. In *Garrison v. Louisiana*, the Court stated, "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the promises of democratic government."¹⁴² Thus, the political content of a proposition ad does not automatically warrant its protection.

The interest involved in regulating false commercial speech, is quite similar to the interest in regulating false proposition ads. False commercial speech restrictions seek to protect consumers from being misled by false ads into buying or not buying a product or service. Likewise, regulating false proposition ads would protect voters from being misled into voting for or against a proposition. This aspect of misleading the public is not present in defamation law, at least not as an end. Considering the interest involved, restricting false proposition ads is similar to regulating false commercial speech. Thus false commercial speech represents a partially viable analogy for false proposition ads as well.

4. *Public Fraud and Limiting Speech for the Public Good*

Since false proposition ads involve public, not private, harm, another possible analogy is to public fraud. Unfortunately for this discussion, courts have not recognized public fraud as a category of unprotected speech. The *119 Vote No!* majority cites an article by Charles Fried in which he wrote, "the First Amendment precludes punishment for generalized 'public' frauds, deceptions, and defamation. In political campaigns the grossest misstatements, deceptions, and defamation are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed."¹⁴³ Justice Talmadge, however, characterizes Fried's statement as a "throwaway line" that no court has adopted or even discussed.¹⁴⁴

The Supreme Court has, in fact, recognized public, not reputational, interest in political speech in cases regarding campaign funding,

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

143. *State Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 697 (Wash. 1998) (quoting Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992) (footnote omitted)).

144. *Id.* at 705 (Talmadge, J., concurring).

particularly disclosure requirements.¹⁴⁵ There are also situations where the law limits false speech in the interest of protecting the public. Perjury laws prohibit knowingly false statements in order to protect the public interest in justice. Prohibitions on fraudulent speech protect people from deception. The Lanham Act limits false commercial ads in part because they mislead consumers. These laws all limit false speech not only because the First Amendment does not protect false speech, but also because the public has a distinct interest in truthful speech in those contexts. Likewise, the public has an interest in truthful speech in campaigns, regardless of whether the campaigns involve candidates or propositions. There should be a place in the framework of unprotected speech for false proposition ads, even if public fraud per se does not exist as a viable category.

5. *Investigative Power of the Legislature*

Lawmaking in this country is generally representative, with legislatures making decisions for the public. With propositions, however, the public itself is the lawmaker. The voting public in a proposition campaign is analogous to a massive legislature, so regulating speech in such campaigns is akin to protecting the investigative powers of the legislature. State and federal courts have consistently recognized the legislature's power to gather information on the issues and potential outcomes of its decisions. As the Court stated in *McGrain v. Daugherty*, "A legislative body cannot legislate wisely or effectively in the absence of information . . . and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."¹⁴⁶ When the Court mentions "requisite information," it cannot mean simply enough information to make a decision, but enough *accurate* information to make the right one. If the legislature needs the power to compel sufficient, accurate information, the voting public has the same need when acting in place of the legislature by voting on propositions.

Each member of the public has the right to research all available information on a given initiative (though not all have the capacity to conduct and understand such research). But the public is limited to the information available and lacks the power to compel additional information. Restricting false proposition ads does not compel more information, but it does compel *accurate* information. Citizen legislators have a particular need to compel accurate information because they lack the aides and advisors available to

145. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that the Federal Election Campaign Act's contribution limits and disclosure rights for private individuals, but not expenditure limitations, were valid).

146. 273 U.S. 135, 175 (1927); see also *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action.").

elected legislators to help them discern accurate, relevant information and use it to make a decision. Rather, citizen legislators possess only the information advertisers throw at them, which is often unclear.

Although the voting public's need for information is similar to that of the legislature, it would be impractical, even harmful, to extend powers, such as the ability to compel testimony, to the general public. Because of the size and nature of its "legislative body," the public as a whole must act more as consumers of political information rather than producers of it. That is why, in states with statutes prohibiting false proposition ads, it is the government, not the citizen legislators, who prohibit the speech. In this way, it is the government on behalf of the "legislators" that has the power, not the legislators themselves. The Washington State Supreme Court called such government function "paternalistic."¹⁴⁷ Yet if the government is acting as a father figure in this situation, it is not one who is controlling public access to useful information. Rather, it is a father limiting the dissemination of false information, which the Court has said is of no communicative value anyway.¹⁴⁸ Still, since it is the government and not citizen legislators who regulate the speech, regulation of false proposition ads is not entirely analogous to the legislature's investigative power. The need for accurate information is the same, but the innate differences between government and citizen legislatures makes the regulation of false information in these contexts different as well.

Not wholly analogous to defamation, false advertising, or the legislature's investigative power, the regulation of false proposition ads is a combination of the three. Although the citizen legislature cannot employ the same affirmative investigative power as the legislature, its similar need for accurate information in making decisions calls for some form of regulation of false proposition ads. Such regulation would protect the public from being misled by false information in the same way as regulation of false commercial speech, though proposition ads involve political, not commercial, speech. Since proposition ads do involve political speech, the false speech they contain is similar to defamation. Propositions lack the reputation of a candidate to damage, but the public's damage in relying on false information is the same whether it involves a candidate or a proposition.

Thus, to regulate false proposition ads, a statute should combine standards from all three categories of unprotected speech. First, the statute should apply only to false statements of fact, as do defamation and false commercial speech laws. Second, an anti-false political speech statute

147. *119 Vote No! Comm.*, 957 P.2d at 698.

148. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (stating that calculated falsehoods are "no essential part of any exposition of ideas") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

should, like defamation, be limited by the maliciousness standard to prevent application to inadvertent lies. Finally, false proposition ads pose a need to protect the public similar to the need posed by false commercial speech, and so an anti-false speech statute should apply only to ads with the potential to mislead the public. Thus a statute should apply only to certain speech, such as ads and campaign literature, or only to material statements regarding the proposition.

C. *Compelling State Interest*

Not only should the state be able to regulate false proposition ads in ways similar to other false speech, but courts should also recognize the state's compelling interest in doing so. The *119 Vote No! Committee* court denied this interest, calling it paternalistic and patronizing to voters.¹⁴⁹ However, the Supreme Court has repeatedly recognized the state's interest in "preserving the integrity of its election process"¹⁵⁰ and "protecting voters from confusion and undue influence."¹⁵¹ In *McIntyre v. Ohio Elections Commission*, the Court even recognized, in dictum, that Ohio's statute limiting false campaign speech served the state's interest in deterring false political speech.¹⁵² This interest in deterring false political speech applies equally to ballot proposition campaigns as to elections for political office because the interest is in the electoral process itself, not individual candidates' reputation, privacy, or free speech interests. The need for a well and accurately informed electorate is the same whether the election concerns a candidate or an initiative. The need may be even greater in the case of ballot propositions, where voters rely more heavily on information disseminated through campaign.

False speech, especially regarding ballot propositions, also disproportionately affects underrepresented voters. If false speech confuses these voters more than others and causes them either not to vote or to vote contrary to their views, the entire election process will be skewed against the underrepresented voters. The state has a compelling interest in ensuring the electoral process is open to all eligible citizens. This should include sanctioning false speech just as much as it does accommodating an illiterate voter or opening the vote to women and minorities.

The majority in *119 Vote No! Committee* stated that to find a compelling state interest in prohibiting false speech for ballot propositions takes for granted that "the people of this state are too ignorant or

149. *119 Vote No! Comm.*, 957 P.2d at 698.

150. *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989).

151. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (stating that the Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

152. 514 U.S. 334, 350-51 (1995) (holding that Ohio's statute prohibiting distribution of anonymous campaign literature violated the First Amendment).

disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate, and it is the proper role of the government to fill the void."¹⁵³ The court's statement, however, implies that readily available and understandable information exists. This is not always the case. Even in a hotly contested campaign, it can be difficult to separate the wheat from the chaff in a barrage of ads.

The *119 Vote No! Committee* court viewed the lack of accurate information as less of a problem in ballot proposition campaigns than candidate campaigns since "the truth of the assertion may be readily tested against the text of the initiative."¹⁵⁴ A voter may certainly compare an ad to the text of a ballot proposition, but the court's faith in voters to comprehend the comparison is misplaced. The average voter in Washington, or any other state, lacks the reading ability to understand an initiative written at the thirteenth-to eighteenth-grade level. Even for the well educated, propositions, like all laws, can be difficult to understand.¹⁵⁵ With the objective political information of the initiative's text and the ballot pamphlet so complex, it is important to keep the subjective information in ads at least honest. Anti-false political speech statutes help do this, at least where deliberate or reckless falsehoods are concerned. The state certainly has an interest in protecting the integrity of its electoral process from false speech, and its attempts to do so through these statutes should be constitutional.

The *119 Vote No! Committee* court also stated that finding a state interest in regulating false political speech assumes that the state's proper role is to determine falsity for voters.¹⁵⁶ The concept of governmental policing of campaign speech might initially appear at odds with the ideal of "uninhibited, robust, and wide-open" debate.¹⁵⁷ However, the idea of an open debate presupposes honesty among the participants. Rates of voter drop-off and voter confusion show how false or misleading messages compel certain people to drop out of the debate, thus making it less open and robust. When speech itself threatens the openness of debate, the traditional First Amendment view, followed in *119 Vote No! Committee*, protects not the debate itself, but the speaker with the loudest voice. As a result, public discourse on the issue becomes not a debate at all but a one-sided soliloquy.

In asserting that the state cannot, and should not, regulate false political speech, the *119 Vote No! Committee* opinion represents what Owen Fiss calls the autonomy view of First Amendment theory. According

153. *119 Vote No! Comm.*, 957 P.2d at 699.

154. *Id.*

155. See, e.g., Eule, *supra* note 12, at 1509 (describing the author's own experience of "struggling through the state ballot pamphlet and beginning to wonder how I had graduated from law school with a reading level below that of a third-year college student").

156. *119 Vote No! Comm.*, 957 P.2d at 699.

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

to this view, the First Amendment places a zone of noninterference around an individual that the state may not enter. Within this zone, the individual may speak freely without fear of governmental regulation. Many individuals pontificating within many zones of noninterference collectively produce a robust and wide-open debate.¹⁵⁸

However, Fiss argues that protecting autonomy in modern society will produce a public debate dominated by the same social forces that perpetuate a grossly unbalanced power structure in our society at large.¹⁵⁹ As a result, Fiss advocates a public debate approach to the First Amendment. Like autonomy, the public debate approach seeks to protect the people's ability to determine their own fate through rich public debate. This approach, however, judges action by its impact on the public debate, not its capacity to interfere with individual autonomy.¹⁶⁰ The public debate approach also puts the state on equal footing with other social institutions in deterring damaging speech. The state's involvement is particularly critical in enforcing public debate because the state is the most public institution, and the only one capable of resisting the pressures of the market in order to "enlarge and invigorate" political debate.¹⁶¹ State involvement in regulating political speech may affect the outcome of public debate, but Fiss considers that effect to be positive. "What democracy exalts is not simply public choice but rather public choice made with full information and under suitable conditions of reflection. From democracy's perspective, we should not complain but rather applaud the fact that outcome was affected, and presumably improved, by full and open debate."¹⁶²

In arriving at his public debate principle, Fiss draws on Alexander Meiklejohn's concept of democracy as a massive town meeting in which "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."¹⁶³ Just as the town meeting model is inadequate for large scale direct democracy, though, the concept of a town meeting does not provide the best model for state regulation of speech. Robert Post criticizes Meiklejohn's town meeting model as putting agenda setting in the hands of the state instead of the people.¹⁶⁴ Fiss admits to this but responds that it is better the agenda be set by the neutral, objective state than by politically driven institutions.¹⁶⁵

158. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785 (1987) [hereinafter Fiss, *Why the State?*]; see also Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

159. Fiss, *Why the State?*, *supra* note 158, at 786.

160. *Id.*

161. *Id.* at 794.

162. OWEN M. FISS, *THE IRONY OF FREE SPEECH* 23 (1996).

163. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960).

164. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1113-14 (1993).

165. Fiss, *supra* note 162, at 24.

Fiss' approach is appropriate in the context of ballot proposition ads where the public has proven either unwilling or incapable of discerning accurate political information through the "more speech" autonomy approach. Fighting *disfavored* speech with more speech allows the majority will to surface while allowing autonomy for the speaker. Fighting *false* speech with more speech, on the other hand, leaves the listener with conflicting facts and no basis on which to discern the truth. So instead of surveying the marketplace for ideas with which he agrees, the listener must first search for ideas he can trust. Injecting the public debate with false and misleading facts not only taints the marketplace of ideas, but dissuades some people, particularly from underrepresented groups, from participating—effectively closing off a portion of the marketplace. By applying a public debate approach, though, anti-false political speech statutes protect the public debate and the electoral process without sacrificing the speaker's autonomy. A speaker is still free to provide facts, express opinions, and support or oppose any measure, but not allowed to deliberately lie.

The state should allow everyone to speak and should not judge whether a person's statement is "worth saying" in terms of content. To facilitate each person's speech, however, the state may need to contain or even limit the speech of others. Such limitations should occur only when the effect, not the meaning, of the speech is harmful to the public debate. The fighting words doctrine follows this approach, focusing on the effect of the words on public safety rather than their content. Public debate is as important as public safety, particularly to the vitality of democracy. Anti-false speech statutes limit only speech that, in addition to being without constitutional protection, is also harmful to the public debate. Rather than contradict the speech of an opponent, false speech negates it and undermines the public's opportunity to judge the meaning and merits of the speech for itself.

False political speech is especially harmful to the public debate because it may skew the outcome of an election which is itself a statement of the public. This danger is even greater for false speech regarding ballot propositions where voters, particularly underrepresented voters, rely more heavily on the speech of public interest groups in the form of advertisements. When false ads mislead and confuse those who are already underrepresented into not voting or voting against conscience, the ads also skew direct democracy decisions against them. The public debate does not benefit from the silencing of certain classes of individuals, whether the silencing is done by the state or by a private institution. To protect the public debate, encourage more representative voting, and support the integrity of the electoral process, the state not only can, but should, limit false speech regarding ballot propositions.

Thus, regulation of proposition ads through anti-false speech statutes, like the one at issue in *119 Vote No! Committee*, should not violate the Constitution. These statutes limit political speech, but that alone fails to trump the fact that false speech is not constitutionally protected. The statutes do not limit speech based on content or quality, which could violate the First Amendment.¹⁶⁶ Rather, a false speech statute limits the property of speech (*i.e.*, falsity), in the same way fighting words limit only the incitable property of the speech. Moreover, the state has a compelling interest in limiting false campaign speech and should enforce that interest to protect the public debate. Therefore, contrary to *119 Vote No! Committee*, anti-false speech statutes, including statutes regarding ballot propositions, should be considered constitutional.

IV

ANTI-FALSE POLITICAL SPEECH STATUTES

Although state regulation of false political speech should be constitutionally permissible, in practice most of the existing state statutes would fail due to overbreadth. A statute is overbroad if it “does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that . . . constitute an exercise [of protected speech].”¹⁶⁷ The state statutes prohibiting false propositions ads tend to involve three elements—falsity, statement of fact, and malice. When all these factors are present, a statute should be narrow enough to limit only unprotected speech. Only two existing statutes, as well as Washington’s recently invalidated statute, include all three factors. Combining aspects of these acceptable statutes, a model statute emerges which should survive overbreadth analysis to provide protection against false proposition ads.

A. *Current Anti-False Speech Statutes*

In addition to defamation which provides some, albeit quite narrow, protection for candidates who are targets of false political ads, seventeen states currently provide the additional protection of a statute prohibiting false speech about political candidates.¹⁶⁸ Ten of these states, along with South Dakota, and until recently Indiana and Washington, also extend the same protection to ballot propositions where defamation does not really apply.¹⁶⁹ Unlike traditional defamation laws, these statutes, including those

166. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

167. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

168. See statutes cited *supra* note 13. For an analysis of these statutes, see Neel, *supra* note 117, at 406-10.

169. The relevant parts of these thirteen state statutes read as follows:

No person shall knowingly make, publish, or circulate or cause to be made, published, or circulated in any letter, circular, advertisement, or poster or in any other writing any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office.

COLO. REV. STAT. ANN. § 1-13-109 (West 1989).

A person who, for the purpose of intimidating, influencing, inducing, or procuring a voter to vote or refrain from voting for or against a candidate or for or against a public question at an election, political convention, or legislative session, transmits any false matter to the publisher of a newspaper, book, or other publication when the publication of that matter would: (1) expose any person to hatred, contempt, ridicule, or obloquy; (2) cause any person to be shunned or avoided; or (3) tend to damage any person in that person's business; commits a Class D felony.

IND. CODE ANN. § 3-14-3-22 (1988) (repealed 1992).

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

LA. REV. STAT. ANN. § 18:1463(C) (West 1979).

No person shall publish or cause to be published in any letter, circular, advertisement, poster or in any other writing any false statement in relation to any question submitted to the voters, which statement is designed to affect the vote on said question.

MASS. GEN. LAWS ch. 56, § 42 (1998).

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

A person is guilty of a misdemeanor who intentionally participates in the drafting of a letter to the editor with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat any candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

MINN. STAT. § 211B.06 (1998).

A person shall not, with actual malice and the intent to impede the success of a campaign for the passage or defeat of a question on the ballot at any election, including any recall or special election, cause to be published a false statement of fact concerning the question on the ballot.

NEV. REV. STAT. ANN. § 294A.345(2) (Michie 1997).

No person may knowingly sponsor any political advertisement or news release that contains any assertion, representation, or statement of fact, including information concerning a candidate's prior public record, which the sponsor knows to be untrue, deceptive, or misleading, whether on behalf of or in opposition to any candidate for public office, initiated measure, referred measure, constitutional amendment, or any other issue, question, or proposal on an election ballot, and whether such publication is by radio, television, newspaper, pamphlet, folder, display cards, signs, posters or billboard advertisements, or by any other public means.

N.D. CENT. CODE § 16.1.10.04 (1997).

No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign . . . post, publish, circulate, distribute, or otherwise disseminate, a false statement,

that apply only to candidates, target the public evils of false political speech rather than damages to individual reputation or privacy. For instance, Louisiana explains the purpose of its statute as follows: "the state has a compelling interest in taking every necessary step to assure that all elections are held in a fair and ethical manner . . . [and] to protect the electoral process."¹⁷⁰ In this sense, the statutes are more like a public fraud statute than defamation. Yet it is not the public or the state that recovers damages under these statutes, but the individual supporters of the "defamed" proposition campaign. By providing relief for the people behind the damaged product (the proposition) and seeking to protect the public not from fraud so much as from avoiding the product (not voting) or supporting an alternative product (voting differently), the anti-false speech statutes also resemble prohibitions on false commercial advertising. The analogy to commercial advertising exists in form, not content, though, since proposition ads involve political, not commercial speech.

either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue.

OHIO REV. CODE ANN. § 3517.22(B) (Anderson 1996).

No person shall cause to be written, printed, published, posted, communicated or circulated, any letter, circular, bill, placard, poster, photograph or other publication, or cause any advertisement to be placed in a publication, or singly or with others pay for any advertisement, with knowledge or with reckless disregard that the letter, circular, bill, placard, poster, photograph, publication or advertisement contains a false statement of material fact relating to any candidate, political committee or measure.

OR. REV. STAT. § 260.532 (1997).

Any person knowingly printing, publishing, or delivering to any voter of this state a document containing any purported constitutional amendment, question, law, or measure to be submitted to the voters at any election, in which such constitutional amendment, question, law or measure is misstated, erroneously printed, or by which false or misleading information is given to the voters, is guilty of a class 2 misdemeanor.

S.D. CODIFIED LAWS § 12-13-16 (Michie 1995).

A person may not knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting at any primary, convention, or election.

UTAH CODE ANN. § 20A-11-1103 (1998).

It is a violation of this chapter for a person to sponsor with actual malice: . . . [p]olitical advertising that contains a false statement of material fact.

WASH. REV. CODE § 42.17.530 (1998) (invalidated by State Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691 (Wash. 1998)).

No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.

WIS. STAT. § 12.05 (1998).

170. LA. REV. STAT. ANN. § 18:1463(A).

While only Louisiana's statute includes its purpose, all but South Dakota and Ohio¹⁷¹ prohibit false speech about propositions within the same statute prohibiting false speech about candidates. The latter represents the classic defamation situation. As such, the statutes also tend to mirror the language of defamation, requiring to a varying degree malicious intent, falsity, and statements of fact. Extending the analogy between false proposition ads and defamatory statements, the ballot propositions themselves would be the equivalent of defamed public figures, not private individuals. Thus, the *New York Times* maliciousness standard should apply.

New York Times and its progeny require a defamatory statement regarding a public figure to be made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁷² Nine of the eleven statutes currently prohibiting false proposition ads require an intent of at least actual malice. Nevada's statute even uses the term "actual malice,"¹⁷³ while three others use the terms "knowing" and "reckless,"¹⁷⁴ mirroring the *New York Times* definition for malice. Five states¹⁷⁵ use only "knowing," making the intent requirement even stricter than actual malice. Of the two remaining states, Louisiana requires that a person "knows or should be reasonably expected to know"¹⁷⁶—essentially knowledge or negligence—and Massachusetts requires no intent at all in relation to falsity.¹⁷⁷

In addition to an intent for falsity, seven of the statutes require an intent to influence the outcome of the election.¹⁷⁸ This requirement protects inadvertent and non-public statements. The language, which typically reads "intended or tends to affect voting,"¹⁷⁹ seems to limit the statutes' reach to primarily political advertisements or other official statements of a political interest group. Most states require the offending speech to be a "statement," but four specify the statement's form, covering such generic

171. Ohio's separate statutes are largely parallel to one another, while South Dakota does not explicitly prohibit false speech against candidates. See OHIO REV. CODE ANN. § 3517.22(B); S.D. CODIFIED LAWS § 12-13-16.

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

173. NEV. REV. STAT. ANN. § 294A.345(2). Washington's now invalidated statute required "actual malice" as well. See WASH. REV. CODE § 42.17.530.

174. MINN. STAT. § 211B.06; OHIO REV. CODE ANN. § 3517.22(B); OR. REV. STAT. § 260.532.

175. COLO. REV. STAT. ANN. § 1-13-109; N.D. CENT. CODE § 16.1.10.04; S.D. CODIFIED LAWS § 12-13-16; UTAH CODE ANN. § 20A-11-1103; WIS. STAT. § 12.05.

176. LA. REV. STAT. ANN. § 18:1463(C) (West 1979).

177. See MASS. GEN. LAWS ch. 56, § 42 (1998).

178. COLO. REV. STAT. ANN. § 1-13-109; MASS. GEN. LAWS ch. 56, § 42; MINN. STAT. § 211B.06; NEV. REV. STAT. ANN. § 294A.345(2); OHIO REV. CODE ANN. § 3517.22(B); UTAH CODE ANN. § 20A-11-1103; WIS. STAT. § 12.05.

179. See COLO. REV. STAT. ANN. § 1-13-109; MASS. GEN. LAWS ch. 56, § 42; MINN. STAT. § 211B.06; NEV. REV. STAT. ANN. § 294A.345(2); OHIO REV. CODE ANN. § 3517.22(B); UTAH CODE ANN. § 20A-11-1103; WIS. STAT. § 12.05.

forms as advertisements, circulars, posters and placards to less obvious forms such as letters to the editor or photographs.¹⁸⁰

Defamation law provides relief only to false statements of fact.¹⁸¹ Eight states require the statement to be false, while the remaining three are more inclusive. South Dakota prohibits speech that is "false, or misleading,"¹⁸² North Dakota prohibits "untrue, deceptive, or misleading" speech,¹⁸³ and Louisiana prohibits "scurrilous, false, or irresponsible adverse comments."¹⁸⁴ Only two states require the false statement to be one of fact,¹⁸⁵ including Oregon which limits its statute to "material" facts.¹⁸⁶

Not all states that use ballot propositions have statutes regulating them, but the presence of such statutes does to some extent correspond to the level of proposition use. Of the five states with the heaviest use of initiatives in recent years—Oregon, California, North Dakota, Colorado, and Washington¹⁸⁷—all but California either have anti-false speech statutes, or did until recently.¹⁸⁸ Interestingly, three of the states with statutes—Louisiana, Minnesota, and Wisconsin—have neither the initiative nor the referendum. Louisiana and Wisconsin do have the recall, however, and all three states require a popular vote for state constitutional amendments.¹⁸⁹ South Dakota, the birthplace of modern direct democracy, is the only state to have an anti-false speech statute that applies to ballot propositions but not one that applies to candidates.

B. Overbreadth

Considering the statutory language of the anti-false speech statutes, particularly references to malicious intent, falsity, and statement of fact, most of these statutes are constitutionally overbroad. To be constitutional, an anti-false political speech statute "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be

180. COLO. REV. STAT. ANN. § 1-13-109 ("letter, circular, advertisement, or poster"); MINN. STAT. § 211B.06 ("paid political advertisement or campaign material"); N.D. CENT. CODE § 16.1.10.04 ("political advertisement or new release"); OR. REV. STAT. § 260.532 ("letter, circular, bill, placard, poster, photograph, publication or advertisement"); *see also* WASH. REV. CODE § 42.17.530 (1998) ("political advertising").

181. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

182. S.D. CODIFIED LAWS § 12-13-16 (Michie 1995).

183. N.D. CENT. CODE § 16.1.10.04 (1997).

184. LA. REV. STAT. ANN. § 18:1463(A) (West 1979). Further down, the statute lists only "false" statements. *See id.* at § 18:1463(C)(1).

185. *See* NEV. REV. STAT. ANN. § 294A.345(2) (Michie 1997); OR. REV. STAT. § 260.532.

186. OR. REV. STAT. § 260.532. Washington's invalidated statute specified "material fact" as well. *See* WASH. REV. CODE § 42.17.530 (1998).

187. DUBOIS & FEENEY, *supra* note 7, at 31.

188. COLO. REV. STAT. ANN. § 1-13-109 (West 1989); OR. REV. STAT. § 260.532; N.D. CENT. CODE § 16.1.10.04 (1997); *see also* Washington's recently invalidated statute, WASH. REV. CODE § 42.17.530.

189. *See* Appendix A.

susceptible of application to protected expression.”¹⁹⁰ Under this standard, a statute should be sufficiently narrow if it prohibits only false statements of fact made with actual malice.

A federal district court in New York struck down a statute similar to these anti-false speech statutes in *Vanasco v. Schwartz* because sections of it prohibited more than simply false statements made with malice.¹⁹¹ First, the New York statute prohibited attacks on candidates based on “race, sex, religion or ethnic background.”¹⁹² While offensive, such attacks involve protected speech and to prohibit them would be unconstitutional. Even if one were to construe race, religion, and gender attacks as categories of fighting words, no fighting words law may be content-based¹⁹³ and thus the statute would remain overbroad.

New York’s statute also prohibited several categories of “misrepresentation,” including misrepresentations of a candidate’s qualifications, positions on political issues, and party affiliation.¹⁹⁴ The court held that these sections of the statute were unconstitutionally vague and overbroad, in part because values like a candidate’s political position are difficult to define, and because “the term ‘misrepresentation’ could be applied to almost all campaign speech.”¹⁹⁵ Whereas a state may prohibit false speech, prohibiting misrepresentation could encompass not only false speech, but also innuendoes or inadvertent misstatements. While something such as party affiliation is necessarily a question of fact, qualifications and political stances are subject to opinion. Finally, the *Vanasco* court emphasized that any state regulation of campaign speech must meet the *New York Times* actual malice standard. The New York statute included no intent requirement, and so was unconstitutionally overbroad in that respect as well.¹⁹⁶

Although the statute in *Vanasco* applied only to political speech regarding candidates, the narrow construction of the statute’s requirements in that case would likely apply to statutes prohibiting false speech regarding ballot propositions. The actual malice standard prevents inadvertent or negligent statements about candidates from qualifying under these statutes. Malice allows the state to control false speech without chilling all political speech. The need to prevent false speech and protect the integrity of the electoral process is just as great for ballot propositions

190. *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (examining a Georgia fighting words statute).

191. 401 F. Supp. 87 (E.D.N.Y. 1975), *aff’d mem.*, 423 U.S. 1041 (1976).

192. *Id.* at 101 (quoting N.Y. Fair Campaign Code, § 6201.1(c)); *id.* at 100 (citing N.Y. Election Law, § 472(a)).

193. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional a Minnesota statute prohibiting display of any symbol known to arouse anger on the basis of race, religion, or sex on the ground that the statute prohibits speech based on content).

194. *Vanasco*, 401 F. Supp. at 101.

195. *Id.* at 97.

196. *Id.* at 92.

as it is for political candidates. Likewise, it is just as important to have free and open debate on ballot propositions without fear of prosecution for a misstatement. Thus the actual malice standard should not only apply to the ballot proposition statutes, but also suffice to make the statutes adequately narrow.

Misrepresentative, misconstrued, or misleading statements contribute equally to voter confusion and miseducation as a statement that is truly false. Misleading statements, however, fall into the grey area of truth where a lie can be either a lie or simply “the truth in masquerade.”¹⁹⁷ To prohibit untrue speech while leaving protected speech untouched, a statute must only prohibit speech that is wholly false. Defamation law requires falsity, as did the court in *Vanasco*. The same standard should apply to ballot proposition statutes.

To be false, a statement must be one of fact because “[u]nder the First Amendment there is no such thing as a false idea.”¹⁹⁸ To avoid overbreadth, a false speech statute must apply only to factual statements. Opinions lie at the heart of the marketplace of ideas and to limit them in any way would have a chilling effect on political debate. Anti-false speech statutes are designed to preserve the integrity of political debate, not stifle it. An anti-false speech statute must therefore be narrow enough to encompass only facts, whether it limits false speech for candidates or ballot propositions. In practice, defining and applying the distinction between facts and opinions is difficult.¹⁹⁹ This difficulty will be dealt with in applying these statutes in Part V, but for now it matters only that a statute must make the distinction by requiring a statement to be factual before it can be prohibited. And to the extent punishing only factually false statements works in defamation law, it should also work for campaign speech statutes.

Only two of the current ballot proposition statutes—Oregon’s and Nevada’s—would likely survive this overbreadth analysis.²⁰⁰ Of the eleven statutes, only the ones from these states require the false statement to be one of fact. Oregon additionally requires a statement of “material fact,” making its statute even more narrow. Both states also utilize a maliciousness standard with Nevada requiring actual malice and Oregon requiring knowledge or reckless disregard for the truth. Finally, both states limit the reach of their statutes to false statements, not misleading statements that may arguably be true.

197. LORD BYRON, DON JUAN 286 (Truman Guy Steffan & Willis W. Pratt eds., 1957).

198. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

199. See *infra* text accompanying notes 203-212.

200. See NEV. REV. STAT. ANN. § 294A.345(2) (Michie 1997); OR. REV. STAT. § 260.532 (1997). For the text of these statutes, see *supra* note 169. Washington’s now invalid statute, in prohibiting sponsorship “with actual malice . . . [p]olitical advertising that contains a false statement of material fact” would pass overbreadth analysis as well. WASH. REV. CODE § 42.17.530 (1998).

Nevada's statute also requires the statement to be made with the intent to impede a campaign for or against the proposition. In effect, this part of the statute requires malice in the classic sense of the word, with regard to the potential consequences of the speech. Defamation law requires only malice with respect to falsity, but it also requires the defamatory speech to damage its subject's reputation. The equivalent of a damaged reputation for a ballot proposition would be a shift in voter support impacting the proposition's ultimate success or defeat.²⁰¹ Since several factors enter into a voter's decision, though, it would be nearly impossible to point to a specific false ad as the direct cause of a proposition's ultimate success or demise. Nevada's intent to impede requirement provides an alternative to defamation's lowered reputation requirement that also goes to the real evil these statutes seek to prohibit—dirty politicking.

C. Model Statute

The optimal anti-false political speech statute would combine Oregon's "material fact" requirement with Nevada's intent to impede requirement in addition to the maliciously false statement of fact requirements present in both statutes. Such a hybrid statute might read something like this:

No person shall, with actual malice and intent to impede the success of a campaign for the passage or defeat of a ballot proposition, cause to be published a false statement of material fact concerning that ballot proposition.

The above statute should survive overbreadth analysis, while limiting the targeted speech mainly to political ads. With such a narrow construction, however, it is questionable how often such a statute would apply to an actual ad.

V

THE MODEL STATUTE IN PRACTICE

From the dearth of case law under existing anti-false political speech statutes, particularly those dealing with ballot propositions, it would seem these statutes are underutilized. The truth may be, however, that few political ads, no matter how misleading, qualify under the statutes. In Washington, for example, the state's Public Disclosure Commission received 133 false advertising complaints between 1993 and 1998. Of those complaints, the Commission dismissed fifty-eight for lacking the merits to warrant an investigation and dismissed another fifty-five following investigation. The remaining twenty complaints went to the

201. A successful ballot proposition could be analogous to a damaged reputation in the sense that the opposing campaign's "reputation" suffered, not the "reputation" of the proposition itself.

Commission for action—the Commission cleared four, found violations for thirteen, and referred just three to the attorney general for prosecution.²⁰² That means only twelve percent of the complaints qualified either as violations or as worthy of further prosecution. Most likely, this low percentage did not result because Washingtonians are somehow prone to truthful political ads that opponents mistake for false. Even in Washington, political ads tend to be fraught with exaggeration, hyperbole, partial truths, unfounded projections, and generally misleading speech. Misleading, exaggerated, or speculative speech does not equal false speech, however. Nor does opinion because no opinion can be false.

Saying opinions are protected is one thing. Discerning opinions from facts in practice is quite another. Take a statement such as “this initiative will cause your utility bills to rise.” Rising utility rates sounds factual but, barring language in the initiative specifically mandating higher rates, the statement is really an opinion concerning the initiative’s potential effects. If the statement is opinion, the state cannot limit the statement, even with an anti-false speech statute. Yet such a statement could lure voters into opposing an initiative they might otherwise support out of fear of higher electric rates, no matter how unlikely an actual increase might be.

Ollman v. Evans,²⁰³ the leading case on the fact/opinion dichotomy, offers two tests for distinguishing fact from opinion—the plurality’s four factor test and Judge Bork’s dissenting totality of the circumstances test. Writing for the plurality, Judge Starr listed four factors a reasonable reader can use to determine whether a given statement is a fact or an opinion: (1) specificity; (2) verifiability; (3) linguistic context; and (4) social context.²⁰⁴

Specificity, drawing on common usage of language, is based on the premise that a reader is less likely to interpret as factual a statement that is indefinite or ambiguous.²⁰⁵ Similarly, a reader is unlikely to interpret a statement as factual if it is not objectively verifiable.²⁰⁶ An examination of linguistic context takes into account the form in which the statement appears. For instance, a reader is likely to view a statement in an editorial or an article laden with metaphor and hyperbole as an opinion. Finally, social context considers the broader setting in which a statement may appear, taking into account varying social conventions that may signal a statement’s factuality to the reader.²⁰⁷ For instance, the Supreme Court considered the social conventions of a labor dispute in deciding the word

202. David Postman, *Remedies are Sought for Lying: Sanctions Still Necessary, Disclosure Director Insists*, SEATTLE TIMES, July 23, 1998, at B1.

203. 750 F.2d 970 (D.C. Cir. 1984).

204. *Id.* at 979.

205. *Id.*

206. *Id.* at 981.

207. *Id.* at 979.

"traitor" to be an opinion when applied to an employee crossing a picket line.²⁰⁸

The social and linguistic context of a political ad, given the sales aspect of advertising and the conventional wisdom that politicians lie, makes a voter unlikely to interpret a candidate's ad statement as gospel. With ballot propositions, however, a voter may be less likely to interpret an ad statement as opinion. When a foreboding statement about a proposition flashes across the screen, there is little way to tell whose opinion it represents. Without a person to attribute them to, opinions, particularly predicting opinions, begin to appear less like a person's view and more like a factual truth. Given that many proposition ads craft statements to sound like facts, whether they are or not, the chances of a reasonable voter interpreting a proposition ad as factual are compounded.

Judge Bork, in his *Ollman* dissent, favored a totality of the circumstances balancing test considering both the context of the statement and the extent to which punishing the statement would inhibit the marketplace of political ideas.²⁰⁹ Judge Bork criticized the plurality's four factor test by saying that he did not think "these simple categories, semantically defined, with their flat and barren descriptive nature, their utter lack of subtlety and resonance, are nearly sufficient to encompass the rich variety of factors that should go into analysis when . . . values meant to be protected by the first amendment are threatened."²¹⁰

Instead, Judge Bork distinguished between two varieties of factual statements. The first is a factual statement that is more like an opinion, such as "one man's opinion about others' opinions," which is in one sense a fact, but also "the kind of criticism that we are used to hearing and about which we regularly suspend judgment."²¹¹ The second kind of factual statement is a hard statement of fact that is "capable of proof or disproof and it describes a physical action that did or did not take place."²¹² According to Bork, when speech takes place in the political arena, only the second type of factual statement should be actionable. In the context of political ads, however, this type of factual statement tends to be far rarer than the first. Flat, provable facts are not common in information about propositions, aside from the actual text of the proposition. Rather, proposition ads tend to focus on predictions of the proposition's future effects—statements that may sound factual, but, as predictions, are necessarily opinions. Under either *Ollman* test, political ad statements will often fall into the opinion category.

208. Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974).

209. *Ollman*, 750 F.2d at 1002 (Bork, J., dissenting).

210. *Id.* at 994 (Bork, J., dissenting).

211. *Id.* at 1009 (Bork, J., dissenting).

212. *Id.*

Even if factual, political ads tend not to tell the whole story of a proposition. Through carefully crafted statements or innuendoes, ads can thus imply false conclusions without giving a flat out false statement. Such ads would therefore not be actionable under the model anti-false speech statute. This may be because market forces encourage campaigners not to lie. Political ads frequently accuse opponents of lying, though, whether the assertion of a lie is true or not. As a campaign escalates into dueling cries of "foul!" it may seem fruitless to try to check an opponent's accusations with honest, truthful ads. The market thus provides little incentive to stay just shy of falsity. In any event, few ads will actually qualify under a properly drawn and narrowly construed anti-false speech statute.

Consider the ad involved in *I-119 Vote No! Committee*. The assertion that "your eye doctor could kill you"²¹³ falls into the category of technically true and could not be prohibited by the model statute. The statement makes it sound like an eye doctor could terminate a patient's life without permission, but falls short of explicitly stating so. A terminally ill patient is highly unlikely to ask an eye doctor to assist with suicide, just as an eye doctor is unlikely to agree to do so unless he or she has the medical expertise to perform it properly. Still, since the statute does not mandate special qualifications, technically an eye doctor, like any other doctor, could aid in a suicide. Thus, the statement itself is not false. Neither is "Nothing [prevents doctors from] 'selling' the idea to the aged, the poor, the homeless." The Hippocratic oath of course prohibits such practices, plus doctors have no legitimate incentive to coerce a patient into suicide. If the statute does not specifically limit such coercion, however, the I-119 Vote No! Committee may describe the possible practice without expressing a falsity. "Nobody need tell family members beforehand"—true, never mind the fact that assisted suicide is a medical procedure and doctor-patient confidentiality would prohibit a doctor from telling families anyway. "No waiting period, no chance to change your mind"—yes, death is final and the statute required no waiting period, so the statement is technically true and would fall outside the false-speech statute. The choice to seek doctor-assisted suicide, however, is not likely to be a spur of the moment decision as the ad's statement implies, and thus a waiting period is probably superfluous. The ad closes by calling I-119 a "dangerous law," a debatable presumption, but also unequivocally a statement of opinion. Overall the ad paints the initiative as enabling doctors to kill unsophisticated, unsuspecting patients by overpowering their will and bypassing their families, when all the poor patient wanted was a simple eye exam. This characterization of the initiative could not be more misleading. However, all of the ad's statements are either true or opinions, and thus neither Washington's statute, nor the model statute described earlier, would apply.

213. For the full text of the ad, see *supra* note 119.

More recently, a radio ad for 1998's Initiative 200²¹⁴ in Washington produced the following "educational message" from the American Civil Rights Institute. The ad involved two alternating speakers:

SPEAKER ONE: I-200 prohibits racial and sex discrimination and prohibits preferences.

SPEAKER TWO: Well, what happened when California eliminated preferences?

SPEAKER ONE: After some initial problems, the University of California has more than doubled its outreach program to help recruit qualified students of all races.

SPEAKER TWO: So I-200 would mean, for example, that Washington State could reach out to low performing K-through-12 schools.

SPEAKER ONE: To help prepare kids, regardless of race, to attend the university.

SPEAKER TWO: Then I-200 allows outreach programs to find qualified applicants who might otherwise be overlooked.

SPEAKER ONE: That's right. . . .²¹⁵

The text of I-200 makes no mention of outreach programs or preparing students for college. It does not prohibit such programs either, so technically the initiative allows for them. The ad implies, however, that outreach programs were prohibited prior to I-200, which is not true. The implication here is also that Washington universities *will* implement such outreach programs. Even if stated explicitly, this implication would qualify as opinion. The initiative does not mandate outreach programs, so discussions of them are pure conjecture about a practice the state college system may adopt. Such statements fall short of triggering the model statute since they do not qualify as statements of fact. Applying the *Ollman* four factor test to the statement that Washington schools will implement outreach programs, the statement lacks verifiability and specificity by virtue of being a prediction, and also signals "opinion" to the common reader by appearing in the context of a partisan-funded ad for a political measure. The statement is also like Judge Bork's unprotected statement of fact because, as a prediction, it is not presently capable of proof or disproof.

The I-200 ad also implies that California's similarly-worded Proposition 209 benefited the University of California schools through outreach programs. One look at minority admission rates at the University of California, Berkeley shows that 209 drastically reduced the school's minority population.²¹⁶ The school has increased recruitment efforts

214. See *supra* text accompanying note 2.

215. Radio Advertisement, American Civil Rights Institute, Questions (on file with author).

216. For statistics on minority enrollment at University of California, Berkeley, see Office of Student Research (home page giving links to "Complete ethnic distribution" for undergraduate and

through outreach, as the ad mentions, but only because minority admission rates decreased so dramatically in the wake of Proposition 209. The ad thus evokes a faulty image of California's experience without affirmative action and implies the same rosy future lies in store for Washington if only voters would approve I-200. These images and innuendoes could lead a voter, particularly a member of an underrepresented group who is less likely to consult the text of the initiative or even newspaper articles discussing it, to vote for the initiative thinking that it aids minorities. Underrepresented groups are most affected by this initiative and misleading them into voting against their beliefs or not voting at all doubly disadvantages them. The American Civil Rights Institute evokes these misleading images using technically accurate, albeit highly selective, factual statements. The ad would therefore evade the falsity, as well as statement of fact, requirements of the model statute and escape prohibition under it.

Also in 1998, Utah voters witnessed ads for Proposition 5 featuring images of eagles soaring and children fishing. The ads pledged to conserve wildlife, preserve the state's wild landscapes, and uphold Utah's proud hunting tradition. Yet the ads made no mention of the proposition's true goal—a state constitutional amendment requiring a two-thirds vote to pass any future hunting initiative, rather than the simple majority necessary to pass all other initiatives. The proposition was basically a preemptive strike by hunting supporters to prevent future initiatives banning the hunting of certain animals or the use of certain techniques, such as airborne hunting or traps, that other states had recently passed.²¹⁷ A local advertising executive, Casey Jones, said he “was shocked at how blatantly dishonest” the ads were.²¹⁸ But were they? Omission may mislead, even confuse, but since it does not involve words, it cannot be false in the sense recognized by the free speech doctrine. Preserving wildlife by preventing initiatives that would curb the hunting of them seems illogical, but like all predictions, it is necessarily an opinion and is not subject to the model statute.

Opinion and omission aside, these ads proved highly effective. Not only did the proposition pass, but exit polls showed nineteen percent of voters voted for the proposition when they did not support the constitutional change it created, and fourteen percent voted against the proposition when they really supported it.²¹⁹ This confusion created a win for Proposition 5 supporters, but a loss for Utah's voters by tainting the electoral process with misconceptions. Misleading and confusing, the ads were nonetheless not false, or at least not false statements of fact, and

graduate students for Fall 1999 and to “OSR Staff Web Pages” containing statistics on new undergraduates from Fall 1991-99) at <http://osr4.berkeley.edu> (last visited Oct. 25, 2000).

217. Judy Fahys, *Prop 5's Formula for Success*, THE SALT LAKE TRIB., Nov. 8, 1998, at A1.

218. *Id.*

219. *Id.*

neither the state's anti-false speech statute nor the model statute would apply.

In the spring of 2000, California voters decided on Propositions 30 and 31. These propositions aimed at preventing the implementation of California's Fair Insurance Responsibility Act and its amendments, which prohibit injured persons from suing insurance companies for unfair handling of insurance claims.²²⁰ A few months before the election, a television commercial urged voters to oppose the propositions by playing on many people's disdain for insurance companies and lawyers. The ad begins by showing a young wife and mother returning from work as her husband serves up dinner, followed by a shot of the father tucking his little girl into bed. Sweet, uplifting music plays as a narrator observes: "Starting out in life takes a lot of hard work and a lot of love. You don't need another worry about making ends meet." Ominous music then takes over as we see the young couple back at the kitchen table, pouring over budgets and bills:

NARRATOR: Like the extra 300 dollars a year laws like Props 30 and 31 could add to your insurance bill.

WIFE (TO HUSBAND): We can't afford another 300 dollars.

NARRATOR: Personal injury lawyers wrote these laws, saddling working families with higher insurance costs.

HUSBAND: Why'd they do this?

NARRATOR: Just so they can file two lawsuits for every accident. They get richer, we pay the price.

WIFE: I'm saying *no* to the lawyers' 300 dollar scheme.²²¹

The ad appears to claim that voters will have to pay an additional \$300 in insurance costs. However, if you look closely, the ad starts by saying the propositions "*could* add to your insurance bill," while flashing a message at the bottom of the screen saying "Source: Former Legislative Analyst William Hamm." These tactics straddle the line between fact and opinion, but do not quite cross into a false fact such as a statement like "these propositions will add \$300" might. The ad's characterization of the propositions' supporters as motivated by greed may be a false fact, but it also would fall into Judge Bork's first category of facts—opinion about another person's opinion—that according to his theory should be protected under the First Amendment when made in a political context.

The phrase "\$300 *scheme*" is also misleading in that it characterizes lawyers as plotting to take money from poor working families and put it in the hands of the insurance companies.²²² Never mind that it would take the

220. Both propositions failed. Dan Morain & Tom Gorman, *Campaign 2000*, L.A. TIMES, March 8, 2000, at A1.

221. Videotape of ad on file with author.

222. The opposition campaign played the "anti-lawyer" card in its other efforts as well. I received a phone call that spring from a gentleman urging me to oppose the trial lawyers by voting against their propositions. When I told him I was a law student, he promptly hung up.

insurance companies electing to raise rates in response to a lawsuit to bring about this supposed "scheme." The word "scheme" and the situation it evokes, however, could also be characterized as opinion. Applying the *Ollman* test, "scheme" lacks specificity and is conducive to different connotations depending on context. Still, the ad could mislead a voter who supports the right to sue insurance companies for unfair claim handling into opposing the propositions because of the characterization of the measures as a lawyers' scheme to get insurance companies more money. This characterization is false, but it is couched in opinion, and thus the model statute could not reach it.

One ad to which the model statute could conceivably apply is the one cited at the beginning of this Comment—"Raised by a single mother, worked her way through community college, then the University of Washington with honors . . . but the law school rejected her because she was white."²²³ This I-200 ad refers to Katuria Smith who recently sued the University of Washington law school for reverse discrimination. The ad's claim that the school rejected her because she was white sounds factual. In terms of the *Ollman* factors, the statement is specific, seemingly verifiable, and phrased linguistically as a statement of fact. Moreover, the ad's creators intended it as a statement of fact, drawing on an article by Nat Hentoff in *The Village Voice*. According to Hentoff, Dean Hjorth of the University of Washington responded to a question of whether the school would admit a candidate with Katuria Smith's credentials if she was African American, by answering "yes." However, Hjorth denies ever making this statement, as well as the notion that the school would have admitted Smith if she were a minority. The statement "rejected her because she was white" thus not only appears factual, but may in fact be false. It should therefore be possible to apply an anti-false speech statute to this ad. Determining the statement's ultimate veracity would lie with the finder of fact, but whatever the outcome, the statute should apply. Supposing that the statement proved false, the model statute would still only restrict the ad if the people behind it maliciously published this false fact. This too would be a question for the fact finder. As debatable as falsity and maliciousness may be here, because they are possible, and because there is a statement of fact, the model statute should apply.

The model statute might also apply to the other I-200 ad quoted at the beginning: "Initiative 200 is written to sound good, but it's misleading and full of hidden consequences. It will abolish affirmative action and hurt real people." Most of the statements in this excerpt of the ad are opinions, but "it will abolish affirmative action" appears to be a statement of fact. Again, the statement is specific, verifiable, and linguistically phrased as a fact. In this case, chances are good a fact finder would consider the statement false.

223. See *supra* notes 1-4 and accompanying text.

I-200 prohibits gender and racial preferences in government hiring, but it does not wholesale abolish affirmative action as the ad states. This distinction is subtle, so chances are the ad's proponents did not maliciously lie, but that again is a question for the fact finder. In any case, since falsity and maliciousness are possible, and a statement of fact is present, the model statute should apply to this ad.

Other misleading ads have appeared elsewhere in other years. In almost any election, some misleading ads will appear because voter manipulation wins elections. Political ads grow more expensive and more sophisticated with every election as the initiative industry learns from past elections and proposition supporters become more willing to empty their pockets. The ads born out of this trend win elections, but they also mislead voters, particularly voters in underrepresented groups. Unfortunately, these ads rarely include false statements of material fact made with actual malice, as a narrowly tailored anti-false speech statute, such as the model statute, should require. Even so, these statutes do impose a check on an otherwise out-of-control situation. Truly false ads may appear, and these anti-false speech statutes will allow states to prohibit them. Although the statutes may not frequently apply, their existence sends a message to proposition sponsors and activists, and may have a deterrent effect. This deterrence, and the prohibition against extreme, maliciously false statements, make the anti-false speech statutes worthwhile to protect voters and the integrity of the election process.

CONCLUSION

In the century since South Dakota first implemented direct democracy, ballot propositions have grown considerably in their importance in American politics. With increased campaign budgets and increased media coverage, ballot propositions have gone from statewide measures to national agenda setters. With this growing influence, however, comes increasingly sophisticated, increasingly misleading political ads that are costly to underrepresented voters. State anti-false political speech statutes cannot completely rid the electoral process of the evils of misleading ads since these statutes must be narrowly tailored to survive First Amendment review. Such statutes do, however, represent a step towards honesty in politics. To the extent they promote that ideal, and to the extent these statutes may apply, states should not hesitate to implement them.

The most common culprit in the problem of proposition ads, however, is not false fact but misleading information. Since even a narrowly tailored anti-false speech statute could not regulate misleading information, reliance on other institutions, particularly the media, may be necessary. Practices such as "truth boxes" or "ad watches" that critique the veracity of ads for voters may help dispel some of the confusion misleading ads

provoke. A typical truth box will reproduce the text and images of an ad and then objectively evaluate its accuracy and effectiveness, providing a more complete picture of the ad's message.²²⁴ Truth boxes are becoming more prevalent, but mainly in newspapers which unfortunately appear only once while the misleading ad continues to play on television.²²⁵ CNN critiques political ads during presidential elections²²⁶ and a few local stations like San Francisco's KRON²²⁷ run truth boxes, but more local critiques are necessary. Television truth boxes also appear only once, but the medium does reach more people than newspapers. Perhaps the best location for truth boxes would be the internet where they could remain archived for potentially indefinite periods of time. The internet is not necessarily known for its consistently reliable information, but appearing on an online site for a newspaper or television station could combine credibility with the longevity of internet information. The internet also continues to become an increasingly viable source for voter information as access to the medium continues to grow.

While the media may be in a better position than the state to expose misleading ads because they are not bound to address only malicious statements of fact, the state still has a role to play in addressing the problem. We rely on the media to expose and discourage hate speech, but the state may step in when that hate speech rises to the level of fighting words. Similarly, in the political speech arena, the media can help expose misleading ads, but when those ads rise to the level of maliciously false statements of fact, the state can, and should, intervene.

States may take other measures beyond enacting anti-false political speech statutes to help voters wade through misleading political information and encourage voting. For instance, ballot pamphlets should be available in all states with ballot propositions. These pamphlets must be easier to read, however, to provide any help at all. Some states already implement maximum readability levels for ballot pamphlets. Oregon applies readability standards to the attorney general's ballot title and Alaska requires certain reading levels for its ballot proposition summaries. Oklahoma requires its ballot titles to be no more than 150 words in length and no more difficult than an eighth-grade reading level.²²⁸ States should also make an effort to make ballot pamphlets shorter, without compromising thoroughness, to encourage voters to actually read them.

224. For examples of truth boxes, see *Ad Watch*, PORTLAND PRESS HERALD, Sept. 28, 1999, at 12A; *Ad Watch*, ORANGE COUNTY REGISTER, Jan. 28, 2000, at B7.

225. See Thomas B. Rosenstiel, *Policing Political TV Ads*, L.A. TIMES, Oct. 4, 1990, at A1; see also Joseph Rodota, *New Media vs. Old Politics*, S.F. EXAM'R, Sep. 13, 1998, at D5.

226. David Kelly, *CNN 'Ad Police' Probing Spotty Political Spots*, HOLLYWOOD REP., Apr. 15, 1992, at A1.

227. Rosenstiel, *supra* note 225, at A1.

228. See DUBOIS & FEENEY, *supra* note 7, at 177.

Additionally states should strive to use other media such as television or the internet. Many states already place ballot propositions online, but states should attempt to disseminate this information on television as well. To do so would allow states to reach more voters, including a higher percentage of voters from underrepresented groups.

By using mass media as a vehicle, measures such as truth boxes and televised or online voters' pamphlets combat misleading proposition ads on their own turf. These solutions target the same voters who are typically misled by false proposition ads, and should help to make proposition votes more representative and reflective of the public's will. This in turn would bring our present experience of direct democracy closer to what the Progressives envisioned—a massive body of capable voters, determining their own laws without manipulation by powerful special interests or government entities.

APPENDIX A
DIRECT DEMOCRACY IN THE STATES

	<i>Direct Initiative (year adopted)</i>	<i>Indirect Initiative (year adopted)</i>	<i>Popular Referendum (year adopted)</i>	<i>Recall (year adopted)</i>	<i>Anti-False Speech Statute (candi- dates)</i>	<i>Anti-False Speech Statute (proposi- tions)</i>
Alaska	1959	---	1959	1959	Yes	No
Arizona	1910	---	1910	1912	No	No
Arkansas	1909	---	1909	---	No	No
California	1911	---	1911	1911	No	No
Colorado	1910	---	1910	1912	Yes	Yes
Florida	1978	---	---	---	Yes	No
Georgia	---	---	---	1978	No	No
Idaho	1912	---	1912	1933	No	No
Illinois	1970	---	1970	---	Repealed 1992	Repealed 1992
Kansas	---	---	---	1914	No	No
Kentucky	---	---	1917	---	No	No
Louisiana	---	---	---	1914	Yes	Yes
Maine	1908	---	1908	---	No	No
Maryland	---	---	1915	---	No	No
Mass.	1918	---	1918	---	Yes	Yes
Michigan	1908	1908	1908	1913	No	No
Missouri	1908	---	1908	---	No	No
Montana	1906	---	1906	1976	No	No
Nebraska	1912	---	1912	---	No	No
Nevada	1904	1904	1904	1912	Yes	Yes
New Mexico	---	---	1911	---	No	No
No. Dakota	1914	---	1914	1920	Yes	Yes
Ohio	1912	1912	1912	---	Yes	Yes
Oklahoma	1907	---	1907	---	No	No
Oregon	1902	---	1902	1908	Yes	Yes
So. Dakota	1898	---	1898	---	No	Yes
Utah	1900	1900	1900	---	Yes	Yes
Washington	1912	1912	1912	1912	Invalidated 1998	Invalidated 1998
Wisconsin	---	---	---	1926	Yes	Yes
Wyoming	1968	---	1968	---	No	No

Sources:

For initiative and referendum: DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 37-39 (1984).

For recall: THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 126-27 (1989).

For anti-false political speech statutes: ALASKA STAT. § 15.56.010(a)(3) (Michie 1995); COLO. REV. STAT. ANN. § 1-13-109 (West 1989); FLA. STAT. ANN. 104.271 (West 1992); IND. CODE ANN. § 3-14-3-22 (1988) (repealed 1992); LA. REV. STAT. ANN. § 18:1463(C) (West 1979); MASS. GEN. LAWS ch. 56, § 42 (1998); MINN. STAT. § 211B.06 (1998); MISS. CODE ANN. § 23-15-875 (1990); MONT. CODE ANN. § 13-35-234 (1999); NEV. REV. STAT. ANN. § 294A.345(1) (Michie 1997); N.C. GEN. STAT. § 163-274(8) (1999); N.D. CENT. CODE § 16.1.10.04 (1997); OHIO REV. CODE ANN. § 3517.21(B) (Anderson 1996); OHIO REV. CODE ANN. § 3517.22(B)(2) (Anderson 1996); OR. REV. STAT. § 260.532 (1997); S.D. CODIFIED LAWS § 12-13-16 (Michie 1995); TENN. CODE ANN. § 2-19-142 (1998); UTAH CODE ANN. § 20A-11-1103 (1998); WASH. REV. CODE § 42.17.530 (1998); W. VA. CODE § 3-8-11(c) (1999); WIS. STAT. § 12.05 (1998).